The State is required to provide adequate medical care to those it confines. In this time of shrinking budgets, many prison systems have turned to contracting with private health care providers to meet their legal obligations. Some states have turned most of their health care services over to private companies such as Correctional Medical Services, Inc. (CMS), even though CMS’s record for providing health care is dismal. In Michigan, since CMS has taken control of providing medical care to Michigan’s prisoners, the complaints that the author and others have received pertaining to medical care have increased significantly. This article discusses the federal legal standard for providing medical care, what level of care will and will not violate this Federal standard, how private companies or their staff may be liable, and the impact the Prison Litigation Reform Act (PLRA) has on that Federal standard.

A. Eighth Amendment - Deliberate Indifference Standard

Under the Eighth Amendment to the United States Constitution, prison officials are required to provide prisoners with “reasonably adequate” medical care. Courts have defined adequate medical care as “services at a level reasonably commensurate with modern medical science and of a quality acceptable within prudent professional standards,” and at “a level of health services reasonably designed to meet routine and emergency medical, dental and psychological or psychiatric care.”

In 1976, the United States Supreme Court established the standard used by lower federal courts to review claims by prisoners of denial of medical care. In Estelle v. Gamble, the Supreme Court stated: “[D]eliberate indifference to serious medical needs of prisoners constitutes the ‘unnecessary and wanton infliction of pain,’ proscribed by the Eighth Amendment. This is true whether the indifference is manifested by prison doctors in their response to the prisoner’s needs or by prison guards in intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed.”

The Estelle Court went on to state that mere negligence in providing of medical care does not violate the Eighth Amendment: “[A] complaint that a physician has been negligent in diagnosing or treating a medical condition does not state a valid claim of medical mistreatment under the Eighth Amendment. Medical malpractice does not become a constitutional violation merely because the victim is a prisoner.”

Recently, lower federal courts have made it clear that gross negligence in providing medical care also does not violate the Eighth Amendment. Courts have held that repeated acts of negligence by staff do not constitute deliberate indifference.

There are two components to establishing violations of the Eighth Amendment’s “cruel and usual punishment” provision as it relates to medical care: (1) the “objective component,” i.e., did the prisoner have a serious medical need, and (2) the “subjective component,” or better known as the state of mind of the officials who were responsible for the medical care.

1. Objective Component - Serious Medical Need

To violate the Eighth Amendment, deprivations of medical care must be serious enough to amount to the “wanton and unnecessary infliction of pain.” Prison officials need not inflict an actual physical injury or cause lasting or per-
Federal Standards (continued)

permanent injury to be liable for violation of the Eighth Amendment.14 Often, the length of time a prisoner is subjected to pain in a medical case will play a significant part in determining whether the denial of care was deliberate indifference.15

An Eighth Amendment claim was stated under the Eighth Amendment, prison staff must provide reasonably adequate care to prisoners with disabilities.33 Deliberate indifference was found to exist when a doctor knew of a prisoner’s paralysis, knew that a wheelchair could not fit in the prisoner’s cell, and knew that the prisoner could have been admitted to the infirmary and the prisoner also was not able to care properly for his medical condition.34 In another case, a court found that prison staff were deliberately indifferent to a prisoner when they took no steps to correct the following conditions that they knew about: wheelchair would not be placed within the infirmary, and no access to a shower even though they knew about: wheelchair would provide reasonably adequate care to prisoners with disabilities.33 Deliberate indifference was found to exist when a doctor knew of a prisoner’s paralysis, knew that a wheelchair could not fit in the prisoner’s cell, and knew that the prisoner could have been admitted to the infirmary and the prisoner also was not able to care properly for his medical condition.34 In another case, a court found that prison staff were deliberately indifferent to a prisoner when they took no steps to correct the following conditions that they knew about: wheelchair would not be placed within the infirmary, and no access to a shower even though they had problems controlling urination and bowel movements.35

2. Subjective Component - State of Mind of Prison Staff

A prison staff member is “deliberately indifferent” under a subjective standard if the staff “knows of and disregards an excessive risk to inmates’ health or safety....” This does not require proof of an intent to inflict pain or a detailed inquiry into the prison staff’s state of mind,36 but the conduct or lack of conduct must demonstrate a knowing indifference to serious medical needs.37 The prisoner must establish that there was a purposeful act or failure to act on the part of the prison staff to a serious medical need.38 "An accident, although it may produce added anguish, is not on that basis alone to be characterized as wanton infliction of unnecessary pain” sufficient to demonstrate deliberate indifference,26 nor does “an inadvertent failure to provide adequate medical care” by itself create a cause of action under 1983.27 A prisoner must establish that prison staff purposefully ignored or failed to respond to the pain or possible medical need in order for deliberate indifference to be established.28 The Sixth Circuit stated: “In order to state an Eighth Amendment claim in a medical mistreatment case, a prisoner must show unnecessary suffering brought about by the deliberate indifference of prison staff to his needs.”29

Courts have held that when the need for medical treatment is obvious, medical care that is so cursory as to amount to no treatment at all may constitute deliberate indifference.29 Also, a court held that “[a] doctor’s decision to take an easier and less efficacious course of treatment” may constitute deliberate indifference.30 Under the Eighth Amendment, doctors are required to provide appropriate medical care for serious medical needs and cannot take short-cuts.

Examples of Deliberate Indifference

(a) Handicapped Prisoners32: Under the Eighth Amendment, prison staff must provide reasonably adequate care to prisoners with disabilities.33 Deliberate indifference was found to exist when a doctor knew of a prisoner’s paralysis, knew that a wheelchair could not fit in the prisoner’s cell, and knew that the prisoner could have been admitted to the infirmary if the doctor so chose. The doctor refused to place the prisoner in the infirmary and the prisoner also was not able to care properly for his medical condition.34 In another case, a court found that prison staff were deliberately indifferent to a prisoner when they took no steps to correct the following conditions that they knew about: wheelchair would not fit in the cell; confinement to bunk for about three months with no opportunity to move about or exercise injured limbs; and no access to a shower even though he had problems controlling urination and bowel movements.35

(b) Dental Care: In deciding whether the failure to provide adequate dental care exhibits deliberate indifference, a court will review the particular facts of the case.36 The court will consider the pain suffered by the prisoner from the delay in

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providing the dental care, the deterioration of the teeth due to a lack of treatment, and the inability of the prisoner to engage in normal activities while being denied dental care. In one dental care case, the court held that three to five seconds of being subjected to a drilling procedure is not deliberate indifference “where there is a medical reason that anesthetic or anesthesia cannot be safely or conveniently provided.”

(c) Disagreement With Doctor as to Medical Care: A refusal to permit medical treatment may, in certain circumstances, state an Eighth Amendment claim. However, a difference of opinion between a prisoner and prison medical staff as to what treatment is proper and necessary does not give rise to a deliberate indifference claim. The Sixth Circuit has stated: “Where a prisoner has received some medical attention and the dispute is over the adequacy of the treatment, federal courts are generally reluctant to second guess medical judgments and to constitutionalize claims which sound in state tort law.”

(d) Delay in Medical Treatment: An issue that is common in most prison medical care systems is delay in approving medical care or in its implementation once ordered. However, delay by itself will not violate the Eighth Amendment. In deciding whether delay in medical care rises to the level of deliberate indifference, courts will look at the length of delay, the detrimental effect of such delay, and, most importantly, the pain that results from such delay.

In prison systems, generally, most non-life-threatening medical conditions are subject to significant delays in the providing of treatment. When significant delay and substantial pain are present in these non-life-threatening situations, an Eighth Amendment violation may exist.

(e) Prescribed Treatment: An Eighth Amendment claim is stated by the failure of prison staff to provide prescribed crutches, bedding and/or medication.

Prison staff delaying for non-medical reasons the recommended treatment of a prisoner is in violation of the Eighth Amendment. In one case, a court found that prison staff confiscation of a sling interfered with previously prescribed medical treatment in violation of the Eighth Amendment.

(f) Access to Outside Care: A prisoner has no independent constitutional right to medical care outside the institution. However, since a prison medical care system rarely provides the complete range of necessary medical services within their walls, the failure to obtain the necessary medical care for a prisoner from a source outside the prison may constitute deliberate indifference. To state a claim for failure to provide medical care at an outside medical facility, the prisoner must demonstrate that the medical need was “sufficiently serious” to meet the objective element of the deliberate indifference test, and that the delay in meeting that need caused “substantial harm.” Finally, prison officials “may not allow security or transportation concerns to override a medical determination that a particular inmate is in need of prompt treatment and must be transported to an appropriate facility.”

B. Supervisory Liability

The director of the prison system, the medical director, and the warden cannot be held personally liable for every unconstitutional act that takes place in a prison. Stated otherwise, “There must be a showing that the supervisor encouraged the specific incident of misconduct or in some other way directly participated in it.” There must be a showing that supervisory personnel either personally participated in the acts comprising the alleged constitutional violation or instigated or adopted a policy that violated the prisoner’s constitutional rights.

Generally, courts have applied a three-prong test to determine whether a supervisor is liable: (1) whether the supervisor’s failure to adequately train and supervise subordinates constituted deliberate indifference to a prisoner’s medical needs; (2) whether a reasonable person in the supervisor’s position would understand that the failure to train and supervise constituted deliberate indifference; and (3) whether the supervisor’s conduct was causally related to the subordinate’s constitutional violation.

Co-Payment for Medical Care

Courts have held that charging prisoners who can pay for medical care is permitted, and does not constitute deliberate indifference or violate due process. If the prisoner’s refusal to pay results in any delay or denial of medical care, prison staff will not be found to be deliberately indifferent. Prison staff’s refusal to provide medical care based upon the lack of ability to pay would constitute deliberate indifference if the medical care sought was for a serious medical need.

Impact of Prison Litigation Reform Act (PLRA)

1. Physical Injury Requirement

Section 1997e(e), of 42 U.S.C., provides: “No federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury.”

On its face, the statute would appear to allow prison officials carte blanche to impose mental and emotional injury on prisoners as long as there are no “physical injuries.” However, courts have held that the statute does not preclude injunctive relief when no “physical injury” is involved.

Congress failed to define the term “physical injury” and also failed to provide a reference in the legislative history of the PRLA as to what this term means. However, Congress did make it clear that a prisoner had to allege only a “physical injury” and not a “severe physical injury” to recover damages for mental or emotional injuries. The question then becomes what is meant by the term “physical injury” in regards to a claim of deliberate indifference to a medical need.

In determining what words in a statute mean, courts will examine the language of the statute to determine if the meaning can be ascertained. If the language of a statutory provision is clear and unambiguous on its face, the language is then presumed to have a plain meaning unless the text suggests an absurd result. In determining the meaning of words, such as “physical injury,” a court may “refer to dictionaries for guidance.” “Physical” is defined by the dictionary to mean, “of or relating to the body; concerned or preoccupied with the body and its needs.” “Injury” is defined as “an act that damages, harms, or...
hurts: an unjust or undeserved infliction of suffering or harm; wrong.”

In applying these two definitions to medical cases, prisoners should be able to establish a “physical injury” if there has been any swelling or infection, any deterioration (change) in a body part, or trauma which resulted in substantial pain from the harm caused by prison staff.

Some courts have held § 1997e(e) “physical injury” provision is inapplicable when a prisoner asserts a violation of a fundamental constitutional right, such as medical care, for which a physical injury is not necessarily an element of that claim. Other courts have required at least a de minimis injury to meet the “physical injury” requirement of the PLRA. Other courts have required a separate showing of physical injury, beyond the showing of deliberate indifference, to recover damages for mental or emotional injury. However, even if § 1997e(e) precludes an award of compensatory damages for mental or emotional injury based on the lack of a physical injury, it does not bar other forms of relief, including nominal or punitive damages or injunctive relief, provided substantive violations of fundamental constitutional rights are demonstrated.

2. Exhaustion of Administrative Remedies

Under the PLRA, a prisoner is required to exhaust all available administrative remedies before bringing suit on a federal claim. Specifically, section 1997e(a) provides: “No action shall be brought with respect to prison conditions under section ... 1983 [of this title], or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.”

This requirement applies even if the grievance process does not permit the award of money damages and money damages is the only remedy being sought by the prisoner.

Under the PLRA, the grievance filed must specifically state the issue pertaining to the denial of medical care being complained of and list the name or names of the staff that caused the violation. If the identity of the prison staff is not known, a request for the name of the prison staff, even if not provided in response to the grievance, is sufficient for exhaustion purposes.

Liability of Contractual Providers

If the State contracts out to a private entity one of its traditional functions, such as providing medical services to prison prisoners, the private entity may be sued under 42 U.S.C. § 1983 as one acting “under color of state law.” A private entity providing contractual services which are a traditional function of a State can raise most of the defenses that the State can when sued. However, people who provide services to prisoners on a one-time basis without a contract with the State do not act under color of state law. Further, private contractors are not entitled to the defense of qualified immunity in lawsuits alleging violation of constitutional rights.

Even though the State has contracted with a private entity to provide medical care, State prison officials can be liable if the contractor does not provide adequate medical care and the State has knowledge of that failure. As the Court noted in Estelle v. Atkins: “Contracting out prison medical care does not relieve the State of its constitutional duty to provide adequate medical treatment to those in its custody, and it does not deprive the State’s prisoners of the means to vindicate their Eighth Amendment rights. The State bore an affirmative obligation to provide medical care to [the prisoner]...”

Conclusion

The requirement that the State must provide adequate medical care to prisoners still exists regardless of shrinking budgets and contracting out of that care. The PLRA has not directly impacted on the State’s obligation to provide adequate medical care. What probably is now required pursuant to the PLRA, if compensatory damages are sought in a lawsuit, is to allege some type of “physical injury” that either caused the need for the medical care or resulted from the care. Finally, the administrative grievance process must be exhausted, which requires stating in the grievance the person who failed to provide the medical care and the medical care that was not provided.

Notes

1 Estelle v. Gamble, 429 U.S. 97, 103, 97 S.Ct. 285 (1976). (“An inmate must rely on prison authorities to treat his medical needs; if the authorities fail to do so, those needs will not be met...”). “Because society does not expect that prisoners will have unqualified access to health care, deliberate indifference to medical needs amounts to an Eighth Amendment violation only if those needs are ‘serious.’

2 See, Ronald Young, “DYING FOR PROFITS: CMS and the Privatization of Prisoner Health Care”, Prison Legal News, Vol. 11, No. 12 (Dec. 2000). See also Moore v. Jackson, 123 F.3d 1082, 1088 (8th Cir. 1997) (“appropriate for a jury, ... to determine whether CMS had a custom or procedure of misplacing, ignoring or destroying MSRs [medical service request forms] with resulting harm to the inmates.”).

3 The Eighth Amendment provides: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.” U.S. Const. amend. VIII. Courts have held that pretrial detainees are entitled to the same protection afforded convicted inmates who have serious medical needs. See Roberts v. City of Troy, 773 F.2d 720, 723 (6th Cir. 1985).


5 United States v. DeCologero, 821 F.2d 39, 43 (1st Cir. 1987); See also Fernandez v. United States, 941 F.2d 1488, 1493-94 (11th Cir. 1991) (citing to DeCologero).


7 Estelle v. Gamble, at 104-05 (citations and footnotes omitted). One court has stated that “[t]he requirement of deliberate indifference is less stringent in cases involving a

May 2003
prisoner’s medical needs than in other cases involving harm to incarcerated individuals because “[t]he State’s responsibility to provide inmates with medical care ordinarily does not conflict with competing administrative concerns.” See also McGuckin v. Smith, 974 F.2d 1050, 1060 (9th Cir. 1991), quoting Hudson, 503 U.S. at 5, overruled on other grounds, WMX Techs v. Miller, 104 F.3d 1133 (9th Cir. 1997).

8 Estelle v. Gamble, supra 429 U.S. at 106 (citations and footnotes omitted) (where medical personnel saw inmate 17 times in 3 months and treated back strain with bed rest, muscle relaxants, and pain relievers, their failure to x-ray inmate’s broken back or implement other diagnostic techniques or treatment was not deliberate indifference); see also Bellcore v. United States, 994 F.2d 427, 431 (8th Cir. 1993) (fact that prison doctor misdiagnosed inmate’s condition, that method of physical examination and treatment may not have followed community standards, or that doctor disagreed with inmate’s suggested course of treatment did not amount to deliberate indifference).

9 See, McGhee v. Foltz, 852 F.2d 876, 881 (6th Cir. 1988) (claim of “gross negligence” does not violate Eighth Amendment); Walker v. Norris, 917 F.2d 1449, 1454 (6th Cir. 1990) (“gross negligence cannot support a section 1983 substantive due process claim in the prison context.”); Franklin v. Zain, 152 F.3d 783, 786 (8th Cir. 1998) (showing of even gross negligence is not enough to establish deliberate indifference to serious medical needs (citation omitted)).


12 Rhodes v. Chapman, 452 U.S. 337, 347, 101 S.Ct. 2392 (1981); accord Wilson v. Seiter, 501 U.S. at 298; see also Ellis v. Butler, 890 F.2d 1001, 1003 n1 (8th Cir. 1989) (“medical condition need not be an emergency in order to be considered serious under Estelle.”).

13 See, e.g., Hicks v. Frey, 992 F.2d 1450, 1457 (6th Cir. 1993) (“Extreme conduct by custodians that causes severe emotional distress is sufficient” to state a claim); Parrish v. Johnson, 800 F.2d 600, 605 (6th Cir. 1986) (same). See also Hudson v. McMillian, supra 503 U.S. at 9, where the Supreme Court held that the medical need only had to be “serious.”

14 Borretti v. Wiscomb, 930 F.2d 1150, 1154-55 (6th Cir. 1991) (“[A] prisoner who suffers pain needlessly when relief is readily available has a cause of action against those whose deliberate indifference is the cause of his suffering.”); cf Estelle v. Gamble, supra (denial of medical care may result in pain and suffering which no one suggests would serve a penological purpose). Cf. Hudson v. McMillian, supra 503 U.S. at 10 (“The dissent’s theory that [precedent] requires an inmate who alleges excessive use of force to show serious injury in addition to the unnecessary and wanton infliction of pain misapplies [precedent] and ignores the body of our Eighth Amendment jurisprudence.”) (emphasis in original). See also Section V, infra, for a discussion as to the impact of the PLRA’s requirement of a physical injury to recover in a medical case.

15 See Murphy v. Walker, 51 F.3d 714, 719 (7th Cir. 1995) (“Any injury to the head inflicting prolonged pain and discomfort mandates medical evaluation within a reasonable period of time.”); Heard v. Sheahan, 253 F.3d 316, 319 (7th Cir. 2001) (“every day that the defendants ignored the plaintiff’s request for treatment increased his pain”); Robinson v. Moreland, 655 F.2d 887, 889-90 (8th Cir. 1981) (weekend delay in treating a broken hand stated cause of action); Spain v. Procurier, 600 F.2d 189, 199 (9th Cir. 1979) (less critical needs may be denied, however, for reasonable periods of time when disciplinary needs warrant); Hunt v. Dental Dep’t, 865 F.2d 198, 200-01 (9th Cir. 1989) (concluding that allegations of three-month delay in replacing dentures, which caused pain to inmate, stated a claim of deliberate indifference); McGuckin v. Smith, supra 974 F.2d at 1060 (inmate must show that prison officials purporfully ignored or failed to respond to the inmate’s pain or medical needs in order to establish deliberate indifference).

16 Duran v. Anaya, 642 F.Supp. 510, 524 (D. N.M. 1986) (citing to Laaman v. Helgemoe, 437 F.Supp. 269, 311 (D.N.H.1977)); Henderson v. Harris, 672 F.Supp. 1054, 1059 (N.D. Ill. 1987) (citations omitted); Ramos v. Lamm, 639 F.2d 559, 575 (10th Cir. 1980), cert. denied, 450 U.S. 1041 (1981) (“Deliberate indifference to serious medical needs is shown when prison officials have prevented an inmate from receiving recommended treatment or when an inmate is denied access to medical personnel capable of evaluating the need for treatment.”); Aswegan v. Henry, 49 F.3d 461, 464 (8th Cir. 1995) (serious medical need is one obvious to layperson or supported by medical evidence, like physician’s diagnosis); Coleman v. Rahija, 114 F.3d 778, 784 (8th Cir. 2000).

17 McGuckin v. Smith, supra 974 F.2d at 1059-60; Gutierrez v. Peters, 111 F.3d 1364, 1373 (7th Cir. 2000); Chance v. Armstrong, 143 F.3d 698, 702 (2d Cir. 1998), but see Frahm v. Starks, 809 F.Supp. 26, 29 n.11 (E.D. Mich. 1992) (“Courts utilizing this [McGuckin] analysis might erroneously find a constitutional violation where medical treatment has been purposefully denied due merely to a negligent or mistaken assessment of a plaintiff’s physical condition.”). Based upon later Sixth Circuit decisions, Frahm is probably not good law. See Boretti v. Wiscomb, supra 930 F.2d at 1154-55 (needless pain is actionable even if there is no permanent injury).

18 See McGuckin v. Smith, supra 974 F.2d at 1060; Koehl v. Dalheim, 85 F.3d 86, 88 (2d Cir. 1996) (inmate’s need for prescription eyeglasses constituted a serious medical condition where, as result of not having glasses, the inmate suffered headaches, his vision deteriorated, and he was impaired in daily activities); Tillery v. Owens, supra 719 F.Supp. at 1286.

19 800 F.2d 600, 610-11 (6th Cir. 1986).

20 Id.

21 Boretti v. Wiscomb, supra 930 F.2d at 1154-55 (affirming that an actual injury is not required for a finding of an Eighth Amendment violation).

22 Farmer v. Brennan, supra 511 U.S. at 837; see also Rogers v. Evans, 792 F.2d 1052, 1058 (11th Cir. 1986) (medical treatment that is “so grossly incompetent, inadequate, or excessive as to shock the conscience or to be intolerable to fundamental fairness” constitutes deliberate indifference).

23 Hicks v. Frey, supra 992 F.2d at 1455. In Weeks v. Chaboudy, 984 F.2d 185 (6th Cir. 1993), prison staff argued that they lacked actual knowledge of the injury that the inmate suffered. The district court found that “Dr. Chaboudy, by virtue of his long tenure at the facility, should have known that his refusal to admit the plaintiff to the infirmary would result in the conditions which he did in fact endure ...”. The Sixth Circuit stated that “the squalor in which Weeks was forced to live as a result of being denied a wheelchair was clearly foreseeable by Dr. Chaboudy.” Id. at 187.

Prison Legal News 5 May 2003
Federal Standards
(continued)

24 See Boretti v. Wiscomb, supra 930 F.2d at 1154-55; Byrd v. Wilson, 701 F.2d 592, 595 (6th Cir. 1983) (per curiam) (deliberate refusal on the part of prison officials to provide an inmate with prescribed medication may demonstrate the state of mind of deliberate indifference); Miteor v. Beorn, 896 F.2d 848 (4th Cir. 1990) (failure to provide the care that a treating physician himself believes is necessary could be found to be conduct which surpasses negligence and constitutes deliberate indifference (citation omitted)); Weeks v. Chaboudy, supra 984 F.2d at 187; Ancata v. Prison Health Services, Inc., 769 F.2d 700, 704 (11th Cir. 1985) (when the need for medical treatment is obvious, medical care that is so cursory as to amount to no treatment at all may constitute deliberate indifference); Brown v. Hughes, 894 F.2d 1533, 1537 (11th Cir.) (per curiam), cert. denied, 496 U.S. 928 (1990) (delay in access to medical care that is “tantamount to ‘unnecessary and wanton infliction of pain,’ ” may constitute deliberate indifference to an inmate’s serious medical needs (quoting Estelle, 429 U.S. at 104)). However, prison staff may rebuff a claim of deliberate indifference to a serious medical condition by producing medical records of sick calls, examinations, diagnoses, and medications. See Mendoza v. Lynaugh, 989 F.2d 191, 193-95 (5th Cir. 1993).

25 In establishing deliberate indifference, inmates must frequently resort to a comparison to the contemporary standard of the medical professional when challenging action involving the exercise of medical judgment by prison staff. Usually, inmates will be required to produce opinions of medical experts asserting that the inmate’s treatment was so grossly contrary to accepted medical practices as to amount to deliberate indifference. See Howell v. Evans, 922 F.2d 712, 719 (11th Cir. 1991).

34 See Boyd v. Knox, 47 F.3d 1476, 1479 (3rd Cir. 1995) (three-week delay in treatment of viral meningitis constituted deliberate indifference); Hepp v. Allen, 779 F.2d 634, 641 (8th Cir. 1985) (three-week delay in prescription of medication constituted deliberate indifference).

26 Estelle v. Gamble, supra 429 U.S. at 105 (emphases added).

27 Id.

28 Scharfenberger v. Wingo, 542 F.2d 328, 330 (6th Cir. 1976) (“a prisoner’s custodians cannot lawfully deny adequate medical care even in instances of deliberate self injury.”).

29 Thaddeus-X v. Blatter, 175 F.3d 378, 401 (6th Cir. 1999).

30 See McElligott v. Foley, 182 F.3d 1248, 1255 (11th Cir. 1999) (citing with approval Ancata v. Prison Health Services, Inc., supra 769 F.3d at 704).

31 See Waldrop v. Evans, 871 F.2d 1030, 1033 (11th Cir. 1989); see also Campbell v. Sikes, 169 F.3d 1353, 1365 (11th Cir. 1999) (Farmer v. Brennan, supra, did not affect Waldrop since it was based on the existence of evidence of subjective awareness of deliberate indifference); McElligott v. Foley, 182 F.3d 1248, 1255 (11th Cir. 1999) (Waldrop cited with approval); Chance v. Armstrong, 143 F.3d 698, 703 (2d Cir. 1998).

32 Failure to provide medical care to disabled inmates may also violate the Americans with Disabilities Act or the Federal Handicapped Act. Neither of these acts is discussed in this article. See, e.g., Roop v. Squadrone, 70 F.Supp.2d 868, 876 (N.D. Ind. 1999) (must show how disability caused denial of medical care). 33 Leach v. Shelby County, 891 F.2d 1241 (6th Cir.), cert. denied, 495 U.S. 932 (1989) (“delirious” conditions under which inmate Leach was incarcerated (he was not bathed or given a hospital mattress for several days, in spite of his paraplegic condition) established that his serious medical needs were deliberately ignored.”); see also Kaufman v. Carter, 952 F.Supp. 520, 527 (W.D. Mich. 1996) (“A medical condition that threatens one’s ability to walk, even if ultimately reversible, is unquestionably a serious matter.”).

34 Weeks v. Chaboudy, supra 934 F.2d at 187.

35 Hicks v. Frey, supra 992 F.2d at 1457.

36 See Harrison v. Barkley, 219 F.3d 132, 136-37 (2d Cir. 2000) (“dental conditions (like other medical conditions) vary in severity and … a decision to leave a condition untreated will be constitutional or not depending on the facts of the particular case.”).

37 See Fields v. Ganders, 734 F.2d 1313, 1314-15 (8th Cir. 1984) (“severe pain” due to infected tooth).

38 See Boyd v. Knox, 47 F.3d 966, 969 (8th Cir. 1995) (three-week delay in dental treatment aggravated problem); Hunt v. Dental Dept., 865 F.2d 198, 201 (9th Cir. 1989) (claim stated by three-month delay in obtaining replacement dentures); Fields v. Ganders, 734 F.2d 1313 (8th Cir. 1984) (claim stated by three-week delay in providing dental care); Williams v. Scully, 552 F.Supp. 431, 432 (S.D. N.Y. 1982) (finding a material issue of fact as to whether deliberate indifference after an inmate was made to wait five and a half months for refilling of a cavity, resulting in infection and loss of the tooth).

39 See Hunt v. Dental Dept., supra 865 F.2d at 200 (plaintiff complained that he was unable to eat properly); cf. Dean v. Coughlin, 623 F.Supp. 392, 404 (S.D. N.Y. 1985) (holding that “dental needs—for fillings, crowns, and the like—are serious medical needs as the law defines that term”), vacated on other grounds, 804 F.2d 207 (2d Cir. 1986).


41 See, Mandel v. Doe, 888 F.2d 783, 788 (11th Cir. 1989) (noting that “knowledge of the need for medical care and intentional refusal to provide that care constitute deliberate indifference”); Monmouth County Correctional Institution Inmates v. Lanzaro, 834 F.2d 326, 346 (3d Cir. 1987), cert. denied, 486 U.S. 1006 (1988); see also Hathaway v. Coughlin, 37 F.3d 63, 68 (2d Cir. 1994), cert. denied, 513 U.S. 1154 (1995) (when plaintiff repeatedly complained of severe pain, defendant doctor’s frequent examinations of plaintiff did not preclude finding of deliberate indifference, because “[a] jury could infer deliberate indifference from the fact that [defendant] knew the extent of [plaintiff]’s pain, knew that the course of treatment was largely ineffective, and declined to do anything more to attempt to improve [plaintiff]’s situation”), Hunt v. Uphoff, supra 199 F.3d at 1223-24 (holding that an inmate’s claim that he was denied adequate and timely medical assistance did not reflect “mere disagreement with his medical treatment,” and that “the fact that he has seen numerous doctors [does not] necessarily mean that he received treatment for serious medical needs, i.e., that treatment was prescribed at all or that prescribed treatment was provided”).

42 See Ramos v. Lamm, 639 F.2d 559, 575 (10th Cir. 1980) (disagreements with the prison staff about medical care does not establish deliberate indifference); Varnado v. Lynaugh, 920 F.2d 320, 321 (5th Cir. 1991) (a disagreement between an inmate and his physician concerning whether certain medical care was appropriate is actionable under Sec. 1983 only if there were exceptional circumstances).

43 Westlake v. Lucas, 537 F.2d 857, 860 n. 5 (6th Cir. 1976).

44 See, e.g., Harris v. Coweta County, 21 F.3d 388, 393-94 (11th Cir. 1994) (some delay in rendering medical treatment may be tolerable depending on the nature of the medical need and the reason for the delay); Loe v. Armistead, 582 F.2d 1291 (4th Cir. 1978) (11-hour delay in examining inmate’s painfully swollen and obviously broken arm may state a claim), cert. denied, 446 U.S. 928 (1980); Olson v. Stotts, 9 F.3d 1475, 1477 (10th Cir. 1993) (eleven-day delay in elective surgery does not constitute deliberate indifference); Boblett v. Angelone, 957 F.Supp. 808, 814 (W.D. Va. 1997) (delay in medical care caused by inmate’s own actions does not amount to deliberate indifference on the part of staff).
However, a delay in providing medical care to extract a confession may violate the Eighth Amendment. See, Taylor v. Bowers, 966 F.2d 417, 423 (8th Cir. 1992) (doctor’s delay of surgical intervention in order to prompt inmate to confess he swallowed a drug-filled balloon violated inmate’s right to treatment of serious medical condition)).

43 See, Lisco v. Warren, 901 F.2d 274, 276-77 (2d Cir. 1990) (failure to examine inmate going through “life-threatening” and “fast-degenerating” condition for three days could constitute deliberate indifference); Hathaway v. Coughlin, 841 F.2d 48, 50-51 (2d Cir. 1988) (delay of two years in arranging surgery to correct pins in inmate’s hip raises question of fact as to deliberate indifference of prison officials’ conduct).

44 See, Carswell v. Bay County, 854 F.2d 454, 455 (11th Cir. 1988) (inmate made repeated requests for medical treatment which were ignored over an eleven week period during which the plaintiff lost approximately 53 lbs), Sealock v. Colorado, 218 F.3d 1205, 1210 (10th Cir. 2000) (“[d]elay in medical care only constitutes an Eighth Amendment violation where the plaintiff can show that the delay resulted in substantial harm.”); Hunt v. Uphoff, supra 199 F.3d at 1224 (stating that officials may be “held liable when [a] delay results in a lifelong handicap or a permanent loss”).

45 See Coleman v. Rahija, supra 114 F.3d at 784 (“Coleman presented sufficient ‘verifying medical evidence’ that Rahija ‘ignored a critical or escalating situation or that the delay posed a substantial risk of serious harm’ for her claim to succeed); Crowley v. Hedgepeth, 109 F.3d 500, 502 (8th Cir. 1997) (inmate failure to place verifying medical evidence in record to establish detrimental effect of delay in medical treatment precluded claim of deliberate indifference to medical needs); Hopotowit v. Ray, 682 F.2d 1237, 1259 (9th Cir. 1982) (“It is doubtful, for example, that any circumstance which would permit a denial of access to emergency medical care.”); Shannon v. Lester, 519 F.2d 76 (6th Cir. 1975) (inmate may recover for any injury caused by delay in medical care and any concomitant pain, suffering or mental anguish); Westlake v. Lucas, supra 537 F.2d at 860 (allegation that plaintiff was left in severe pain over an extended period of time without the administration of analgesic relief sufficient to withstand motion to suppress); Fitzke v. Shappell, 468 F.2d 1072, 1078-79 (6th Cir. 1972) (failure to respond to complaints of pain for 12-17 hours for inmate who had hit his head on a telephone pole and blacked out constitutes a constitutional deprivation).

44 See, e.g., Johnson v. Lockhart, 941 F.2d 705 (10th Cir 1991) (10 month delay in elective surgery stated claim where substantial pain resulted); Johnson v. Bowers, 884 F.2d 1053, 1056 (8th Cir. 1989) (long delay in scheduling “elective” surgery to repair nerve damage in inmate’s arm that results in restriction in use of arm constitutes deliberate indifference); Jones v. Johnson, 781 F.2d 769, 771 (9th Cir.1986) (denial or delay of elective surgery due to budget constraints may state a claim); Hamm v. DeKalb County, 774 F.2d 1567 (11th Cir. 1985), cert. denied, 475 U.S. 1096 (1986) (elective surgery may be delayed due to local government’s interest in limiting the cost of jail detention); Derrickson v. Keve, 390 F.Supp. 905, 907 (D.Del. 1975) (failure to perform elective surgery on inmate serving life sentence would result in permanent denial of medical treatment and would render inmate’s condition irreparable); Olson v. Stotts, 9 F.3d 1475, 1477 (10th Cir. 1993) (eleven-day delay in elective surgery does not meet the “deliberate indifference” standard).

45 Johnson v. Hardin County, 908 F.2d 1280, 1284 (6th Cir. 1990) (holding that district court properly denied summary judgment on plaintiff’s deliberate indifference claim where defendants, inter alia, frequently failed to provide plaintiff with all of his daily doses of pain medication); Boretti v. Wiscom, supra 930 F.2d at 1156 (failure to comply with prescribed daily dressing changes and pain medication stated claim); Allegheny Cty. Jail v. Pierce, 612 F.2d 754, 762 (3d Cir. 1979) (preventing an inmate from receiving recommended treatment states a claim). But see O’Loughlin v. Doe, 920 F.2d 614, 617 (9th Cir. 1990) (repeatedly failing to satisfy requests for aspirins and antacids to alleviate headaches, nausea and pains is not constitutional violation; isolated occurrences of neglect may constitute grounds for medical malpractice but do not rise to level of unnecessary and wanton infliction of pain); Huddgens v. DeBruyn, 922 F.Supp. 144 (S.D. Ind. 1996) (holding that the prison policy requiring inmates to purchase over the counter medications with personal funds does not violate the Eighth Amendment).

50 See Monmouth County Correctional Institution Inmates v. Lanzaro, supra 834 F.2d at 346; Durmer v. O’Carroll, 591 F.2d 64, 69 (3d Cir. 1979) (if the failure to provide adequate care in the form of physical therapy was deliberate, and motivated by non-medical factors, then claim is stated); Verser v. Elvea, 113 F.Supp.2d 1211, 1216 (N.D. Ill. 2000) (“no one who examined the record could reasonably or erroneously conclude that Mr. Verser could be denied the cheap and ordinary medical treatment (physical therapy and a knee brace or ace bandage!), prescribed by treating specialist, pursuant to the unexplained directions of a nonexpert who never examined him, and that he would not even be allowed to complete the medical treatment that that physician directed.”).

51 See Wood v. Housewright, 900 F.2d 1332, 1337 (9th Cir. 1990); also see Jones v. Evans, 544 F.Supp. 769, 775 (N.D. Ga. 1982) (nonmedical employee’s interference with prescribed care “can almost never be characterized as other than deliberate and indifferent.”); Tolbert v. Eyman, 434 F.2d 625, 626 (9th Cir. 1970) (claim stated when warden refused to allow inmate authorized medicine that he needed to prevent serious harm to his health) (cited with approval in Estelle, 429 U.S. at 105 n. 12.); Kaminsky v. Rosenblum, 929 F.2d 922, 924, 927 (2d Cir. 1991) (summary judgment precluded by fact questions on deficiency of medical care and deliberate indifference—despite the fact that inmate received “frequent medical attention” while in prison—in part because prison officials may have disregarded an independent doctor’s recommendation of hospitalization).

52 Roberts v. Spalding, 783 F.2d 867, 870 (9th Cir.), cert. denied, 479 U.S. 930 (1986).

53 Ellis v. Butler, supra 890 F.2d at 1003 (cancellation of appointment with outside knee specialist may state deliberate indifference claim).

54 See, Sealock v. Colorado, supra 218 F.3d at 1210 (refusal to send inmate having heart attack to outside facility).

Federal Standards (continued)

Treatment was responsible for responding to inmates’ medical complaints and could be held liable for failure to do so, cert denied, 113 S.Ct. 2992 (1993); Greason v. Kemp, 891 F.2d 829, 839-40 (11th Cir. 1990) (warden who knew of inadequate psychiatric staffing could be held liable); Smith v. Rowe, 761 F.2d 360, 369 (7th Cir. 1985) (Director of Corrections held liable for his knowing failure to remedy improper segregation of inmate).

City of St. Louis v. Praprotnik, 485 U.S. 112, 108 S.Ct. 923, 96 L.Ed.2d 712, 724 (11th Cir. 1991) (causation can be shown either that CMS was directly involved in the violation or that money for inmate accounts for postage were “assessment[s] for value received” and plaintiffs did not contend that they did not receive the services for which they were charged). Further, even if the copayment charge does deprive the inmates of property within the meaning of the Due Process Clause, the inmate must show that the State’s post-deprivation procedure is inadequate to provide relief before a federal court will consider a federal property deprivation claim. See Viscory v. Walton, 712 F.2d 1062, 1063 (6th Cir. 1983); Scott v. Angelone, 771 F.Supp. 1064, 1067 (D. Nev. 1991) (no due process violation where money for medical care was deducted from inmate’s account).

Reynolds, 128 F.3d at 175 (“If any delay occurs, it is solely because of the decisions made by the inmates themselves, not because of any conduct on the part of the prison administration.”).

Shapley v. Nevada Board of State Prison Commissioners, supra 766 F.2d at 408 (inmate does not state a claim under the Eighth Amendment when he cannot allege that he was denied medical treatment because he was unable to pay a nominal co-payment or fee); Johnson v. Department of Pub. Safety & Corr. Serv., 885 F.Supp. 817, 820 (D. Md. 1995) (“because the policy mandates that no one shall be refused treatment for an inability to pay, the co-payment will not result in a denial of care”).

See Harper v. Showers, 174 F.3d 716, 719 (5th Cir.1999); Zehmer v. Trigg, 133 F.3d 459 (7th Cir. 1997). See also Kerr v. Puckett, 138 F.3d 321, 323 (7th Cir. 1998), where the court stated that the PLRA physical injury requirement does not apply to someone who is not a “prisoner” at the time suit is brought.

[T]here is no statutory definition of “physical injury” as used in § 1997e(e).” Liner v. Goord, 196 F.3d 132, 135 (2d Cir. 1999).

See Vergos v. Gregg’s Enterprises, Inc., 159 F.3d 989, 990 (6th Cir 1998); People v. Fields, 448 Mich. 58, 67, 528 N.W.2d 176 (1995) (since the “Legislature did not define the phrase ‘physical injury,’ this Court must give those words their common, ordinary meanings”).

Webster’s Third New International Dictionary, at 1706; see also Random House Webster’s College Dictionary (1997), p. 672, defines the term “physical” as “of or pertaining to the body.”

Webster’s Third New International Dictionary, at 1164; see also Random House Webster’s College Dictionary (1997), p. 983, defines the term “injury” as “harm or damage done or sustained.” See also Knight v. Caldwell, 970 F.2d 1430, 1433 (5th Cir 1992) (“defined injury as ‘damage or harm to the physical structure of the body, including diseases that naturally result from the harm.’”)

The court went on to state that this definition is consistent with the analysis set forth in Hudson v. McMillan, supra.

Courts have found the existence of a “physical injury” where superficial lacerations and abrasions, along with evidence of wanton and unnecessary use of force resulting in severe pain, see, e.g., Brooks v. Kyler, 204 F.3d 102, 109 (3d Cir. 2000), and where bruises, welts and abrasions resulted from guard beating, Pryer v. C.O. 3 Slavic’s Enterprises, Inc., 196 F.3d 132, 135 (2d Cir. 1999).

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See Wolfe v. Horn, 130 F.Supp.2d 648, 658 (E.D. Pa. 2001) (1997e(e) physical injury requirement satisfied where pre-operative transsexual inmate alleged that after her hormone therapy was withdrawn, she suffered headaches, nausea, vomiting, cramps, hot flashes and hair loss and that with the re-emergence of masculine physical characteristics (reduced breast size, increased body hair and lowered voice pitch), she became depressed and suicidal); Sealock v. Colorado, supra 218 F.3d at 1210-11 (where inmate alleged that sergeant was deliberately indifferent to his need for medical attention, heart attack satisfied 1997e(e)’s physical injury requirement even though inmate presented no evidence that delay caused by sergeant resulted in any damage

May 2003

8 Prison Legal News
to his heart, where jury could find the delay prolonged inmate’s pain and suffering); see also Harrison v. Barkley, 219 F.3d 132, (2d Cir. 2000) (holding defendants’ alleged refusal to treat inmate’s tooth cavity would constitute deliberate indifference to serious medical need under Eighth Amendment, even though inmate did not ultimately suffer serious physical harm, provided defendants knew of and disregarded risk to inmate’s serious medical needs); Liner v. Goord, 196 F.3d 132, 135 (2d Cir. 1999) (body cavity search that was “alleged sexual assaults qualify as physical injuries as a matter of common sense”); cf. Warburton v. Underwood, 2 F.Supp.2d 306, 315 (W.D. N.Y. 1998) (declining to dismiss First Amendment Establishment Clause claim for failure to comply with physical injury requirement under 42 U.S.C. 1997(e) despite the fact that the only injury plaintiff could experience as a result of a constitutional violation under the Establishment Clause would be mental or emotional).

71 See Siglar v. Hightower, 112 F.3d 191, 193 (5th Cir.1997) (“absence of any definition of ‘physical injury’ in the new statute, we hold that the well established Eighth Amendment standards guide our analysis in determining whether a prisoner has sustained the necessary physical injury to support a claim for mental or emotional suffering. That is the injury must be more than de minimis, but need not be significant.”) (citation omitted); Warren v. Westchester County Jail, 106 F.Supp.2d 559, 570 (S.D. N.Y. 2000) (“Although the [PLRA] does not define ‘physical injury,’ the developing case law in this area reflects the view that, consistent with Eighth Amendment jurisprudence, the predicate injury need not be significant but must be more than de minimis.”); Luong v. Hatt, 979 F.Supp. 481, 485-86 (N.D. Tex. 1997) (“physical injury” must be more than de minimis to satisfy 1997(e)); Zehner v. Trigg, 133 F.3d 459 (7th Cir.1997) (left up to a jury to determine if the term “physical injury” as used in § 1997(e) included exposure to noxious odors, including body odors from human discharges, and “dreadful” conditions of confinement, without undermining Congress’ intent in enacting 1997(e); Rahim v. Sheahan, No. 99 C 0395, 2001 WL 1263493 (N.D. Ill. Oct. 19, 2001) (in finding that the inmates’ allegation of “physical pain and emotional turmoil” from being shackled to their hospital beds sufficiently pleaded a claim and met the physical injury standard of the PLRA, court applied the excessive force standard “the injury must be more than de minimis, but need not be significant”). Id. at *9).

74 See Zehner v. Trigg, 952 F.Supp. 1318, 1322 (S.D. Ind.) (physical injury requirement of ' 1997(e) is not broad enough to encompass inhalation or ingestion of asbestos without proof of resulting disease or other adverse physical effects), aff’d, 133 F.3d 459 (7th Cir. 1997); Siglar v. Hightower, supra at 193-94 (claim based on sore and bruised ear lasting for three days was de minimis, and thus, plaintiff failed to raise valid Eighth Amendment claim for excessive use of force nor did he have requisite “physical injury” to support claim for emotional or mental suffering); Leon v. Johnson, 96 F.Supp.2d 244, 248 (W.D. N.Y. 2000) (a delay in providing medication is not an “injury” of the type contemplated by the statute); Cain v. Commonwealth of Virginia, 982 F.Supp. 1132, 1135 n. 3 (E.D. Va. 1997) (headaches causing vision loss and requiring pain medication as well as numbness, joint pain and stomach cramps did not constitute physical injury within scope of 1997(e)); Luong v. Hatt, supra (claim of Eighth Amendment failure to protect dismissed where inmate failed to demonstrate injuries sustained were more than de minimis and, thus, also were insufficient to support claim for mental or emotional suffering).

75 See, e.g. Allah v. Al-Hajeez, 226 F.3d 247, 253 (3d Cir. 2000) (holding that determination that 1997(e) bars plaintiff’s First Amendment claim for compensatory damages does not bar all claims for damages, such as nominal and punitive damages); Perkins v. Kansas Dept. of Corrections, 165 F.3d 803, 807 (10th Cir. 1999) (nominal and punitive damages may be available if no physical injury is shown upon remand); but see Davis v. District of Columbia, 158 F.3d 1342 (D.C. Cir. 1998) (under PLRA, without physical injury, inmate can recover only nominal damages; punitive damages claims barred by the PLRA).

76 An issue that has not been resolved is whether an inmate is required to exhaust administrative remedies prior to bringing an action alleging violation of the American Disabilities Act (ADA) and/or the Federal Rehabilitation Act (FRA). The ADA and FRA do not require exhaustion of administrative remedies before filing. See: Cable v. Department of Developmental Servs., 973 F.Supp. 937, 940 (D.C.Del.1997) (“Courts have consistently held that there is no exhaustion requirement under Title II of the ADA.”). Some courts have held that the PLRA’s exhaustion provisions do not apply to ADA lawsuits. See: Parkinson v. Goord, 116 F.Supp.2d 390, 398 (W.D. N.Y. 2000) and cases cited; Finley v. Giacobbe, 872 F.Supp. 215, 219 n. 3 (S.D. N.Y. 1993) (Title II “adopts procedures set forth in 505 of the Rehabilitation Act” not Title VII and therefore does not require exhaustion).


78 See: Curry v. Scott, 249 F.3d 493, 504 (6th Cir. 2001) (claim properly dismissed against guard when “none of the prisoners complained about Howard’s behavior, nor even mentioned Howard in their prison grievances”).

79 See: Irvin v. Zamora, 161 F.Supp.2d 1125, 1134 (S.D. Cal. 2001) (“plaintiff’s grievances did present the relevant factual circumstances giving rise to a potential claim and did request the identities of the individuals directly responsible for spraying the pesticide. This was sufficient to put prison officials on notice of possible problems with these individuals.”).

80 West v. Atkins, 487 U.S. 42, 54, 108 S.Ct. 2250 (1988); see also Street v. Corrections Corp. of Am., 102 F.3d 810 (6th Cir. 1996) (CMS a proper party to this 1983 action); Hicks v. Frey, 992 F.2d 1450, 1458 (6th Cir. 1993) (“It is clear that a private entity which contracts with the state to perform a traditional state function such as providing medical services to prison inmates may be sued under 1983 as one acting ‘under color of state law’.”); Street v. Corrections Corp. of Am., supra (CMS cannot be held vicariously liable for the actions of its agents).

81 See: Edwards v. Alabama Dept. of Corrections, 81 F.Supp.2d 1242, 1255 (M.D. Ala. 2000) (“In order to prove that CMS should be liable, the plaintiffs would have to demonstrate that CMS itself directly caused the violation of their constitutional rights through their adoption of some official policy or practice.”); Miller v. Correctional Medical Sys., Inc., 802 F.Supp. 1126, 1130 (D.Del.1992) (CMS can be liable if she can show that it engaged in a policy or custom that demonstrates deliberate indifference). Cf. Leatherman v. Tarrant County Narcotics Intelligente and Coordination Unit, 507 U.S. 163, 166, 113 S.Ct. 1160 (1993) (holding that municipalities “cannot be held liable unless a municipal policy or custom caused the constitutional injury”).

Richardson v. McKnight, 521 U.S. 399, 117 S.Ct. 2100 (1997) (correctional officer working for a private contractor engaged by Tennessee to manage its prisons was not entitled to claim qualified immunity defense); see also Malinowski v. DeLuca, 177 F.3d 623, 624 (7th Cir.1999) (holding that privately employed building inspectors were not entitled to claim qualified immunity under Richardson).

West v. Atkins, supra 487 U.S. at 53 (footnote omitted). See also Leach v. Shelby County Sheriff, supra 891 F.2d at 1250.

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ANNOUNCING the 2nd National Training Institute of the Center for Children of Incarcerated Parents:

Working with Criminal Offenders & Their Children

The 2nd National Training Institute of the Center for Children of Incarcerated Parents will be held June 11-14, 2003 at the Western Justice Center in Pasadena, California. The Center is the only national agency of its kind founded and staffed by former prisoners. The CCIP Institute will present information on the developmental concepts, service models and practice that have made the Center a national leader in quality programs for children of criminal offenders and their families.

Training sessions will examine developmental practice and offer “how to” workshops on innovative service models like mentoring for children of prisoners and Head Start programs in correctional settings.

Early registration ($375) is offered April 1-May 15. Regular registration ($450) is offered from May 16-June 10. Lodging at special rates will be available at the Pasadena Hilton. Scholarships are available for former prisoners and children of current or former prisoners. Visit CCIP’s website at e-ccip.org or call 626-449-2470 for registration information.
I
n May 2002, Texas Parole Officer Connie Lynn Stones pleaded guilty to charges of solicitation of capital murder after police recorded her trying to hire a hit-man to kill her lover’s girlfriend.

Stone was in love with Brett Williams, who had once been under her supervision and she was eager to further their relationship. Her only complication was the presence of the man’s former wife. So Stone resolved to have the woman killed.

After meticulously searching her records, Stone settled on Stephen Armistead, newly released from prison, to do her dirty work. When Armistead heard the proposal he became paranoid and went to the police. Police wired Armistead who then set up a meeting with Stone to work out the lurid details of her plan.

“Well, uh, did you have any preference...to how you want this done?” asked Armistead. “Do you want me to make it like...a burglary gone wrong, or a drug deal gone wrong or a rape gone wrong?”

“It doesn’t matter,” Ms. Stone said laughing. “I’m thinking just a drive-by would be the best to me.”

Richardson police recorded the entire conversation and arrested Stone as she left Armistead’s house.

Defense attorney Brad Lollar argued that Stone suffered from undiagnosed depression and borderline personality disorder. He also argued that Ms. Stone exhibited a typical “pathology” seen in women involved in abusive relationships.

Lollar said that Stone, who is white, was beaten and used for sex and money by Williams, who is black. He accused Williams of forging $7,000 worth of Stone’s checks.

Prosecutor Fred Burns also noted the race angle when he argued that Stone solicited Armistead because he was a member of a white-supremacist gang in prison.

Before she ran afoul of the law, Stone held a variety of sensitive law enforcement positions. Stone was a child-abuse investigator in Florida, eventually a district parole officer in Texas where she met her lover, Williams. Because of her background in law enforcement, Stone offered to pull some legal strings for Armistead along with the $1,500 cash she had already given him.

“I played along,” said Armistead. “I was doing this for my protection at the time. I wasn’t really sure what was going on, but I knew it wasn’t right.” It is arguably one of Armistead’s few smart decisions. His 17 prior arrests and his current status on an ankle monitor are testaments to his less than successful criminal career.

For her own part Stone admitted her guilt. “I knew I wanted it done, but there was also a part that would be questionable with the leg monitor and for me to be with a black guy,” she said. “In a way, I was looking to be punished.”

Stone got her wish. A Dallas County judge and prosecutor granted her 40 years in TDCJ. Williams, who claimed no knowledge of the plot, was not charged.
Welcome to the thirteenth anniversary issue of PLN. This marks the 157th issue of PLN that we have published since our first issue appeared in May, 1990. In that time period a lot has happened, both with PLN and the prison system we cover. For one thing, both grew. PLN expanded from a ten page, hand typed, photocopied newsletter with 75 people on its mailing list to its current size, format and circulation. Meanwhile, the American prison and jail population more than doubled to its current size of over two million people imprisoned.

As I write this, U.S. forces have just attacked Iraq. Around the time of PLN’s fifth issue in 1990 the U.S. was preparing to attack Iraq for its invasion of Kuwait. The cause of war, U.S. dominance of the world’s energy supplies, has not changed. Once the current war is over we can expect to see the incarceration of discharged veterans who fill American prisons after every large conflict. The corporate media has glossed over the fact that since the federal government restored the death penalty in 1988 they have executed three people, two of them Gulf War I veterans.

If American casualties mount in the Gulf we can expect to see growth in the domestic anti war movement. Historically, the prisoner’s rights movement has grown along with, and tailed after, larger outside movements, both civil rights and anti war. There is a clear connection between domestic policies of repression and mass imprisonment and a foreign policy of imperial conquest and militarism. The same ruling class elites benefit from both while the working class elites benefit from both while the working class pays the price.

There is a connection between the latter they will also question the former.

Recently progressive magazines such as The Nation and elements of the corporate media have engaged in hand wringing over the torture of alleged Al Qaida members. Even some prominent attorneys like Al Dershowitz have publicly voiced support for torturing alleged terrorist suspects. Troubling is the implication that only now is the U.S. engaging in torture, or perhaps only now considering it.

Torture has long been practiced by U.S. military and security forces. Indeed, it was recognition of the commonality of the “third degree” in most American police stations that led to the supreme court’s landmark Miranda v. Arizona decision. After World War II the American government sent its agents around the world to train its allies and flunkies in torture techniques, from the Shah’s SAVAK in Iran to South American and Asian torture states, American government agents institutionalized and professionalized what before had been haphazard torture practices. A.J. Languth’s book, Hidden Terrors gives an excellent history of the US role in training torturers in South America. In Viet Nam the CIA’s Phoenix Program was a policy and practice of torture and murder aimed at targeting supporters of Vietnamese independence. In many cases, the very vilenes and repugnance of administrative and widespread torture and murder used by American puppet regimes may have hardened popular resolve that led to their collapse in Iran and Viet Nam, among others. In other places, like Argentina, Chile and Indonesia, the practice was brutally effective in crushing dissent.

But we need not venture overseas or into the distant past to document ongoing torture by the U.S. government and its agents. Shortly after the US brought its first batch of captives to Guantanamo Bay, on Cuban territory occupied by the US, Senator Diane Feinstein said the captives there had nothing to complain about. That their conditions of confinement were better than those of state prisoners in California.

Put in that context, the Guantanamo Bay captives are better off, even if they haven’t had a trial, haven’t been charged or convicted of anything and are held incommunicado from the world. At least, unlike California state prisoners, they aren’t being raped in their cells by the guard’s prisoner enforcers, are not being gunned down for sport, made to fight each other for their captor’s amusement, nor housed in massively overcrowded facilites. Not as far as anyone knows, anyways. As noted in this issue of PLN’s News in Brief section, at least two prisoners in Afghanistan were recently beaten to death by their American captors.

More significantly, for the past thirteen years, PLN has been reporting the ongoing, systematic and endemic abuses of the human and civil rights of American prisoners, including torture, sensory deprivation, beatings, sleep deprivation, long term isolation, pepper sprayings, murder, sexual assault and the whole sordid litany of ways in which power can be used to inflict pain, death, degradation and humiliation on a captive population. Preventive detention without committing a criminal act? Called civil confinement, PLN has covered that since its first year. The practice is merely expanding. None of this is new as a cursory review of PLN back issues would show. Unfortunately, I can’t say that I think things are improving or changing for the better. As long as human rights violators have impunity, whether in the U.S., England, Iraq or El Salvador, abuses will continue. Unfortunately, too few in the American media and virtually no public figures are willing to examine what occurs in American prisons and jails.

When PLN started publishing in 1990 there were a number of national and local publications reporting on prison and jail issues. Today, virtually all of them are history and only a few prisoner rights publications exist today. PLN is the only national publication dedicated to exposing the human rights violations that occur on a daily basis in American prisons and jails. PLN has become a vital tool in the struggle for human rights by activists in and out of prison, lawyers and other advocates. Due to the political unpopularity of what we report, we are largely cut off from mainstream foundation funding. Thus, we rely mostly on support from our readers and advertisers to continue our work. As conditions worsen, the more there is to do.

To celebrate our 13th anniversary we have expanded from 36 to 40 pages. This will allow us to bring readers still more news and information about the American gulag, hopefully in a more timely manner. We need your support to both continue our work as well as cover the additional costs of expand-
Prison Legal News

ing our size and bringing readers the first rate journalism and legal reporting that has become synonymous with PLN in the past 13 years. Please make a tax deductible donation to help support PLN’s work.

This coming year will bring stories on the relation between war and prison industries, criminal government contractors, the war on the poor in the US, the private prison industry, prison labor outbidding third world sweat shops and much more.

I would like to thank all those people over the past 13 years who have made PLN possible, both to start, to continue and to grow as we have under considerable hardship and adversity. At this point there are so many people that have helped in so many ways, big and small, that it is impossible to thank them individually. You know who you are and without your support there would be no 13th PLN anniversary.

Enjoy this issue of PLN and please encourage others to subscribe.

CCA Pays $54 Million to IRS and Settles Gender Discrimination Complaint

On October 28, 2002, Corrections Corp. of America, (CCA) settled its 1997 federal taxes after an audit by the Internal Revenue Service for the sum of $54 million. The IRS challenged the validity of the tax deductions that the former Prison Realty, a real estate investment trust (REIT) had claimed in 1997 tax return. This subsidiary of CCA’s was formed in 1997 for the sole purpose of creating corporate tax advantages [See: “CCA Sells Self; Wackenhut Creates REIT,” PLN Aug. ’98.]

This merger between Prison Realty and CCA was disassembled in 2000 after continually plummeting stock prices because of concerns of a potential conflict of interest by the cooperative association of Prison Realty and CCA. Both companies were located in the same Nashville office and shared the same corporate personal on the board of both companies. This allowed CCA to lease their prison back to themselves with a much more profitable tax break [See: “Prison Realty/CCA Verges on Bankruptcy,” PLN July ‘00.]

CCA expects no effect on its real estate investment trust status, and they foresee an increase in the company’s accumulated earnings and profits for 2002. CCA went on to say that they do not expect this settlement to result in a material tax benefit or tax expense for the year. CCA is currently appealing additional IRS audits for their 1998 and 2000 tax returns, and they believe the 1998 audit resolution will not materially hurt the company’s liquidity or results. The financially troubled company faces numerous shareholder lawsuits and other legal problems, based on its financial chicanery. [PLN May ‘02].

In a separate matter, on August 27, 2002, CCA agreed to pay $152,000 in back wages for gender discrimination to 96 women who had applied for jobs with CCA but were not hired. The settlement was reached after the U.S. Department of Labor audit found that female applicants with equal or better qualifications than their male counter parts were turned down because of their gender. The CCA owned prison in Sayre, Oklahoma, has offered 19 of the rejected female applicants jobs at the Sayre prison. CCA has to meet federal standards because they have numerous contracts with the federal government. Charles James, deputy assistant secretary for Federal Contract Compliance said, “We strongly encourage all federal contractors to develop and implement self-audit processes to prevent equal opportunity problems from occurring.”

Sources: Reuters, The Daily Oklahoman, The Associated Press State & Local Wire

Prison Sucks.com

Research on the prison industrial complex features an incarceration clock, links to ready to distribute factsheets and 400+ links to reports by prisons, all organized by category. A valuable research tool for prison activists.
The Parents’ Project: Parent-Child Prison Visitation Issues

Raised by Bazzetta, et. al. v. McGinnis, et. al.

by Denise Johnston & Michael Carlin

In 1999, the Michigan Department of Corrections [MDOC] imposed a broad set of restrictions upon parent-child prison visitation. These restrictions included prohibition of visits to prisoners by minor siblings, nieces and nephews, and by children unaccompanied by a parent or legal guardian. After appeal, these prohibitions were determined to be constitutional for contact visits but their application to non-contact visits was challenged and found to violate the constitutional rights of prisoners and prospective visitors. This opinion, by Judge Nancy G. Edmunds of the U.S. District Court in Detroit, was appealed and a temporary stay of enforcement granted in May, 2001; the District Court’s order was affirmed by the Court of Appeals for the 6th Circuit in 2002. The U.S. Supreme Court accepted the case and it was argued on March 26, 2003.

Bazzetta raises many important questions regarding incarcerated parents and their families; two are discussed here:

1) What is a parent and how is a parent-child relationship identified?
2) What is the relationship of child custody status to parent-child visitation in the prison?

The answers to each of these questions have major implications for understanding the impact of Bazzetta on families of prisoners in Michigan.

What Are Parents?

Decisions like the one that found the above restrictions to parent-child contact visits to be constitutional are based on a narrow understanding of “parent” as the biological or adoptive mother or father. Prisoners who have lived with and raised but not adopted the biologically-unrelated children of spouses or partners are not parents by this definition. Similarly, prisoners who have taken the parental role and reared minor siblings or other child relatives are not considered their “parents” by the Bazzetta decision and the relationship they have with those children is legally unprotected.

Ironically, in light of a long history of failing to support the families of prisoners, the child welfare system’s standard for judging incarcerated parents and their children stands in opposition to the Bazzetta decision. That standard has as its central concept the primacy of the “psychological parent”—the assertion that the person who has cared for and provided the primary relationship for a child for an extended period of time (usually 1 year or more), regardless of biological relationship to the child, is the critical and irreplaceable parental figure. At the heart of this concept—which was never supported by empirical research—was the understanding that children could not have more than one parental relationship at a time or in sequence. This standard has been responsible for thousands of decisions to 1) remove children from the custody of incarcerated parents from whom they would be separated for long periods of time; 2) grant permanent custody of the children of prisoners to the “psychological parents” who had been caring for them before and/or during a parent’s incarceration; and 3) terminate prisoners’ parental rights.

A Supreme Court decision upholding the ruling of the 6th Circuit Court of Appeals will ignore the large body of case law and authoritative opinion in the child welfare literature that supports the importance of the relationship of children and their “psychological parents”.

Child Custody Status and Parent-Child Prison Visitation

There has been no research on child endangerment during prison visits, and there are no studies that have measured the rate or even the number of incidents of child maltreatment or exploitation in prison visiting settings. In the absence of data, the prohibition of prison visits by children unaccompanied by their parent or legal guardian can be seen as an attempt to prevent situations in which a visiting child would be endangered if not accompanied in the prison by the adult legally responsible for their custody and care. This attempt is admirable, even if there is no evidence that occurrences of this nature are anything but exceedingly rare and no evidence that the presence of a birth parent or legal guardian would have prevented the incidents that have occurred.

At the same time, there are a group of families with both parents incarcerated who are adversely affected by such prohibitions. While this group represents a small fraction (probably less than 2%) of the families of male prisoners, it represents a much larger proportion of the families of women prisoners. Children in these families reside with relative caregivers who are not the children’s legal guardians and would be unable to visit their incarcerated parents by the Bazzetta standard.

Another effect of this type of prohibition is the de facto regulation (by correctional authorities) of child custody within prisoners’ families; parent-child visits in families with two incarcerated parents will not occur unless there is a substantial reduction in the prisoners’ parental rights. (When legal guardianships are in place, birth parents have only minimal rights to their children.)

Since criminal offenders have been found to face significant obstacles in maintaining and regaining legal custody of their children, another effect might be to increase the rate at which prisoners permanently lose child custody.

Why Bazzetta?

At least one of the concerns that led to Bazzetta—how to insure safe prison visiting by children with limited government liability—is valid. However, as a response to that concern, the prison regulations challenged by Bazzetta are punitive and potentially destructive to prisoners’ families.

Probably the most important thing to understand about Bazzetta is that it reveals the degree to which prison custody concerns are valued—by the judiciary as well as prison officials—over the needs of children, parents and families. It is worrisome that the family and
criminal courts have been able to come from entirely opposite theoretical positions to decisions that similarly undermine the fragile bonds of families involved in the criminal justice system.

Erroneously Released Texas Prisoner Has Right to “Street” Calendar Time

by Matthew T. Clarke

The Fifth Circuit Court of Appeals held that a Texas prisoner erroneously released on mandatory supervision has a right to calendar time spent on the street—but not any potential good conduct time—following revocation.

Fernando Thompson, a Texas state prisoner, filed a petition for writ of habeas corpus in federal district court after the Texas Department of Criminal Justice refused to credit him with the time he earned while out of prison following his premature mandatory supervision release. The district court denied relief without addressing whether an erroneous release precludes forfeiture of calendar time and good-time credits upon revocation of mandatory supervision. Thompson appealed.

The Fifth Circuit held that neither Texas state law nor federal law requires Texas to credit a prisoner with calendar time accrued while on mandatory supervision. Likewise, the Due Process Clause, which prohibits a state from exceeding a prisoner’s sentence in an unexpected manner, does not apply. However, in Ex Parte Morris, 626 S.W.2d 754 (Tex.Crim App 1982) (en banc), the Texas Court of Criminal Appeals held that “a sentence must be continuous and a prisoner or inmate cannot be required to serve his sentence in installments, unless it is shown that a premature or unlawful release of the prisoner or inmate resulted or occurred through some fault on the part of the prisoner or inmate.” Thus, the law in effect in Texas at the time of Thompson’s premature release was to credit the prisoner with the street time so long as the prisoner was not at fault. This legally entitled Thompson to calendar time accrued during while released.

Because the denial of calendar time affected the duration of Thompson’s confinement, it constituted a liberty interest, entitling him to the procedural protection set forth in Wolff v. McDonnell, 418 U.S. 539 (1974).

“The touchstone of due process is protection of the individual against arbitrary action of government.” Because Texas did not provide any evidence to support its denial of Thompson’s calendar time and nothing in the record showed that he should not be credited with it, the denial was arbitrary. This arbitrary action was inconsistent with due process despite Texas’s protestations that Thompson’s own actions lead to the revocation of his mandatory supervision.

The Fifth Circuit ruled quite differently in the matter of good time credits which are given a prisoner for good conduct and/or participation in work and/or educational programs. The Morris court determined that an erroneously released prisoner was entitled to restoration of good time credits as a matter of constitutional due process. However, the Fifth Circuit is not bound by a state appellate court’s interpretation of federal constitutional law. The Fifth Circuit held that because Texas statutes provided for the forfeiture of good time credits upon revocation of mandatory supervision and there is no Texas statute abrogating forfeiture of good time credits when a prisoner is prematurely released, there is no state-created right to reinstatement of good time credits after an erroneous release. Furthermore, the loss of the good time credits did not affect a liberty interest because Thompson was, in fact, released from prison even earlier than he had a right to be and was returned to prison because of his own misconduct. Therefore, Thompson was not entitled to restoration of good time credits. The case was remanded to the district court for further proceedings consistent with the opinion. See: Thompson v. Cockrell, 263 F.3d 423 (5th Cir. 2001).
In April of 2001, Human Rights Watch released a report called No Escape: Male Rape in U.S. Prison. The report, written by Joanne Mariner, contains dozens of first-hand accounts of prisoner rape and sexual assault, stories that are both horrifying and sobering.

Some of the most frightening passages in the book, though, are not in the main body of the text. They’re in the appendix, which features letters that state corrections departments coughed up after Human Rights Watch requested information about sexual assault behind bars.

In the appendix, the reader learns what these corrections departments, despite countless stories of human suffering to the contrary, are still saying about sexual assault.

From the Kentucky Department of Corrections: “These instances are very rare, (but) … we do not maintain a central list of the disposition of these cases.”

From the Alaska Department of Corrections: “We, luckily, have no need to keep statistics, as this has not been a problem.”

From the Connecticut Department of Corrections: “Our department does not maintain statistics regarding inmate on inmate rape or sexual abuse primarily because it is seldom reported ….”

In state after state, the officials running the prisons disavow any knowledge of a problem that, according to the best research on the subject, affects as many as one in five male prisoners.

For that reason, and many others, No Escape is a wrenching book to read. It’s also one of the most in-depth, authoritative, and comprehensive books written on the subject of prisoner rape. The book provides a review of the conditions that contribute to prisoner rape – including the growth of the American prison population in the last 20 years, the privatization of the prison industry, and the crippling of prisoners’ legal rights through the Prison Litigation Reform Act of 1996.

No Escape also reviews some of the realities of prisoner rape that are misunderstood by the public: that victims tend to be nonviolent offenders, young people, and first-timers; that victims are sometimes subjected to repeated abuse that can last for years; and that rape victims contract diseases like HIV and often suffer from crippling depression and post-traumatic stress disorder.

All of these facts are brought to life in No Escape through the inclusion of prisoners’ first-hand accounts of rape. Human Rights Watch quotes men like B.J. from Connecticut (that peaceful state where rape is “seldom reported,” according to the DOC) who describes being assaulted after he was celled with a known rapist.

“I remained in shock and paralyzed in thought for two days until I was able to muster the courage to report it, this the most dreadful and horrifying experience of my life,” B.J. writes.

Then there are prisoners like M.P. from Arkansas, who describes submitting to life as a sexual slave for another prisoner, and S.H., from Texas, who was rented out for sexual favors. S.H. filed five grievances, eight appeals and a federal lawsuit in an attempt to get some relief for his situation. He was denied any remedy, every step of the way.

That institutional indifference to the problem of sexual assault behind bars is documented in No Escape’s final chapter, where Mariner notes that “rape occurs in U.S. prisons because corrections officials, to a surprising extent, do little to stop it from occurring.”

Even simple steps that could reduce the likelihood of sexual assault – such as realistic prisoner orientation programs and careful classification of prisoners by risk of victimization – are relatively uncommon, Human Rights Watch reports. Prisoners’ complaints of rape are not taken seriously and avenues of legal redress are typically blocked.

“Rape is not an inevitable consequence of prison life, but it certainly is a predictable one if little is done to prevent it and punish it,” Mariner concludes.

The two years since No Escape was published have seen a major surge of advocacy to address sexual assault behind bars. No Escape was covered on the front page of the New York Times, introducing many members of the public to a reality they had never considered. Since then, publications such as the Washington Post, the Los Angeles Times, The Nation, Mother Jones, and The Weekly Standard have also prominently covered the issue.

No Escape has served as a powerful resource for Stop Prisoner Rape (SPR), the only national organization solely devoted to ending sexual violence behind bars. Stop Prisoner Rape had been around for more than 20 years before No Escape, but the book’s authoritative documentation of the problem has proved to be a critical tool in SPR’s arsenal.

Since the publication of No Escape, SPR and Human Rights Watch have worked together (along with others) to launch a listserv, sponsor a national conference, and lobby for the first-ever federal legislation to address rape in prison, known as the Prison Rape Reduction Act. In fact, No Escape was cited during Congressional hearings on the bill. The legislation, which is still pending, would authorize a study to document the extent of the problem and create a program of standards and incentives to help officials detect and prevent prisoner rape.

For men and women behind bars, rape remains a real threat. SPR continues to hear from prisoners every day who are being victimized – prisoners who still face the kinds of brutality documented in No Escape. SPR now offers survivors of sexual assault a range of information and referrals, the chance to post stories on its heavily trafficked website, and the opportunity to speak out through contacts with reporters and researchers.

That’s a powerful legacy for a single book, but No Escape tells a powerful story. It’s one we all need to understand.
Write succinctly! Or, alternatively, bore your intended reading audience to death with burdensome legal treatises steeped in excessive, redundant verbosity, liberally laced with old-as-the-hills cliches.

Get it? Writing to Win is a refreshing, practical guide to improving your legal written communications skills. Attacking legal writing as obscure and often self-defeating, former Harvard Law Lecturer Steven Stark offers simple rules from which the reader can learn to avoid common mistakes.

Writing to Win helps you to create effective documents. Simple but often overlooked tools such as outlining and using active rather than passive styles are but two of Stark’s ten “rules of the road.” You also learn the fine art of editing - eliminating redundancy as well as obscure terms and trite expressions. Sprinkled with humorous examples, the text is particularly instructive because it is fun to read. For example, “Read my lips - no new taxes” was lauded for its direct communications approach versus a rigorous discourse on tax policies that might have been offered instead.

Writing to Win is neither a grammar manual nor a forms book. It is a presentation guide focusing on aiding lawyers to approach their task of becoming more effective writers. Getting down to mechanics, Writing to Win first covers the art of argument - emphasizing six rules for achieving a strong narrative form. Next are sections on writing litigation (of particular use to PLN readers) and on writing in legal practice, e.g., memoranda and contracts. Chapters within each section deal with articulating facts (thirteen rules) and developing legal arguments (16 more rules). Other chapters guide you with rules for writing trial and appellate briefs, as well as for drafting complaints and answers.

Unique to this type of book are chapters on the important legal processes of written discovery and oral argument. And if your legal writing goes into patent applications, Stark offers fourteen rules for technical writing aimed at improving comprehension. Perhaps of universal use to PLN readers are the seven rules for effective legal letter writing.

Writing to Win offers a bonus bibliography of over 200 reference sources, indexed to each chapter, to permit the avid student to obtain further help in any topic addressed by Stark.

Remember, exactly 50% of all litigation is lost. If you’ve taken the trouble to litigate, don’t you want to improve your odds of winning? Writing to Win is available from PLN (see p.33-34 of this issue) for $15.95 plus shipping.
Texas Prison Guard Charged with Raping Male Prisoner; Prisoner Files §1983 Complaint

Nathan Essary, a slightly built 22-year-old prisoner, was gang-raped at the Rogelio Sanchez State Jail near El Paso, Texas. Following the rape, Essary was transferred to the John Montford Psychiatric Facility in Lubbock for treatment. Then, in May 2001, Essary was moved to the O. L. Luther State Prison at Navasota, Texas, where he was assigned to work in the laundry.

Michael Chaney, then a prison guard at Luther, worked as a laundry manager and was Essary’s supervisor. Chaney, widely known for sexually harassing prisoners, began paying unwelcome attention to Essary. Although other prisoners had earlier and repeatedly filed grievances and sexual assault complaints against Chaney,

Jerry Barrett, warden at the Luther prison, failed to take reasonable measures to prevent Chaney from continuing his sexually aggressive practices or from inflicting harm on the prisoners under his control.

Chaney continued his inappropriate behavior toward Essary by making sexually charged remarks, kissing him, and grabbing Essary by the buttocks and genitals. Chaney warned Essary that if he complained, he would concoct false disciplinary charges and ruin Essary’s chances for parole.

Chaney assigned Essary to work as a janitor in the prison laundry, a job that required him to stay late and clean up after the other prisoners had returned to their cells. Early in October 2001 on an evening when Chaney and Essary were the last two people in the laundry, Chaney locked the doors, pushed Essary into the sergeant’s office, and ordered Essary to masturbate him.

Later, Chaney came to Essary’s cell and ordered him to come to work. That evening, Chaney sent other laundry workers to their cells, then pushed Essary into the captain’s office where he kissed him on the face and mouth, ordered him to “get hard,” and forced Essary to masturbate him. Later, Essary was given a job-change to the medical squad.

On May 30, 2002, following an analysis of DNA evidence, Michael Chaney was indicted on one count of aggravated sexual assault and improper sexual activity with a person in custody. Chaney is no longer employed as a Texas prison guard.


Margaret Winter, Associate Director of ACLU’s National Prison Project in Washington DC, is lead attorney for Essary. Winter is assisted by attorneys Craig Cowie and Amy Fettig of the ACLU Foundation in Washington DC. Austin attorney Meredith Routtree, the dynamic leader of the ACLU’S Texas Prison and Jail Accountability Project, is also a member of Essary’s team.

The Essary complaint follows another Texas prisoner’s sexual harassment complaint which was filed in April 2002 by Roderick Johnson. [PLN, Oct. ‘02, page 20.] As with Essary, Johnson is being ably assisted by attorneys from the ACLU. See: Essary v. Chaney, H-02-3822, U.S. District Court for the Southern District of Texas, Houston Division, 2002.

Eighth Circuit Reverses Dismissal of Prisoner’s Hepatitis C Treatment Claim

The U.S. Eighth Circuit Court of Appeals has reversed and remanded in part a North Dakota Federal District Court’s dismissal of a state prisoner’s claim that he was denied treatment for hepatitis C.

Dale J. Burke is a prisoner of the North Dakota Department of Corrections and Rehabilitation (NDDCR). Burke has hepatitis C. He sued NDDCR and its health care provider, Medcenter One, under 42 U.S.C. §1983 and the Americans with Disabilities Act (ADA), 42 U.S.C. §12101, alleging that NDDCR and Medcenter One completely denied him treatment for hepatitis C.

The district court, screening the complaint prior to service of process as required by 28 U.S.C. §1915A, dismissed without prejudice for failure to state a claim for relief. The district court did not consider Burke’s amended complaint. Burke appealed, abandoning his ADA claims on appeal.

The appeals court held that Burke stated a claim for relief. “Mr. Burke alleged more than a disagreement over the proper course of treatment for his hepatitis C: he alleged that he was denied treatment entirely” and that the basis for the denial of treatment was his prior lawsuits against the NDDCR medical director. Burke’s suit should have been allowed to proceed against NDDCR and Medcenter One.

The appeals court affirmed the ADA dismissal and reversed the §1983 dismissal. The appeals court instructed the district court to consider Burke’s amended complaint on remand. See: Burke v. North Dakota Dept. of Corrections and Rehabilitation, 294 F.3d 1043 (8th Cir. 2002).
Ohio Supreme Court Orders Changes in Parole Board Procedures

by Robert Woodman

On December 18, 2002, in a 6-1 decision, the Ohio Supreme Court ordered a fundamental change in the way the Ohio Adult Parole Board, a division of the Adult Parole Authority (APA), makes parole determinations. The decision may affect the release dates of as many as 18,000 Ohio prisoners.

In 1998, the APA radically revised its parole determination guidelines. The revisions were supposed to bring sentences imposed prior to July 1, 1996, in line with sentences imposed on or after July 1, 1996, the effective date of Ohio’s “Truth in Sentencing” law. Sentences under the “old law” (prior to July 1, 1996) are mostly indeterminate, while the later, “new law” sentences are mostly determinate. Under parole board practices, prisoners under the old law usually serve far more time for a crime than prisoners under the new law convicted of the same crime. The revision to the guidelines, however, codified a Parole Board practice that had, up until then, been only informally applied. Under this practice, the Board ignored the offense(s) of conviction and considered all charges against a defendant, including those for which the defendant was indicted, but which were later dismissed or reduced as the result of a plea bargain, or which were acquitted at trial. In some cases, the Board considered charges stated on a police report, for which the defendant was never indicted.

The revised guidelines are grid-based, much like the federal sentencing guidelines. The Board calculates an offender’s risk of recidivism on a scale of 0 to 8 based on prior criminal and institutional behavior, then selects an offense category based on the “total offense behavior,” established using a “preponderance of the evidence” standard. In most cases under the revised guidelines, the Board moved an offender upward from his or her offense(s) of conviction to a category based upon all unconvicted, dismissed, or acquitted charges.

Prisoners with plea bargains quickly began challenging this practice as a violation of plea agreements. The appellate districts in Ohio split on the issue. The Ohio Supreme Court consolidated three cases on certified conflict and addressed them. In each appeal, the defendants had entered into plea bargains with the State of Ohio for reduction, dismissal, or both, of some charges in exchange for guilty pleas on other charges. In each case, the Parole Board scored the defendants in much higher categories based on the original charges and continued the defendants’ sentences far beyond what they would have received had only the offenses of conviction been considered.

The Ohio Supreme Court reviewed the the three cases and how the defendants’ parole eligibility was affected by the Board’s practices. The Court noted that the law existing at the time each defendant’s plea agreement was made, former Ohio Revised Code (O.R.C.) §2967.13(A), made a prisoner “eligible for parole at the expiration of his minimum sentence.” The court held “that the words ‘eligible for parole’ ... ought to mean something. Inherent in this statutory language is the expectation that a criminal offender will receive meaningful consideration for parole.” The Parole Board’s practice, the court said, rendered the phrase “becomes eligible for parole at the expiration of his minimum term” meaningless.

The court agreed with Ohio’s argument that the Parole Board has broad statutory authority in parole determinations. “However, that discretion must yield when it runs afoul of statutorily based parole eligibility standards and judicially sanctioned plea agreements.”

The Court held, “In any parole determination involving indeterminate sentencing, the Adult Parole Authority must assign [a prisoner] the offense category score that corresponds to the offense or offenses of conviction.” This does not, however, stop the Parole Board from continuing a prisoner’s sentence for any other reason the Board deems appropriate, including the circumstances of the crime that led to arrest and conviction.

After the decision, Assistant Ohio Public Defender Charles Clovis who, with Assistant Ohio Public Defender Siobhan O’Keefe, filed a class action suit against the APA for its practice said, “I’m extremely pleased.” And Ohio Public Defender David H. Bodiker stated, “A great wrong has been righted.” Assistant Ohio Attorney General Todd Marti, who represented the State, and Parole Board Chairman Gary Croft both admitted the decision “will have some effect,” on prisoners’ sentences, but they both refused to speculate how much effect it would have. State officials denied the ruling would cause a mass release of old law prisoners. Attorney Norman Sirak, who has a federal suit against the APA for various causes, predicted that Ohio would try to construe and apply the decision as narrowly as possible.

This decision, however, is one of the few major defeats ever handed by Ohio courts to the APA. Unfortunately, the decision came too late for one of the appellants. Wiley Layne left prison when his maximum term of imprisonment expired, prior to the Supreme Court’s decision. See: Layne v. Ohio Adult Parole Authority, 97 Ohio St.3d 456, 780 N.E.2d 548 (Ohio 2002).


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May 2003

Prison Legal News 19
No Qualified Immunity Defense for Florida Beatings

by David M. Reutter

The Eleventh Circuit Court of Appeals has held that prison guards at the Florida State Prison (FSP) who beat prisoner David C. Skrtich are not entitled to dismissals. Two of the defendants, Timothy A. Thornton and Jason P. Griffis, are the same guards recently acquitted in the Frank Valdez murder. [“Another Murder by Florida Guards, Another Acquittal,” PLN, Aug. ’02.] Thornton and Griffis appealed the denial of their motion to dismiss on qualified immunity grounds. The other defendants, guards Willie Archie, James E. Dean, Stacey L. Green, and Tony Anderson appealed the denial of their motion for summary judgment on the same grounds.

Skrtich was on close management at FSP as a result of an extensive disciplinary history, including aggravated assault with a deadly weapon for repeatedly stabbing a guard, and had been the subject of several cell extractions in the past. On January 13, 1998 Skrtich refused to vacate his cell so it could be searched. Griffis, Archie, Dean, and Green arrived at Skrtich’s cell in riot gear, and Thornton directed them to enter the cell to extract Skrtich. Griffis entered the cell with an electronic shield and shocked Skrtich, knocking him to the floor. Skrtich offered no resistance, and Griffis, Archie, and Dean repeatedly kicked him in the back, ribs, and side while Green struck him with his fists. After falling, Skrtich was lifted onto his knees three times, and the beating continued each time. After Thornton and Anderson watched, Thornton verbally threatened Skrtich and knocked him to the ground while other guards picked him up and slammed his head into the wall.

As a result of his injuries, Skrtich had to be airlifted by helicopter to a hospital where he remained for nine days, and spent several months recuperating. The medical records reflect Skrtich received multiple left rib fractures, a fractured back, knee and shoulder injuries, abdominal trauma, and post trauma anemia. The doctors reported “that the shoe impressions on inmate Skrtich were probably made from a stomping motion as opposed to merely holding him down.” Dr. Victor Selyutin of FSP told the Inspector General Skrtich’s injuries were consistent with “physical abuse.”

The Court held that defendants Archie, Dean, Green and Anderson were not entitled to qualified immunity on summary judgment. If Skrtich proves at trial he was rendered inert by the electric shock and not resisting, that the officers administered the severe beating for no other purpose than the infliction of pain, he will be entitled to damages from the guards who collectively administered the beating or failed to intervene to stop it. Additionally, the Court rejected the defendants claim the force was de minimus in light of Skrtich’s injuries. The Court also held Thornton and Griffis' motion to dismiss was an abuse, through stalling, of the pretrial process. The motion to dismiss before the Court was the third one filed in the case, and the first time these defendants had asserted qualified immunity. The Court held that qualified immunity is a defense that must be affirmatively pled, and as the current motion was improperly filed, the defendants’ waived that defense. The district court’s denial of the motions for summary judgment and to dismiss was affirmed. See: Skrtich v. Thornton, 280 F.3d 1295 (11th Cir. 2002).

California Pays $1.1 Million in Prison Sexual Harassment Suits

In August 2002, California prison officials agreed to pay a settlement of $400,000 to former guard Terri Sanchez in the latest in a series of suits for aggravated sexual harassment filed by female guards at the California Correctional Center in Susanville. The total amount of settlements and awards over the past two years is $1.1 million. Federal District Judge William B. Shubb said, “Essentially, Sanchez claims that from the moment she began working at the Department of Corrections [CDC] until the moment she left [three and one half years later] ... she was unable to escape from unwanted verbal and physical advances of a sexual nature and was ridiculed because of her gender.”

When she complained of the sexual harassment, fellow guards labeled Sanchez a “rat” and “filer” and ostracized her. Shubb noted that the evidence she presented “suggests that retaliation continued to happen despite the CDC’s efforts to investigate and punish alleged retaliatory acts.” The stress this caused resulted in Sanchez’s taking three stress leaves and ultimately receiving disability retirement because she had become “incapacitated for the performance of her duties ... based upon her psychological condition,” according to Cal-PERS.

Fred Johnson, the chapter president of the California Correctional Peace Officers Association is one of the guards named by Sanchez. She alleged that he and other guards used filthy language and made obscene gestures to her and that two lieutenants and a sergeant were sometimes present when this occurred. Johnson would allegedly stare at her private areas, make offensive comments, and touch her. A female sergeant testified that Johnson possessed virtual immunity from disciplinary action. The warden, Johnson, and an employee relations officer all admitted that Sanchez’s complaint against Johnson was never investigated.

In 2001, former guard Cindy Costello, represented by attorney Robin Perkins, won a jury award of $612,000, plus interest of $10,000 against CDC and $75,000 in punitive damages and interest of $10,000 against a former CDC lieutenant. Jurors in the trial expressed dismay at the CDC’s handling of sexual harassment. Former guard Edna Browning-Overstreet and nurse Donna Hopson, both represented by Perkins, settled for $50,000 each.

CDC officials alleged that they now have a zero-tolerance policy for sexual harassment and no complaints of that nature have been received since Warden Roy Castro took over in November 2000.

Source: The Sacramento Bee

May 2003

Prison Legal News
On June 23, 2002, in the first case prosecuted before a jury under a new harassment law, a Texas jury convicted a prisoner of harassment and sentenced him to 20 years in prison.

Jeffery Wayne Wheatly, a 35-year-old Texas state prisoner, was indicted for throwing feces and urine on two guards and their clothing in administrative segregation at the TDCJ Hughes Unit on January 25, 2001. Wheatly took his case to a jury, something which has not previously occurred under the harassment statute which was enacted September 1, 1999. Prosecutors enhanced the third-degree felony using Wheatly’s prior conviction for aggravated robbery. The jury rejected Wheatly’s defense that he was set up by guards and sentenced him to the maximum of 20 years to be served after he completes his aggravated robbery sentence. Prosecutors noted that all other prisoners previously charged under this statute had pleaded guilty.

Source: The Gatesville Messenger

Washington Prisoner L&I Statutes Struck Down

The Washington Supreme Court struck down a statutory scheme which denies labor and industries benefits to state prisoners with life sentences and no dependents. RCW 51.32.040(3) and 72.60.102 were declared unconstitutional, because they deny lifers without dependents any monetary compensation for work related injuries, while prisoners with release dates or beneficiaries are compensated for such injuries.

Tony Willoughby and Lennie Cain are both incarcerated at the Washington State Penitentiary in Walla Walla, and neither will be released alive from prison. Neither prisoner has a spouse or other dependent. Both lost fingers in accidents while on prison work details. The Washington Department of Labor and Industries (L&I) valued Willoughby’s claim at $10,260.81 but would not assess Cain’s disability rating.

The prisoners filed declaratory judgment actions in the Walla Walla County Superior Court challenging the propriety of L&I’s denial of benefits for their job-related injuries. On July 25, 2000, the Superior Court found that L&I denied the prisoners their benefits without due process of law. The Washington Department of Labor and Industries (L&I) valued Willoughby’s claim at $10,260.81 but would not assess Cain’s disability rating.

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BOP Communion Wine Ban Challenged
by David M. Reutter

The Court of Appeals for the District of Columbia has reversed the grant of summary judgment favoring prison officials in a Bivens action filed by Catholic Christian prisoners at the Federal Prison Camp in Pensacola, Florida, which challenged the BOP’s rule prohibiting prisoners from receiving Communion Wine during rituals, but “the staff or contract chaplain may consume small amounts of wine for performance of the ritual.”

The prisoners practice as part of their religion the Eucharist sacrament, which is called Holy Communion. Communion is administered after a priest consecrates the bread and wine, and the prisoners believe the bread transforms into the body of Jesus Christ and the wine into his blood. The priest can present the wine through several methods, and until the new rule became effective the prisoners received it through intinction method. Intinction is the dipping of the transformed bread into the wine and consuming the bread. The prisoners, in their complaint, stated their belief is its “the command of the Lord Jesus Christ to consume both the bread and wine” during the Eucharist sacrament. Prison officials entered into the record letters from a Catholic nun and the local Bishop, who stated that Communion by bread alone is a long tradition, but Communion “has a more complete form as a sign when it is received under the forms of both bread and wine.” Therefore, in granting relief to BOP officials the district court held that consuming wine during communion is not an essential practice of the prisoners’ religion, one “which the believers may not violate at peril of his soul.”

The Appellate Court held this is the wrong standard of law, for a plaintiff need not first show that the rule is directed at a practice deemed by the religion to be “mandatory.” A plaintiff, to implicate a First Amendment violation need only show a law or regulation imposes a substantial, as opposed to inconsequential, burden on the litigant’s religious practice. This prohibits the court from questioning the orthodoxy of a believer’s practice, but requires it to determine if there is any basis for the practice in the religion’s creed. If the prisoner implicates an imper-}

Injury Report Satisfies Texas Tort Claims Actual Notice Requirement
by Matthew T. Clarke

A Texas state court of appeals has ruled that the safety investigation and accident report of an accident in which a prisoner was injured gave the prison system actual notice of the prisoner’s claim as required by § 51.014(8).

Brian Edward Simons, a Texas state prisoner, sued the Texas Department of Criminal Justice (TDCJ-ID) and Ron Canon, a TDCJ-ID plumber who was Simons’s supervisor, for severe injuries he suffered while using a tractor and mechanical post hole digger as part of a prison work crew. TDCJ filed a plea to the jurisdiction alleging that Simons had not given TDCJ actual notice of the injury within six months of the injury, as required by the Texas Tort Claims Act, Texas Civil Practice and Remedies Code § 51.014(8). The district court denied the plea and TDCJ filed an interlocutory appeal.

The Beaumont court of appeals noted that it was undisputed that Simons failed to give TDCJ formal written notice of the injury. Also undisputed was the fact that TDCJ had actual knowledge of the injury and the identities of the parties involved. On the day of the accident, Canon prepared a “Supervisor Report on Employee/Inmate Injury” which included a detailed report of the accident, the persons involved, and witness statements. Attached to the minutes of a specially-called prison safety meeting was a report—including six witness state-
ments—from the prison’s safety officer to the regional safety officer. The report showed that Simons was charged with the disciplinary infraction of refusing to obey an order to stand clear of the digger. Simons’s statement included a declaration it was just an accident and that no one was to blame. TDCJ-ID’s investigation concluded that the accident was a result of Simons’s failure to stand clear when ordered. TDCJ-ID claimed this did not give actual notice that TDCJ-ID was likely to have been the cause of the injury.

The court of appeals held that the fact that a safety investigation was conducted indicated that TDCJ-ID had knowledge of its potential culpability and the possibility that it could be accused of negligence arising from the accident. In fact, the extensive safety investigation of a serious injury that occurred while the prisoners were operating motor-driven machinery in a supervised work detail was used by TDCJ-ID to gather the information it needed to defend Simons’s claims. Thus, TDCJ-ID clearly had actual notice of Simons’s claim under the Texas Tort Claims Act. The court of appeals specifically declined to rule on whether the actual notice requirement was, in fact, jurisdictional as alleged by TDCJ-ID. See: Levidan v. Ashcroft, 281 F. 3d 1313 (D. Cir. 2002).
Psychologist Not Qualifiedly Immune in Prisoner Suicide Suit

by John E. Dannenberg

The Sixth Circuit US Court of Appeals ruled that a prison psychologist’s awareness of a prisoner’s potential for suicide was sufficient to defeat the psychologist’s qualified immunity defense in a 42 U.S.C. § 1983 wrongful death civil rights action brought by the prisoner’s estate.

Michigan state prisoner Billy Montgomery hanged himself in his cell in the Southern Reception and Guidance Center eight days after being transferred from county jail. His earliest release date for his DUI conviction was only five weeks later.

Norris McCrary, a prison psychologist, was assigned to evaluate Montgomery after a guard had observed him acting despondently in his cell and had removed all sharp objects. McCrary cell-interviewed Montgomery the morning prior to his death. McCrary’s notes indicated that Montgomery had suicidal thoughts but no specific plan. He rated Montgomery’s suicide risk as “moderate,” and put him on suicide watch.

The next morning, David Howell, a physician’s assistant, visited Montgomery for a previously scheduled physical examination. Although Montgomery’s file didn’t contain McCrary’s notes, Howell deduced that Montgomery’s problem was only fear of other prisoners, and that his apparent suicidal thoughts were only a pretext to gain protective housing. Howell’s supervisor, V.S. Thyagarajan, M.D., signed off on Howell’s observations.

McCrary visited Montgomery shortly thereafter and concluded that Montgomery was not suicidal, just fearful of other prisoners. Montgomery stated that he was not feeling suicidal and McCrary took him at his word. About five hours later, Montgomery hanged himself with a sheet in his cell, leaving a suicide note to his girlfriend.

Carolyn Comstock sued McCrary, Howell and the doctor in U.S. District Court (E.D. Mich.) on behalf of Montgomery’s estate, asserting violation of his Eighth Amendment cruel and unusual punishment rights. The defendants unsuccessfully moved for summary judgment, asserting qualified immunity while acting under of color of state law, and later appealed.

To defeat the qualified immunity defense, the Sixth Circuit held that plaintiffs would have to demonstrate that the defendants had shown deliberate indifference to McCrary’s serious psychiatric needs. Citing Farmer v. Brennan, 511 U.S. 825 (1994), the Court tested the three defendants under both objective and subjective standards to determine if the medical needs were “sufficiently serious” and that the defendants should have, but did not, perceive the significant risk involved. The Court then tested under Saucier v. Katz, 533 US 194 (2001) as to whether the right Montgomery asserted was clearly established at the time and that a reasonable official would have understood his behavior violated that right.

The Court first held that pre-existing law was settled that serious psychological needs so qualify, particularly where suicidal tendencies are involved.

The tougher question turned on whether the defendants were unreasonable in not responding to Montgomery’s rights, that is, that they had recognized a clear “affirmative duty” to act, yet failed to do so. Under this standard, the Court ruled that psychologist McCrary would have clearly understood such a duty with a known suicidal patient, was therefore not qualifiedly immune, and accordingly affirmed the district court’s denial of summary judgment.

The conduct of medical assistant Howell and the supervising doctor’s actions, however, were more attenuated and warranted qualified immunity, because those defendants did not “implicitly authorize” or “knowingly acquiesce” in any unconstitutional conduct. Accordingly, the Sixth Circuit reversed the district court’s denial of summary judgment for them below, and remanded for further proceedings solely as to McCrary. See: Comstock v. McCrary, 273 F.3d 693 (6th Cir. 2001).
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**BJS Summarizes State Sex Offender Registries**

The Bureau of Justice Statistics (BJS), a division of the U.S. Department of Justice, released a state-by-state summary of the Sex Offender Registries (SOR’s) throughout the United States. The report, released in March 2002, compared the states’ SOR’s in February 2001 to BJS’s prior reports in 1998 and 1999. These reports were produced by the National Sex Offender Registry Assistance Program (NSOR-AP), a BJS operation. NSOR-AP helps states participate in the FBI’s National Sex Offender Registry (NSOR) and to fulfill the requirements of the Jacob Wetterling Act (Pub.L. 104-145, 110 Stat. 1345), Megan’s Law, and the Pam Lynchter act (Pub.L. 104-236, 110 Stat. 3093).

In 1998, there were 263,166 registered sex offenders throughout the United States. In February 2001, the 50 States and the District of Columbia reported 386,112 registered sex offenders, a 47% increase. Different states, however, varied in the number of registered offenders and the percentage increase. These differences were due to several factors, including the number and type of offenses requiring registration, the date of offense requiring registration, and the duration of the registration.

The top 10 states in terms of number of registered sex offenders in 2001 were California (88,853), Texas (29,494), Michigan (26,850), Florida (20,000), Illinois (16,551), Washington (15,304), Wisconsin (11,999), Indiana (11,656), New York (11,575), and Arizona (11,500). Massachusetts had about 17,000 sex offenders who qualified to register, but at the time of the survey, the Massachusetts SOR was under a superior court injunction, so Massachusetts’ numbers were not included in the report. The bottom 10 states were Maine (473), Wyoming (682), North Dakota (760), West Virginia (950), Nebraska (1,120), New Mexico (1,171), South Dakota (1,182), Maryland (1,400), Rhode Island (1,424), and Hawaii (1,500). The District of Columbia had 303 registered sex offenders in 2001, up from 50 in 1998. The state with the largest percent increase from 1998 to 2001 was Washington; the SOR increased 993%. Other states with huge growths were Alabama (up 659%), Rhode Island (422%), Ohio (319%), Georgia (280%), Maryland (250%), and Arkansas (206%). Another seven states saw their SOR’s grow more than 100% between 1998 and 2001.

Twenty-two states collect and maintain DNA samples as part of their SOR. Twenty-nine states and the District of Columbia have publicly accessible websites containing searchable information on sex offenders in their SOR, up from six states in 1998 and fifteen states in 1999. The report contains an appendix summarizing the dissemination and community notification provisions of each state. States with websites also had their web addresses listed. Other methods of disseminating information were listed in comments in the appendix.

One copy of this report is free upon request by writing the U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, Washington, D.C. 20531. Request report number NCJ 192265, “Summary of State Sex Offender Registries, 2001.” Detailed state summaries of each state’s SOR can be viewed online at www.ojp.usdoj.gov/bjs. Abstracts of the prior reports are also available.

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**Texas Guard’s Conviction Reversed**

A Texas court of appeals has reversed the conviction of former Texas City Unit TDCJ-ID guard Charles Melvin Page for sexual assault and impersonating a police officer. Page was convicted of having flashed a badge, claimed he was a cop, and demanded oral sex from a prostitute in 1997. During the trial, evidence of Page having committed two other similar crimes was introduced, supposedly to help prove identity. The court held that identity was not really an issue; therefore the extraneous crimes evidence was inadmissible. See: Page v. State, 88 S.W.3d 755 (Tex.App.-Corpus Christi 2002).
No Right to Artificial Insemination

by John E. Dannenberg

The US Court of Appeals for the Ninth Circuit ruled that the right to procreate is fundamentally inconsistent with incarceration, thereby upholding a California state prison policy disallowing a prisoner from sending a sperm specimen to his wife for artificial insemination.

William Gerber, serving 111 years-to-life at Mule Creek State Prison, sued Warden Rodney Hickman under 42 U.S.C. §1983 alleging Hickman violated his constitutional right to procreate via artificial insemination as well as his equal protection rights. The US District Court (E.D. Calif.) ruled that the fundamental right to marry is circumscribed by incarceration and that there is neither a constitutionally protected right to conjugal visits in prison nor a right to procreate via artificial insemination. See: Gerber v. Hickman, 103 F.Supp.2d 1214 (E.D. Cal. 2000).

The Ninth Circuit at first reversed, holding that the right to procreate is a fundamental protected right. (264 F.3d 882 (9th Cir. 2001)) [Silverman, J. dissenting]. This ruling was then vacated pending en banc review. (273 F.3d 843 (9th Cir. 2001)).

Judge Silverman’s decision for the 6-5 divided en banc court instead affirmed the district court. The Ninth Circuit postulated a two part test. First, it had to “determine whether the right to procreate while in prison is fundamentally inconsistent with incarceration (citing Turner v. Safley, 482 US 78, 94-96 (1987)). If so, this ends [the] inquiry.” Only in the case where the asserted right is not inconsistent with incarceration would the court proceed to the second question: “Is the prison regulation abridging that right reasonably related to legitimate penological interests?” Turner, supra, at 96-99.

Answering the first question, the court reasoned that curtailment of certain rights is necessary to accommodate prison “needs and objectives,” adding that deterrence and retribution are such factors in addition to correction. Prisoners have no constitutional right to contact visits or conjugal visits, the court observed: “That California regulations permit some prisoners the privilege of conjugal visits is simply irrelevant to whether there is a constitutional right to conjugal visits or a right to procreate while in prison.”

Gerber attempted to argue that because forced surgical sterilization is prohibited (Skinner v. Oklahoma, 316 US 535 (1942)), it follows that prohibition against procreation is also thereby protected. The court distinguished the permanency of sterilization from the limited restriction occurring only while still in prison, and rejected this argument. The court went on to interpret Turner as plainly “envisioning that while the intangible and emotional aspects of marriage survive incarceration, the physical aspects do not.”

Additionally, while California’s “Prisoner’s Bill of Rights” (Cal. Penal Code §§2600-2601) permits marriage, its language re “legitimate penological interests” mirrors Turner. Hence, no state law claim lies.

Gerber’s equal protection argument was rejected. The court accepted the prison officials’ argument that maintaining contact with free people is more important for prisoners who will eventually be released than for those who are ineligible for parole.

A Eighth Amendment claim (considered only hypothetically here because there was no prior leave to amend at the district court level) was rejected because artificial insemination is not one of “the minimal civilized measures of life’s necessities,” citing Hudson v. McMillian, 503 US 19 (1992).

Sharply disagreeing, the dissent opined that there was nothing in the record to show that procreation is per se inconsistent with the fact of incarceration. Indeed, they observed that the existence of the California Department of Corrections (CDC) regulation permitting (some) conjugal visits ipso facto calls into question such a determination of inconsistency. The dissent re-characterized the majority’s “inconsistent with incarceration” mantra as merely its “impression,” unsupported by facts in the record.

The dissent added that prison administrative/security concerns regarding physical visits were simply not at issue here. Indeed, it summarized the “intrusion” into legitimate prison concerns as “(1) ejaculate (2) into a plastic cup, which is then to be (3) mailed or given to his lawyer (4) for delivery to a laboratory (5) that will try to use its contents to artificially inseminate Mrs. Gerber,” a sequence no more intrusive on prison officials than “mailing a manuscript.”

The dissent further noted that the California Legislature specified only incarceration as the punishment and did not levy other specific forms of punishment such as not speaking, not owning property, not marrying or not practicing religion. Being “locked up in a cell” does not connote further forms of punishment. Only the CDC - not the Legislature - has made this interpretation of “imprisonment.” The dissent found CDC’s restrictive interpretation to be no more than “the personal opinion of prison bureaucrats.” See: Gerber v. Hickman, 291 F.3d 671 (9th Cir. 2002) (en banc).

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ADA Liability Extends to New Jersey County Jail and Vicinage

The U.S. Third Circuit Court of Appeals, reversing a New Jersey District Court, has held that the Americans with Disabilities Act (ADA) extends to a county jail and to a New Jersey Vicinage that is not, at the time of the complaint, integrated into the state court system.

In September 1994, Ronald Chisolm was arrested in Mercer County, New Jersey on a Pennsylvania bench warrant and booked into the now-closed Mercer County Detention Center (MCDC), a maximum security pretrial detention facility. Chisolm is deaf, communicates primarily through American Sign Language (ASL), reads and writes English poorly, and has limited lip-reading skills.

Upon booking, Chisolm indicated he was deaf. He requested an ASL interpreter and a TDD machine. He also asked that his hearing roommate, Kenneth Knight, be contacted. MCDC officials did none of this, nor did they explain to Chisolm jail rules or the reason for his arrest. Over the next four days, Chisolm, forced to communicate in writing and by lip-reading, was misclassified by MCDC as a suicide risk, an unemployed vagrant, and a medium security risk. Chisolm finally received a TDD when his roommate brought Chisolm’s personal TDD to MCDC. Chisolm was also granted television privileges, but was never informed about closed captioning or how to activate it.

Four days after his arrest, Chisolm was arraigned before the Mercer County Vicinage (a vicinage is a locally-funded county court apart from the state system). Having no ASL interpreter, the Vicinage rescheduled the hearing for six days later. Knight then contacted an attorney for Chisolm, who arranged for an ASL interpreter to be in court the next day. The attorney also got the warrant quashed, and Chisolm was released the next day.


The Court of Appeals held that the Mercer County Vicinage was not immune from suit under the Eleventh Amendment. Although since merged into the state court system and protected from ADA suits, at the time of Chisolm’s arraignment the Vicinage was a county court and not protected by the Eleventh Amendment.

The court found that Chisolm was a “qualified individual” under the ADA, 42 U.S.C. §12101, who had been denied services, programs, or activities because of failure to accommodate his disability. In granting summary judgment to MCDC, the district court failed to “resolve all reasonable factual inferences in favor of Chisolm, the non-moving party.” The court pointed to the district court’s deference to MCDC’s vague, conclusory “security concerns” in denying Chisolm a TDD. Further, the court found that MCDC’s claim that Chisolm was adequately accommodated in communication by writing and lip-reading to be substantially disputed. The Vicinage’s failure to timely provide an ASL interpreter was also actionable under the ADA.

The appeals court reversed the district court’s dismissal of claims against the Mercer County Vicinage and grant of summary judgment to MCDC and remanded the case for trial. See: Chisolm v. McManimon, 275 F3d 315 (3rd Cir. 2001).

Texas Pro Se Litigant Entitled to Notice of Hearing

A Texas court of appeals has held that a pro se litigant who files an affidavit of indigence, when seeking to appeal an adverse ruling in a civil case in forma pauperis, is entitled to notice of a hearing on the court clerk’s challenge to the affidavit.

Timothy A. Aguilar, a Texas state prisoner, filed a civil suit pro se and in forma pauperis. The district court dismissed the suit for want of prosecution. Aguilar then filed a notice of appeal, an affidavit of indigence, and an Inmate Trust Fund statement. The Harris County Clerk filed a contest of the pauper’s affidavit. The district court sustained the challenge to the affidavit, noting that Aguilar “failed to appear” for the challenge hearing. Aguilar then filed an application for a writ of mandamus with the court of appeals complaining that he could not appeal because the district court had denied him the right to appeal as an indigent.

The court of appeals noted that the record did not show that Aguilar had ever been notified of the challenge hearing. Furthermore, the district court’s notation that Aguilar had “failed to appear” showed that it was not mindful of the fact that Aguilar was a state prisoner and could not appear in the absence of a bench warrant. Therefore, it granted the petition for a writ of mandamus and instructed the district court to conduct a hearing on Aguilar’s affidavit of inability to pay costs and provide him an opportunity to be heard. Readers should note that, although this important ruling for Texas prisoners was dated June 2, 1997, it was not published until April 2, 2002. See: Aguilar v. Stone, 68 S.W.3d 1 (Tex.App.-Houston [1st Dist.] 1997).

Have you been told you aren’t a “resident” of the prison town or county?

The Census counts prisoners where they are incarcerated, not where they are from, diluting the political clout of prisoners’ home communities. Prison communities fight to count the prisoners for Census purposes, but there are reports of prison communities taking the opposite approach when prisoners seek to use local services by telling the prisoners that they don’t qualify because they don’t live at the prison. I’m trying to gather these stories as part of a larger research and advocacy project to reform the census. Copies of denial letters from local or court officials and/or citations to controlling ordinances and statutes would be especially helpful at proving that prisoners are not considered a part of the prison town.

Write: Peter Wagner
Prisoners of the Census Project
Prison Reform Advocacy Center
617 Vine Street, Ste 1301
Cincinnati, OH 45202-2416
Head of Counsel for Texas Prisoners Fired

In September 2002, the Texas Board of Criminal Justice fired John Fant, head of the State Counsel for Offenders (SCFO), after an investigation revealed that he had lied on a 10-year-old employment application.

In a written statement, the prison board alleged that Fant stated on his 1992 application that he was a licensed attorney “when in fact his license had been suspended in 1987 for failure to pay his bar dues.”

SCFO is an independent office charged with representing and aiding indigent prisoners for, among other things, crimes that occur in prison (Texas also has special prosecutors for this); divorce, immigration and civil commitment proceedings; backtime discrepancies; and PDR filings.

Dismissal for Failure to Allege Physical Injury Improper

The Second Circuit Court of Appeals held that dismissal under 42 U.S.C. § 1997e(e) for failure to allege physical injury was improper where a prisoner’s complaint requests injunctive and/or declaratory relief and the pleadings do not reveal the nature of damages sought.

New York Department of Correctional Services (DOCS) prisoner Louis Thompson filed three separate civil rights actions against various employees of the Clinton Correctional Facility (Clinton) related to the denial of medications he allegedly needed for epilepsy. Thompson’s prayer for relief did not include any damages claims and merely sought the return of the medications and for the court to resolve the issues raised. The court consolidated the actions.

Thompson was later transferred to another DOCS facility but subsequently submitted an affidavit claiming that he continued to be denied his medications. He also filed a document with the court in which he requested $50,000 in damages.

Prison officials moved to dismiss for failure to state a claim and Thompson failed to respond to the motion. The district court dismissed the action because Thompson failed to allege that he was physically injured. Thompson appealed and the court appointed counsel to represent him.

The court rejected defendants’ claim that Thompson’s transfer rendered his request for injunctive relief moot. The court found that “a live controversy continues between Thompson and Carter: Thompson’s request for an order directing Carter to return Thompson’s medications.”

The court concluded “that Section 1997e(e) applies to all federal civil actions including claims alleging constitutional violations. Because Section 1997e(e) is a limitation on recovery of damages for mental and emotional injury in the absence of a showing of physical injury, it does not restrict a plaintiff’s ability to recover compensatory damages for actual injury, nominal or punitive damages, or injunctive and declaratory relief.”

Ultimately, the court held that “Thompson’s demand that Carter return his medications is neither moot nor barred by Section 1997e(e),” and vacated the dismissal of that claim. It also remanded to allow Thompson to file an amended complaint to clarify the nature of any damages sought and to add additional defendants at the facility he is currently confined in. See: Thompson v. Carter, 284 F.3d 411 (2nd Cir. 2002).

Source: The Dallas Morning News

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Prison Legal News 27 May 2003
Prisons Experience Outbreaks of Infectious Disease

by Michael Rigby

Prisons in Vermont and Pennsylvania dealt with serious outbreaks of infectious disease this past August resulting in the disinfection of an office complex and the filing of a class action lawsuit, respectively.

Vermont

In late July 2002, an outbreak of Legionnaire’s Disease, a sometimes fatal bacterial infection, began in Vermont’s Waterbury prison and spread to a surrounding office complex infecting a total of 23 people and prompting efforts to disinfect the complex. Of the 16 most seriously affected by the disease, 14 of which were former prisoners, all but one were out of the hospital as of August 14, 2002. The rambling complex employs and houses more than 1500 people and is home to many state agencies, including the state women’s prison.

Pennsylvania

After an outbreak of colonizing methicillin-resistant staphylococcus aureus, or MRSA, six former or current prisoners at the Bucks County Prison in Doylestown, Pennsylvania, are suing the county for delay and denial of medical treatment. The class action lawsuit, filed in federal court on September 18, 2002, seeks more than $150,000 per prisoner in damages.

In August 2002, several female prisoners contacted attorneys Anita Albert and Martha Sperling and told them they were not being treated for a skin condition they believed to be MRSA, an antibiotic resistant staph infection which can cause boils, lesions, infections and pneumonia.

Third Circuit Upholds $100,000 Damages Award to Assaulted Pennsylvania Prisoner

The U.S. Third Circuit Court of Appeals has upheld the jury verdict and damages award in a Pennsylvania case involving the assault of a state prisoner by guards. [PLN, Sept. ’99]

Gerald Henderson was a prisoner of the Pennsylvania Department of Corrections (PADOC) at SCI-Rockview. On March 29, 1995, during a count time, Henderson had a scheduled telephone call. The telephones were located in an open area at the base of the cell tiers. All other prisoners were in their cells. While on the phone, Henderson was struck on the head by a three-pound piece of concrete concealed in a potato chip bag. He dropped the phone, fell to the floor, and began to pass out. Before losing consciousness, Henderson saw SCI-Rockview guards David Fortson and Paul Sherry looking down at him from one of the tiers.

Henderson sued twelve prison officials under 42 U.S.C. §1983, including Fortson and Sherry. Ultimately, all defendants and claims were dismissed by the trial judge except the excessive force claim against Fortson and Sherry.

Henderson represented himself at trial. Testimony established that Fortson and Sherry dropped the concrete on Henderson. On cross examination, Henderson questioned Fortson about PADOC’s installation of a safety gate over the telephones after the assault. Defense counsel repeatedly objected to the questions as irrelevant and was repeatedly overruled by the trial judge. A jury found for Henderson, awarding him $50,000 in compensatory damages and $50,000 in punitive damages.

On appeal, the defendants assigned as error the safety cage questions, citing Fed.R.Evid. 407 (subsequent remedial measures), Fed.R.Evid. 401 (“relevancy” defined), and, impliedly, Fed.R.Evid. 403 (prejudice). They argued that the trial judge abused her discretion in admitting the questions.

The appeals court discussed when subsequent remedial measures may be admitted. Because evidence about PADOC’s subsequent installation of a telephone safety cage could not establish the identity of the assailants and did not violate the rule’s proscriptions, it was admissible under Fed.R.Evid. 407.

The court also found the evidence relevant. Defendants argued that prisoners regularly threw objects from the tiers. The safety cage was not installed, however, until Fortson and Sherry assaulted Henderson, rebutting that defense.

The court held that the argument that the evidence was prejudicial under Fed.R.Evid. 403 was not preserved for appeal. Furthermore, the evidence was not prejudicial, because the case turned on the assailants’ identity, not on the assault itself, nor on negligence for failing to install a cage sooner.

The district court’s judgment was affirmed. This case is unpublished. See: Henderson v. Mazurkiewicz, et. al., Case No. 00-2553 (3rd Cir. 2001).
Ninth Circuit Reexamines Standards for Qualified Immunity at Summary Judgment Stage in California Shooting Case

by John E. Dannenberg

Amending its earlier decision at 240 F.3d 845 [PLN, June ‘01], the US Court of Appeals for the Ninth Circuit clarified the evaluation of qualified immunity claims by prison officials at the summary judgment stage of a prisoner’s Eighth Amendment excessive force civil rights complaint.

Donnell Jeffers, a Black prisoner at California State Prison, Sacramento (CSP-SAC) was shot by guards during a Hispanic-Black melee involving 200 prisoners in CSP-SAC’s B-facility yard in November, 1996. Jeffers sued claiming excessive force and racial animus when only one Hispanic was shot while many Blacks were shot.

The prison guards, Warden of CSP-SAC and the Director of the California Department of Corrections (CDC) defended against suit claiming qualified immunity. The concern of the Ninth Circuit was to nail down what standards apply to determine qualified immunity in excessive-force suits.

Originally, the US District Court (E.D, Calif.) had denied defendant’s motion to dismiss on qualified immunity grounds, finding that there were triable issues of fact that should go to a jury.

The Ninth Circuit reversed (240 F.3d 845, supra) noting that it had jurisdiction to hear an interlocutory appeal of the denial of a qualified immunity claim. The question of this jurisdiction was reexamined and refined in the new amended decision.

There, the Ninth Circuit held that in order to survive summary judgment, the plaintiff must do more than simply allege that defendants had acted with an improper motive. Rather, his burden is to put forth evidence of specific, non-conclusory factual allegations that would establish the requisite improper motive.

While jurisdiction to hear qualified immunity challenges on appeal is limited to questions of law, where disputed questions of fact also are raised, the appellate court may decide the question of law by assuming the facts in favor of the plaintiff.

The disputed facts here centered on the motive of the shooters and their supervisors. To prevail, Jeffers would have to show that they acted with unconstitutional conduct such that a reasonable person would have known his conduct was outside that norm. The two-part test is (1) was the law governing such official conduct clearly established and (2) under that law, could a reasonable official have believed his conduct was lawful.

Thus, it becomes the actual mental state as an element of the constitutional violation that must be proved- not just the defendant’s subjective intent. To prevail, Jeffers had to show, through evidence, where each defendant had the culpable state of mind to be deliberately indifferent to prisoner safety when acting to quell the melee. It must rise to the level of malice or sadism to survive a qualified immunity bar.

The policies of the warden and director in training staff must be similarly tested regarding qualified immunity. The necessary showing is that the policy itself is so deficient as to amount to a repudiation of constitutional rights and is the moving force that caused the constitutional violation.

Using these standards, the court looked for material evidence of such malice in the motives of the two shooting guards. But the evidence was such that no one could even tell, reviewing the video recordings, whose shots hit Jeffers - let alone, under what motive. The allegation of culpability for failure to prevent any shooter from firing also did not create an inference of impermissible motive.

Similarly, the allegations of racial animus and of failure to act on pre-riot rumors of violence failed the evidentiary test of sadistic mental state.

Accordingly, the court concluded that all defendants were entitled to summary judgment based on qualified immunity and reversed and remanded. See: Jeffers v. Gomez, 267 F.3d 918 (9th Cir. 2001).

By way of contrast, in another case, a San Francisco federal jury found that CDC’s fatal shooting of prisoner Mark Davis at San Quentin State Prison by a yard tower guard did meet the deliberate indifference standard and awarded damages and punitive damages of $2.5 million. The requisite standard of malicious mental state was also proven in Madrid v. Gomez, 880 F.Supp. 1146 (N.D. Cal. 1995), resulting in a damages award.

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Kosher Diets for Prisoners Upheld in Tenth Circuit

by Bob Williams

The Tenth Circuit Court of Appeals has upheld the Colorado Federal District Court’s permanent injunction directing the Colorado Department of Corrections (CDOC) to provide kosher meals to qualified prisoners in accordance with Orthodox Jewish law and rejected the CDOC’s co-pay proposal.


On appeal, the CDOC claims the district court did not apply the four-prong Turner v. Saafley, 107 S.Ct. 2254 (1987), test correctly when analyzing the CDOC’s policy and co-pay proposal.

In Turner’s first prong there must be a legitimate government interest advanced to justify the policy. The CDOC won this prong in the district court yet still claimed error. The Court upheld this prong based on budgetary concerns and the possibility of a negative response from other prisoners, but rejected as specious the CDOC’s claim that the policy is necessary to prevent other lawsuits.

The Court agreed that the CDOC failed to meet the second prong, the analysis of available alternative means to exercise the right, when they claimed kosher meals could be purchased from the prison canteen or provided from the Jewish community. As of July, 2002, the canteen stocked only 62 kosher items, 42 of these are candy snacks and drink mixes. The remaining items such as baking soda, refried beans, and sardines could not possibly be made into a balanced diet and consumed for any serious length of time.

Alternatively, requesting a substitute in the chow line, the CDOC’s so-called “common fare” program, leaves only beans, cheese, or peanut butter day in and day out. Even then it’s not kosher since it’s prepared with and served on utensils which are commonly used with non-kosher foods. “A vegetarian meal prepared in a non-kosher kitchen is not kosher.” The Court found that having the Jewish community be responsible for daily food for prisoners is just not feasible nor could the district court enter such an order.

The Court rejected the co-pay proposal finding that paying in the neighborhood of $90.00 per month co-pay is also not feasible. While a few prisoners could pay this, most simply cannot. Such a system “would force prisoners into debt far beyond what they might earn, thus failing to teach prisoners about responsible spending, while doing little to curb costs per prisoner since the state does not regularly collect such debts upon release.”

The third Turner prong is the effect on guards, other prisoners, and resources accommodating the right might have. The main concerns here are costs and abuses. The CDOC inflated costs and gave varying estimates each time it was asked. Moreover, the estimates included capital equipment and excessively large food waste, leaving these estimates unreliable.

The CDOC also pointed to a case in Oregon where hundreds enrolled in their kosher program. This was quickly distinguished and rejected because Oregon’s policy had no restrictions while Colorado’s policy has screening, documentation, tracking, and other restrictions. In fact, the Court reported only 14 prisoners have sought kosher diets since the injunction was issued.

Finally, the fourth Turner prong requires an analysis of ready alternatives that can accommodate the right at de minimis cost. The Court found free kosher food under the CDOC’s strict policy is a “quick, easy” alternative, noting that this strict policy serves the same goal as “co-pay allegedly serves by controlling both cost and abuse without making prisoner observance of kosher laws a matter of choosing between incurring significant debt or defiling their bodies.” See: Beerheide v. Suthers, 286 F.3d 1179 (10th Cir. 2002).

Additional Sources: The FCF Canteen Catalog

San Mateo County Sues California Jail Phone Service Providers

On July 7, 2002, the county of San Mateo, California, brought suit against Pacific Bell and AT&T alleging they cheated the county out of millions of dollars earmarked for a fund supporting prisoner services. The suit, filed in San Mateo Superior Court, seeks restitution of $2.4 million, plus interest.

San Mateo contracted with Pacific Bell and AT&T in 1993 to provide phone service to prisoners in eight separate county jail facilities. Pacific Bell and AT&T were to provide local and long distance service, respectively. Under terms of the contract, the companies were to pay up to 41% of gross revenues to the Inmate Welfare Fund which helps pay for a variety of prisoner services such as substance abuse and educational programs, law libraries, mental health services and recreation equipment.

The county assumed these payments were being paid in full until a 1999 audit revealed problems with the numbers. According to the suit, the audit estimated that Pacific Bell had been underpaying by as much as $600,000 per year. The suit further alleges that Pacific Bell purposely falsified and hid the real numbers, which also affected AT&T’s payments since they were based on Pacific Bell’s reported revenue.

After Pacific Bell accused the county of using bad data another audit was ordered. The second audit also found that the company had underpaid the county, but by the more modest amount of $411,000 per year, according to the suit.

Evercom Systems of Texas replaced both companies this year as the county’s jail phone service provider. ■

Source: San Francisco Chronicle
Exceptions Made To PLRA Exhaustion Requirement; Discovery Allowed
by John E. Dannenberg

Two U.S. District Courts recently made exceptions to the Prison Litigation Reform Act’s (PLRA) requirement to exhaust administrative remedies. The Central District of California court ruled that when a prisoner’s administrative appeal had been “granted” at an intermediate level, his remedies were deemed exhausted because he had extracted all the relief possible from the administrative process. Separately, the Southern District of New York court ruled that discovery available with respect to formal grievances should be available also as to informal grievances when faced with determining whether a prisoner had actually exhausted his administrative remedies - as he must - before being permitted to maintain a 42 U.S.C. § 1983 civil rights action.

In the California action, state prisoner Charles W. Brady sued prison doctor Attygala and other staff when Brady, whose eye had been injured by his cellmate Darren Coleman in a fight, lost his sight in the eye following inadequate medical care.

Brady, who had complained unavailingly to prison doctors of his declining vision in the injured eye, had to resort to the administrative appeals process to gain the specialized treatment of an ophthalmologist. His appeal was eventually granted at an intermediate level, and he saw the ophthalmologist. However, this occurred too late - a serious infection had by then rendered the eye useless.

Defending against Brady’s ensuing 42 U.S.C. §1983 civil rights complaint, the state actors claimed the case should be dismissed because Brady hadn’t taken his administrative appeal to the highest level available in the system.

Brady countered that such “exhaustion” was not required because there was nothing more he could gain from any higher level that had not already been granted at the intermediate level.

The court construed 42 U.S.C. § 1997e (a) [PLRA provision mandating state prisoners to “exhaust” administrative remedies] as only requiring exhaustion to the point of extracting all the relief possible. To require more would simply undercut the very policy underlying exhaustion - namely, that of permitting prison officials to take corrective action and perhaps prevent litigation. The court ruled that both common sense and Booth v. Churner, 532 US 731 (2001) require such a conclusion and therefore granted Brady’s motion to file an amended complaint. See: Brady v. Attygala, 196 F.Supp.2d 1016 (C.D. Cal. 2002).

In the New York action, Sing-Sing prisoner Jerry Perez sued guards M. Blot, P. Frazier and J. White for excessive use of force by throwing Perez to the ground, hitting him with a baton, punching him, kicking him and breaking his eye socket.

Perez had filed informal verbal and written complaints about his mistreatment. In his subsequent 42 U.S.C. §1983 action, he wanted to conduct discovery as to those complaints. Defendants countered that Perez had failed to follow formal prison grievance rules (which would have permitted subsequent discovery) and was therefore foreclosed from all discovery as to administrative complaints.

The court ruled that failure to use the formal grievance procedure was not fatal to Perez’s state-law-created discovery rights. It instead ruled that the inquiry should turn on whether discovery on the informal complaints would be relevant to the question of whether Perez had in fact exhausted his administrative remedies.

Finding that such discovery appeared to be relevant, the court ordered defendants to provide it. See: Perez v. Blot, 195 F.Supp.2d 539 (S.D.N.Y. 2002).
Wisconsin Lacks Authority Over Funds of Out-of-State Prisoners

A federal court in Wisconsin held that the Wisconsin Department of Corrections (WDOC) lacks the authority to divert the funds of an out-of-state prisoner into a release account, or to cause the receiving state to do so.

In 1998, Wisconsin prisoner Anthony Doty was transferred out-of-state to a private prison operated by the Corrections Corporation of America (CCA) in Tennessee.

Doty sought habeas corpus relief alleging that Wisconsin lost its authority to incarcerate him once it shipped him beyond its boundaries. The district court denied Doty’s petition and he appealed. In order to pay the $105 appellate filing fee, Doty sought “the return of more than $500 of his money that the [WDOC] previously diverted into a ‘release account’ held in his name[.]”

Wisconsin prisoners have both a general account and a release account. All income is deposited into the prisoner’s general account. The release account is created by diverting 15% of each deposit to the prisoner’s general account, until the balance reaches $500. The prisoner may request that his release account be deposited into an interest-bearing bank account. WDOC “regulations allow money to be withdrawn from a release account only upon or in preparation for release. § 309.466(2).”

The court noted that other courts have found that the Wisconsin Prison Litigation Reform Act (WPLRA) and the federal Prison Litigation Reform Act (PLRA) authorize the taking of funds from a prisoner’s release account to pay court filing fees. See: Spence v. Cooke, 222 Wis.2d 530, 537, 587 N.W.2d 904 (Ct.App. 1998); and Spence v. McCaughtry, 46 F.Supp.2d 861 (E.D.Wis. 1999). But judges rarely look to the release account for filing fees under the PLRA unless the prisoner requests that they do so. Spence v. McCaughtry, supra, and Smith v. Hubregtse, 151 F.Supp.2d 1040, 1042 (E.D.Wis. 2001).

The court indicated that “Doty’s income while at CCA-Whiteville Correctional Facility is . . . not subject to Wisconsin DOC regulations, but to whatever Tennessee statutes and regulations govern [prisoner] accounts.” Thus, Wisconsin regulations do “not authorize the DOC to divert (or cause CCA to divert) an out-of-state prisoner’s income to a release account.”

At Doty’s request, however, the court ordered the payment of the appellate filing fee from his release account. The court also held that “so long as Doty remains incarcerated out of state, the DOC may not replenish his release account by diverting his income.” See: Doty v. Doyle, 182 F.Supp.2d 750 (E.D.Wis. 2002).

Disciplinary Boards are not “State Courts” Under AEDPA

The Seventh Circuit Court of Appeals held that prison disciplinary boards are not “state courts” for purposes of 28 U.S.C. § 2254(e)(1). As such, “the state may not benefit from § 2254(e)(1)’s presumption of correctness in appeals from prison disciplinary proceedings.”

Indiana state prisoner Clyde Piggie was issued a conduct report charging him with sexual assault for squeezing a female guard’s buttocks as he passed her in a hallway. Piggie allegedly requested that the Conduct Adjustment Board (CAB) view the videotape from the prison’s surveillance camera that may have recorded the incident. Prison staff allegedly informed him, however, that the tape could not be viewed without a court order.

During the disciplinary hearing, Piggie denied the charges and again requested that the CAB view the surveillance tape. He also repeated the request in a handwritten statement to the CAB chairman. But the chairman allegedly told him there was no tape. According to the state, the tape no longer existed because it was the prison’s policy to reuse the surveillance tapes soon after they were recorded.

Piggie was found guilty of sexual assault and “sentenced . . . to two years in disciplinary segregation and demoted . . . from good-time credit class II to credit class III.” He appealed the decision to the superintendent who affirmed the CAB’s decision. Piggie then appealed to the final reviewing authority of the Indiana Department of Corrections who also affirmed the CAB’s decision.

Piggie then filed a petition for writ of habeas corpus. “The district court initially granted his petition, holding that the CAB’s denial of Piggie’s timely request to have the videotape reviewed violated his due process rights under Wolff v. McDonnell, 418 U.S. 539, 566, 94 S.Ct. 2963 . . . (1974).”

The court subsequently granted the state’s request to vacate its judgment pursuant to FRCP 59 “on grounds that the prison superintendent’s finding that Piggie failed to timely request the tape was binding on federal habeas review.” The court then denied Piggie’s petition and he appealed.

The court of appeals rejected “the state’s contention that the prison superintendent’s finding on appeal that Piggie failed to timely request the tape is binding on federal habeas review under 28 U.S.C. § 2254(e)(1).” In doing so, the court noted that § 2254(e)(1) speaks specifically of determinations made by “state courts,” and not by prison disciplinary boards.

Although the court had not previously addressed whether prison disciplinary boards may be considered “state courts” for purposes of § 2254(e)(1), it noted that it had previously held in White v. Indiana Parole Board, 266 F.3d 759, 765-66 (7th Cir. 2001), that they are not “courts” for purposes of § 2254(d). See also Walker v. O’Brien, 216 F.3d 626, 637 (7th Cir. 2000). The court then found that its reasoning in white applies equally to § 2254(e)(1) and held “that the state may not benefit from § 2254(e)(1)’s presumption of correctness in appeals from prison disciplinary proceedings.”

See: Piggie v. McBride, 277 F.3d 922 (7th Cir. 2002).
Continuing a trend first noted in 2000, the Bureau of Justice Statistics (BJS), a division of the U.S. Department of Justice, reported that the overall growth rate of the United States’ prison population was quite small. In some states, prison populations actually declined. PLN has previously reported on prison population growth [PLN, July ’02, page 14]. The bulletin is titled “Prisoners in 2001.”

The BJS released its 2001 bulletin on Federal and State prisoners in July 2002. BJS reported that at year end 2001, the United States incarcerated 1,406,031 adults in Federal and State prisons. When prisoners in territorial prisons, Immigration and Naturalization Service facilities, military facilities, local jails, jails in Indian country, and juvenile facilities were counted, the number of prisoners nationwide was 2,100,146 persons at year end 2001.

The States added only 3,193 persons to their prison populations in 2001, a growth rate of about 0.3%. Indeed, overall State prisoners’ numbers declined from June 30, 2001, through December 31, 2001.

The Federal prison population grew by 11,577 persons in 2001, about 8.0%. Although the Federal prison population did not decline in the last half of 2001, population growth did slow dramatically. Overall, the nation’s prison population grew only 1.1%, less than the average annual rate of 3.8% since yearend 1995. Indeed, BJS stated that “the prison population rose at the lowest rate since 1972 and had the smallest absolute increase since 1979.”

The U.S. incarceration rate now stands at 470 sentenced prisoners per 100,000 U.S. residents. By gender, approximately 1 of every 12 men and 1 of every 1,724 women were in a Federal or State prison at yearend 2001. By race and age, 10% of all Black males age 25-29 were imprisoned in 2001, compared to 2.9% of Hispanic males and 1.2% of White males in the same age group. In every age group; Black males and females had the highest incarceration rates, followed by Hispanic and White men and women.

In 2001, the District of Columbia and ten states saw prison populations actually decline. The states losing prisoners were New Jersey, Utah, New York, Texas, California, Illinois, Oklahoma, Rhode Island, Ohio, and Massachusetts. In absolute numbers, Texas experienced the biggest decline, losing 4,649 prisoners, followed by California, which lost 3,557 prisoners.

In absolute numbers, the Federal system grew more than any other prison system, gaining 11,577 prisoners. Georgia and Tennessee saw the next largest gains - 1,705 and 1,505 prisoners respectively. In percentage terms, West Virginia experienced the most growth, followed by Alaska, Idaho, Oregon, and Hawaii.

The report analyzed State and Federal prisoners in a variety of ways. Among these are race, gender, age, and type of crime.

One copy of the report is free by writing Bureau of Justice Statistics, Office of Justice Programs, U.S. Department of Justice, Washington, DC 20531. Ask for report number NCJ195189. The report may also be downloaded from www.ojp.usdoj.gov/bjs.
Afghanistan: In December, 2002, two prisoners being interrogated by US forces at the Bagram base near Kabul were beaten to death by their captors. Prisoners at the base are routinely kept naked, hooded, shackled and deprived of sleep for days on end while being beaten for good measure. The dead prisoners were identified as Mullah Habibullah, no age given, and Dilawar, 22. The cause of death is listed as “blunt force injuries” and the deaths were classified as homicides by the Pentagon.

California: On February 24, 2003, Kimberly Lewis, 48, a black male guard at the Donovan State Prison in San Diego, was charged with ten counts of sexual assault for forcing an unidentified gay male prisoner to perform oral sex on two occasions in a prison laundry room. The first assault occurred in November, 2001, when Lewis took the victim into the laundry room, locked the door, and told him “You know what you gotta do,” as he removed his belt and unzipped his jumpsuit. During the second assault three weeks later, the victim saved a mouthful of Lewis’s semen in a towel, which he sent to his sister with a request that she contact a lawyer. Lewis is currently under psychiatric care and the 17 year CDC tactic a lawyer. Lewis is currently under psychiatric care and the 17 year CDC


Florida: On March 21, 2003, Shenard Dumas, 24, escaped from the Polk County jail in Bartow by wearing his cellmate’s identification band and walking out of the jail when his cellmate posted a $50,000 bail bond. Dumas was awaiting trial on kidnapping charges.

France: On March 12, 2003, six or seven gunmen liberated Antonio Ferrara, 30, from the maximum security prison in Fresnes, near Paris. Ferrara was being held as a suspect in at least 15 armored car robberies and one murder. At 4:30 AM Ferrara’s liberators arrived outside the jail, set nearby cars on fire as a distraction, fired at guard towers with automatic weapons and used explosives to blast their way into the prison and a courtyard where Ferrara’s cell was located. Prison officials said it appeared Ferrara blasted the bars out of his cell to meet his rescuers. Ferrara escaped and despite the pyrotechnics and gunfire, no one was injured. Media sources did not report if prison guards fired back at the attackers.

Illinois: On December 27, 2002, Joseph and Helen Koches, age 35 and 39, were found shot to death in a murder suicide at the gate-house of the Graham Correctional Center in Hillsboro where they both worked as guards. Police did not disclose who did the shooting or why.

Kansas: On February 28, 2003, president Mwai Kibaki released 28 death sentenced prisoners and commuted the death sentences of another 195 prisoners to life in prison. The released prisoners had all spent between 15 and 20 years in prison. Home affairs minister Moody Awori said Kibaki’s decision reflected new thinking from a new government. “The government feels there is no justification to keep prisoners, particularly if they have reformed, in prison that long,” Awori said. Kibaki has said he wants to abolish the death penalty in Kenya, which has some 1,270 prisoners on death row. The country has not carried out any executions since 1987.


Minnesota: In November, 2002, former state appeals court judge Roland Amundson, 53, was assaulted by a fellow prisoner at the state prison in Fairbault where he was serving a six year sentence for stealing money belonging to a retarded woman over whose trust fund he was guardian. Corrections commissioner Sheryl Ramstad Hvass admitted that while visiting Amundson at the Lino Lakes Facility where he was moved after the assault, that she had allowed him to speak to a prison doctor about his medical problems on her cell phone. She said “It would have been irresponsible and reckless for me to have ignored” the importance of the call. Presumably this speaks to the high quality medical care and attention all Minnesota prisoners receive.

Mississippi: On August 20, 2002, Lonnie Grisham, 58, a prisoner at the East Mississippi Correctional Facility in Meridian was beaten to death. Police have charged his cellmate, Tyrone Wilson, 29, with the murder. The privately run prison is operated by Wackenhut and is designed to house mentally disabled prisoners.

Mississippi: On February 25, 2003, 29 prisoners at the East Mississippi Correctional Facility in Meridian refused to return to their cells at the Wackenhut operated private prison. Prison guards used pepper spray to intimidate the prisoners and after two hours, had forced them back into their cells. The prisoners were transferred to the state run Mississippi State Penitentiary in Parchman shortly afterwards. Media reports gave no reason for the rebellion.

New Mexico: On July 17, 2002, Juan Mendez, 33, a prisoner at the Lea County Correctional Facility in Hobbs, was charged with murder, conspiracy to commit murder and tampering with evidence stemming from the 1999 stabbing death of prisoner Robert Ortega. Ortega was stabbed 70 times. Charles Aragon pleaded guilty to second degree murder and has agreed to testify for prosecutors that Mendez and three other prisoners, Frankie Herrera, Michael Montoya and...
Robert Lovato, met to plan the murder. Aragon claims Mendez was the lookout while Herrera held Ortega down and Lovato stabbed him repeatedly. Aragon was present during the murder in Ortega’s cell but, according to his testimony, he only watched. The prison is operated by the private company Wackenhut Corrections Corporation.

New York: On June 20, 2002, Paul Payne, 28, was sentenced to life imprisonment after being convicted of murdering fellow prisoner Richard Garcia, 47, in June, 1999. Payne and co-defendant John Price were allowed to enter Garcia’s cell by an unnamed guard who was later removed from his job. Garcia was stabbed to death in his cell by Payne and Price who left the cell yelling “white power” and raising their fists, according to trial testimony. Garcia had six months remaining on his sentence before being stabbed 50 times. The murder occurred at the Lea County Correctional Facility in Hobbs, which is operated by Wackenhut Corrections Corporation.

New York: On March 1, 2003, workers at the Rikers Island jail in New York City reported that a 1965 sketch of Jesus Christ on a cross was stolen from a locked display case in the lobby of the jail and replaced with a copy. A 1986 appraisal valued the sketch at $175,000. Dali gave the sketch to the jail warden after canceling a scheduled visit to the jail. It was inscribed “For the inmates dining room on Rikers Ysland (sic).” Jail officials are investigating the theft.

North Carolina: On January 22, 2003, Willie Forrest III, 33, was convicted by a Raleigh jury of assault with a deadly weapon inflicting serious injury. He responded to the jury’s verdict by punching his lawyer, George Hughes, twice and biting Wake County sheriff’s deputy Lieutenant David Woodruff on the arm. The incident occurred in the courtroom in front of jurors. Forrest was convicted of holding his aunt hostage at knifepoint. He is still awaiting trial on kidnapping and assault on a law enforcement officer charges from that incident. He is also awaiting trial on murder, armed robbery and kidnapping charges in a neighboring county.

North Carolina: On January 20, 2003, James Marsh, 39, a former Chatham county sheriff’s deputy was charged with assaulting jail prisoner Jeffrey Venable, 18, on June 25, 2002, by pulling him to the floor and stepping on him. Marsh had been an investigations lieutenant with the sheriff’s department for 15 years. Marsh resigned on June 28 and now works for the state capitol police. Venable was handcuffed at the time of the attack and the unspecified charges against him were dropped two days later.

North Carolina: On March 23, 2003, Special Forces master sergeant William Wright, 36, killed himself in his Fayetteville jail cell while awaiting trial on charges of murdering his wife shortly after returning from Afghanistan. Over a six week period in the summer of 2002 four soldiers at Ft. Bragg killed their wives. Three of the soldiers were assigned to Special Forces units. With Wright’s death, all three of the Special Forces killers have committed suicide.

Pennsylvania: On November 25, 2002, Angeline McKellar, 40, a guard at the Delaware county jail was arrested and charged with witness intimidation and criminal conspiracy. McKellar allegedly told a female prisoner at the jail who was slated to testify against Maurice Day, 19,
and Joseph Holmes, 29, in the murder trial of Chester policeman Michael Beverly, that if she testified, “You’re going to end up like the bitch he slumped, but he’s going to make you suffer.” McKellar was apparently referring to the murder of Tracy Saunders, 33, who was killed shortly before she was supposed to testify against another member of the Boyle Street Boys, a drug gang to which Holmes and Day allegedly belong. The jail is run by Wackenhut Corrections corporation. While employed by Wackenhut McKellar racked up her own string of criminal convictions. In March, 1999, she was sentenced to ten years probation for a simple assault stemming from a bar fight. In September, 1999, she was sentenced to a year’s probation after pleading guilty to welfare fraud. In 2001 she was sentenced to time served and community service for driving while intoxicated.

Texas: In November, 2002, an audit of the Cameron County sheriff’s Department in Brownsville revealed at least $8,400 belonging to prisoners could not be accounted for. An investigation is underway to determine who, if anyone, stole the money. In December, 2002, federal agents initiated an investigation into claims that jail lieutenant Joel Zamora was soliciting sex with prisoners and offering a speedy release if they complied.

Texas: On January 29, 2003, Stanley Wiley, 38, a Texas Correctional Industries employee at the Clements Unit prison in Amarillo was killed after having his throat slashed in the prison shoe factory where he supervised prisoners. Prisoner Travis Runnels, 26, was charged with murder in Wiley’s death.

Texas: On March 6, 2003, a former state attorney general Dan Morales was indicted in federal court in Austin on charges that he tried to steer millions of dollars in fees from the state’s tobacco settlement to an attorney friend. Morales, who left office in 1999, was also charged with illegally using campaign contributions to pay for a house. Morales, who failed in a run for governor in 2002, denied any wrongdoing.

Texas: On November 1, 2002, Ft. Worth jurors sentenced James Gillie, 56, to fifteen years in prison for fondling a 13 year old girl. Gillie had been employed for some time in the booking section of the Tarrant county jail. Prosecutors claimed Gillie had molested the victim over a multi-year period.

Texas: On October 1, 2002, Byron Hinkle, 23, a guard at the Johnson County jail in Cleburne, gave prisoner Michael Jones a Gatorade bottle filled with liquid air freshener. Jones swallowed a mouthful before realizing it was not a refreshment. Jones was hospitalized and treated but suffered no serious injury. Hinkle was fired after seven months on the job. Prosecutors declined to file charges against him.

Texas: On October 11, 2002, Tarrant County jail guard Michael Price was arrested on charges of armed robbery, resisting arrest and unlawfully carrying a weapon. Price tried to steal a woman’s purse in the town of Temple. The woman, 58, would not surrender her purse, so Price wrestled with her. A crowd then detained Price until police arrived to arrest him. Price resisted arrest.

Texas: On October 8, 2002, Ollie King, 30, and Joey Janice, 21, guards at the Tarrant County jail in Ft. Worth were arrested after trying to deliver five grams of marijuana to a jail prisoner. County sheriff Dee Anderson said visitors would tell prisoners that a package had been delivered at the jail visitation desk. The prisoner would tell Janice who worked as a guard inside the jail, who in turn would contact King who ran the jail’s visiting desk. King would collect the drugs and money from visitors and Janice would later pick up the drugs and deliver them to the prisoner. He and King would split the money.

Texas: On September 10, 2002, Daniel Renner Jr., 42, an employee of Texas Correctional Industries in Gatesville was arrested on charges of intoxication manslaughter for drunk driving his pick up truck into a vehicle driven by Rosie Shaw, 86, killing Shaw.

United States: In February, 2003, the federal Bureau of Prisons prisoner population went over 165,000 becoming the largest prison system in the country, surpassing perennial leaders Texas and California. The BOP now has a budget of $4.6 billion, up from $330 million and 24,000 prisoners in 1980. The BOP has 102 prisons in 1980. The BOP has 102 prisons in 102 cases. On March 23, 2003, Justice Bridge received a deferred prosecution when she enrolled in a two year treatment program for alcoholics and faces no jail time or even a criminal conviction if she completes the treatment program.

Washington: On February 24, 2003, Dennis Fontenot, 50, a guard at the Federal Detention Center in SeaTac was charged in Mason county superior court with one count of felony harassment and released on $25,000 bail. Fontenot is accused of threatening to kill his wife Pamela after an argument over a Jerry Springer tape. Mrs. Fontenot told police that in the past Dennis had shot the walls of their home with a gun, broken doors and damaged walls and she felt it was only a matter of time before he killed her. Mason county superior court judge Toni Sheldon allowed Fontenot to carry a firearm as part of his duties with the BOP even though firearms are normally prohibited to defendants accused of domestic violence.

Washington: On February 28, 2003, Washington State Supreme Court Justice Bobbe Bridge, 58, was arrested in Seattle on charges of drunk driving and hit and run. The arrest occurred after Bridge hit a parked truck with her Mercedes Benz car and tried to leave the scene, but was boxed in by other motorists who saw her erratic driving. Justice Bridge had a blood alcohol level of 0.21, almost three times the legal limit of .08. A justice since 2000 when she was appointed to the state supreme court by governor Gary Locke, she ran unopposed in 2002 for a six year term. Her campaign theme was “enhancement of public trust and confidence in the judiciary.” Justice Bridge issued a statement apologizing for drunk driving and said she would reexamine her use of alcohol. She said she would continue on the state supreme court, where she typically rules in favor of police and prosecutors in criminal cases. On March 23, 2003, Justice Bridge received a deferred prosecution when she enrolled in a two year treatment program for alcoholics and faces no jail time or even a criminal conviction if she completes the treatment program.

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