Preserving the Rule of Law in America’s Jails and Prisons: The Case for Amending the Prison Litigation Reform Act

by Margo Schlanger and Giovanna Shay

Prisons and jails pose a significant challenge to the rule of law within American boundaries. As a nation, we are committed to constitutional regulation of governmental treatment of even those who have broken society's rules. And accordingly, many of our prisons and jails are run by dedicated professionals who care about prisoner welfare and constitutional compliance. At the same time, for prisons-closed institutions holding an ever-growing disempowered population—most of the methods by which we, as a polity, foster government accountability and equality among citizens are unavailable or at least not currently practiced.

In the absence of other levers by which these ordinary norms can be encouraged, lawsuits, which bring judicial scrutiny behind bars, and which promote or even compel constitutional compliance, accordingly take on an outsize importance. Unfortunately, over the past twelve years, it has become apparent that a number of provisions of the Prison Litigation Reform Act (“PLRA”) cast shadows of constitutional immunity, contravening our core commitment to constitutional governance. The PLRA’s obstacles to meritorious lawsuits are undermining the rule of law in our prisons and jails, granting the government near-impunity to violate the rights of prisoners without fear of consequences.

This damage to the rule of law in America’s prisons is occurring even as those prisons have grown in their importance—both because of the nation’s increasing incarcerated population (the world’s largest) and the sharpening international focus on American treatment of prisoners, both domestically and abroad. Amendment is urgently needed. In recent months numerous advocates and organizations have urged reform. Indeed, a bill offered in the last Congress, the Prison Abuse Remedies Act of 2007, H.R. 4109, 110th Cong. (2008), would offer some moderate fixes to the most pressing problems created by the PLRA. In this Article, we discuss three of these problems. First, the PLRA’s ban on awards of compensatory damages for “mental or emotional injury suffered while in custody without a prior showing of physical injury” has obstructed judicial remediation of religious discrimination, coerced sex, and other constitutional violations typically unaccompanied by physical injury, undermining the regulatory regime that is supposed to prevent such abuses. Second, the PLRA’s provision barring federal lawsuits by prisoner plaintiffs who have failed to comply with their jails’ or prisons’ internal grievance procedures—no matter how difficult, futile, or dangerous such compliance might be for them—obstructs rather than promotes constitutional oversight of conditions of confinement. Third, the application of the PLRA’s limitations to juveniles incarcerated in juvenile institutions has rendered those institutions largely immune from judicial oversight because so few young people are able to follow the complex requirements imposed by the statute, and compliance by their parents or guardians on their behalf has been deemed legally insufficient. Each of these three problems disrupts accountability and enforcement of constitutional compliance.

Below, we discuss these issues in some depth. But it is important to mention in preface what we see as the primary salutary effect of the PLRA—its lightening of the burdens imposed on jail and prison officials by frivolous litigation. Pro se prisoner lawsuits in federal court are numerous, often lack legal merit, and pose real management challenges both for courts and for correctional authorities. Congress passed the PLRA in order to deal with this problem. This has in fact
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I. Physical Injury

The PLRA provides that prisoner plaintiffs may not recover damages for “mental or emotional injury suffered while in custody without a prior showing of physical injury.” Given the promise by the Act’s supporters that constitutionally meritorious suits would not be constrained by its provisions, perhaps the purpose of this provision was the limited one of foreclosing tort actions claiming negligent or intentional infliction of emotional distress unless they resulted in physical injury, which might have otherwise been available to federal prisoners under the Federal Tort Claims Act. Such an attempt to limit what legislators may have considered to be frivolous or inconsequential claims would echo fairly common state law limitations on tort causes of action. Notwithstanding what may have been the limited intent underlying the physical injury requirement, its impact has been much more sweeping. First, many courts have held that the provision covers all violations of non-physical constitutional rights. Proven violations of prisoners’ religious rights, speech rights, and due process rights have all been held non-compensable, and thus placed largely beyond the scope of judicial oversight. For example, in Searles v. Van Bebber, 251 F.3d 869, 872, 876 (10th Cir. 2001), the Tenth Circuit concluded that the physical injury requirement barred a suit by a Jewish prisoner who alleged a First Amendment violation based on his prison’s refusal to give him kosher food. This result is particularly problematic in light of Congress’s notable concern for prisoners’ religious freedoms. The Religious Land Use and Institutionalized Persons Act (“RLUIPA”), passed in 2000, states that “No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution,” unless the burden furthers “a compelling governmental interest,” and does so by “the least restrictive means.” 42 U.S.C. § 2000cc-1(a)(1)-(2).

Moreover, although the case law is far from uniform, some courts have deemed sexual assault not to constitute a “physical injury” within the meaning of the PLRA. In Hancock v. Payne, No. 1:03-CV-671, 2006 WL 21751 (S.D. Miss. Jan 4, 2006), a number of male prisoners alleged that over several hours, a guard sexually assaulted them. “Plaintiffs claim that they shared contraband with [the officer] and that he made sexual suggestions; fondled

PLRA (cont.)

occurred, in two ways. First, the PLRA has drastically reduced the number of cases filed: prison and jail prisoners filed twenty-six federal cases per thousand prisoners in 1995; the most current statistic, for 2006, was less than eleven cases per thousand prisoners, a decline of 60%. So the PLRA has been extremely effective in keeping down the number of federal lawsuits by prisoners, even as incarcerated populations rise. Even more important than these sharply declining filing rates for understanding the decreasing burden of litigation for prison and jail officials are the statute’s screening provisions. 28 U.S.C. § 1915A(a), which requires courts to dispose of legally insufficient prisoner civil rights cases without even notifying the sued officials of the suit against them and without receiving any response from those officials. Prison or jail officials no longer need to investigate or answer complaints that are frivolous or fail to state a claim under federal law.

But in addition to frivolous or legally insufficient lawsuits, there are, of course, serious cases brought by prisoners: cases involving life-threatening deliberate indifference by authorities to prisoner health and safety; sexual assaults; religious discrimination; retaliation against those who exercise their free speech rights; and so on. When the PLRA was passed, its supporters emphasized over and over: “[W]e do not want to prevent prisoners from raising legitimate claims. This legislation will not prevent those claims from being raised. The legislation will, however, go far in preventing prisoners from abusing the Federal judicial system.” Yet “prevent[ing] prisoners from raising legitimate claims” is precisely what the PLRA has done in many instances. If the PLRA were successfully “reduc[ing] the quantity and improv[ing] the quality of prisoner suits,” as its supporters intended, one would expect the dramatic decline in filings to be accompanied by a concomitant increase in plaintiffs’ success rates in the cases that remain. The evidence is quite the contrary. The shrunken prisoner docket is less successful than before the PLRA’s enactment; more cases are dismissed, and fewer settle.” An important explanation is that constitutionally meritorious cases are now faced with new and often insurmountable obstacles. These obstacles are the topic of this Article.

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their genitalia; sexually battered them by sodomy, and committed other related assaults.” The plaintiffs further complained that the officer “threatened Plaintiffs with lockdown or physical harm should the incident be reported.” The district court granted summary judgment in part to the defendants. One of the grounds for this defense victory was the physical injury requirement. The court said, “the plaintiffs do not make any claim of physical injury beyond the bare allegation of sexual assault.” In other words, in the view of this district court, not even coerced sodomy (which was alleged) constituted physical injury. Though some other courts have decided the question differently, the Hancock court is not alone in reaching this conclusion.12 As with religious rights, the PLRA em- bodiments prison and jail officials to make objectionable arguments that must be litigated, forcing expenditure of resources and prolonging litigation, as well as further dehumanizing prisoners and promoting a culture of callousness.13 Moreover, experienced civil rights attorneys hesitate to file suits alleging many serious abuses (for example, on behalf of prisoners chained to their beds or subjected to sexual harassment by guards), because they know that corrections officials will argue— and often succeed in arguing—that compensatory damages are barred by the PLRA.14 The point is that the PLRA’s ban on awards of compensatory damages for “mental or emotional injury suffered while in custody without a prior showing of physical injury” has made it far more difficult for prisoners to enforce any non-physical rights—including freedom of religion and freedom of speech—and to seek compensation for any mental rather than physical harm, no matter how intentionally, even torturously, inflicted. (This aspect of the law has, in fact, convinced some courts to save the provision from constitutional infirmity by reading it not to bar relief.)15 The PLRA has left the availability of compensatory damages for the constitutional violation of coerced sex an open question. It has posed an obstacle to compensation even for physical violence, if the physical component of the injury is deemed insufficiently serious. It has thereby undermined the important norms that such infringements of prisoners’ rights are unacceptable. Just as it contradicts constitutional commitments, the PLRA is simultaneously obstructing Congress’s recent statutory efforts to protect prisoners’ religious liberty, as well as freedom from sexual abuse.

II. Administrative Exhaustion

The PLRA’s exhaustion provision states: “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.” 42 U.S.C. § 1997e(a). The provision appears harmless enough. Who could object, after all, to a regime in which corrections officials are given the first opportunity to respond to and perhaps resolve prisoners’ claims?

But in many jails and prisons, administrative remedies are, unfortunately, very difficult to access. Deadlines may be very short, for example, or the number of administrative appeals required may be very large.17 The requisite form may be repeatedly unavailable,18 or the grievance system may seem not to cover the complaint the prisoner seeks to make.19 Prisoners often fear retaliation, and, although some courts have recognized exceptions to the exhaustion requirement based on estoppel or “special circumstances,”20 others have refused to excuse prisoners’ lapses.21 Beginning six years after the PLRA’s enactment, first some of the Courts of Appeals,22 and finally the Supreme Court, in Woodford v. Ngo, 548 U.S. 81 (2006), held that the PLRA forever bars even meritorious claims from court if a prisoner has failed to comply with all of the many technical requirements of the prison or jail grievance system.

This means that if prisoners miss deadlines that are often less than fifteen days and in some jurisdictions as short as two to five days,23 a judge cannot consider valid claims of sexual assault, beatings, or racial or religious discrimination. Moreover, the PLRA’s exhaustion requirement has been held to grant constitutional immunity to prison officials based on understandable mistakes by pro se prisoners operating under rules that are often far from clear. Wardens and sheriffs routinely refuse to engage prisoners’ grievances because those prisoners commit minor technical errors, such as using the incorrect form,24 sending the right documentation to the wrong official,25 or failing to file separate forms for each issue, even if the interpretation of a single complaint as raising two separate issues is the prison administration’s.26 Each such misstep by a prisoner bars consideration of even an otherwise meritorious civil rights action.27 Although dismissals are often without prejudice, prison grievance deadlines are so short that prisoners who failed to exhaust before filing suit generally are unable to return to court.28

For this reason, the National Prison Rape Elimination Commission, a bipartisan commission appointed under the Prison Rape Elimination Act of 2003,
has warned that the PLRA exhaustion requirement can “frustrate Congress’s goal of eliminating sexual abuse in U.S. prisons, jails, and detention centers.” The Commission wrote to the House Judiciary Committee that “[b]ecause of the emotional trauma and fear of retaliation or repeated abuse that many incarcerated rape victims experience, as well as the lack of confidentiality in many administrative grievance procedures, many victims find it extremely difficult—if not impossible—to meet the short timetables of administrative procedures.”

To solve this problem, the Commission has proposed (in a working draft of regulatory standards) that “Any report of sexual abuse made at any time after the abuse, which names a perpetrator and is made in writing to the agency, satisfies the exhaustion requirement of the Prison Litigation Reform Act.”

Far from encouraging correctional officials to handle the sometimes frivolous but sometimes extremely serious complaints of prisoners, the PLRA’s exhaustion rule actually provides an incentive to administrators in the state and federal prison systems and the over 3,000 county and city jail systems to fashion ever higher procedural hurdles in their grievance processes. After all, the more onerous the grievance rules, the less likely a prison or jail, or staff members, will have to pay damages or be subjected to an injunction in a subsequent lawsuit. In fact, even when prison and jail administrators want to resolve a complaint on its merits, the PLRA discourages them from doing so, and therefore actually undermines the very interest in self-governance Congress intended to serve. Can anyone reasonably expect a governmental agency to resist this kind of incentive to avoid merits consideration of grievances? The officials in question are a varied group—elected jailers and sheriffs, appointed jail superintendents, professional wardens, politically appointed commissioners. What they all have in common is an understandable interest in avoiding adverse judgments against themselves or their colleagues.

Thus, by cutting off judicial review based on an prisoner’s failure to comply with his prison’s own internal, administrative rules—regardless of the merits of the claim—the PLRA exhaustion requirement undermines external accountability. Still more perversely, it actually undermines internal accountability, as well, by encouraging prisoners to come up with high procedural hurdles, and to refuse to consider the merits of serious grievances, in order to best preserve a defense of non-exhaustion.

Moreover, courts have generally ignored Justice Breyer’s suggestion in his Woodford v. Ngo concurrence that “well established exceptions to exhaustion” from administrative law and habeas corpus doctrine be implemented in the PLRA context. 548 U.S. at 103-04. Under ordinary administrative law, exhaustion is not required where it would be futile—for example, if an aggrieved party seeks damages in a case where no other kind of relief is applicable, but the administrative process is not empowered to award damages. But the Supreme Court has held that the PLRA forecloses a futility exception to its exhaustion requirement. Booth v. Charner, 532 U.S. 731, 741 n.6 (2001). Likewise, ordinary administrative law waives exhaustion requirements where delay in judicial review imposes a hardship on the plaintiff. But most courts have held that the PLRA allows no emergency exception from the exhaustion requirement. As one court put it, “The PLRA does not excuse exhaustion for prisoners who are under imminent danger of serious physical injury, much less for those who are afraid to confront their oppressors.” Broom v. Rabitschun, No. 1:06-CV-350, 2006 WL 3344997 (W.D. Mich. Nov. 17, 2006). A requirement of administrative exhaustion that punishes failure to cross every t and dot every i by conferring constitutional immunity for civil rights violations, and allows no exceptions for emergencies, is simply unsuited for the circumstances of prisons and jails, where physical harm looms so large and prisoners are so ill-equipped to comply with legalistic rules.

Ideally, grievance systems actually improve agency responsiveness and performance by helping corrections officials to identify and track complaints and to resolve problems. Good grievance systems can indeed reduce litigation by solving prisoners’ problems. But the PLRA’s grievance provision instead encourages prison and jail officials to use their grievance systems in another way—not to solve problems, but to immunize themselves from future liability. Judicial oversight of prisoners’ civil rights is essential to minimize violations of those rights, but the PLRA’s exhaustion provision arbitrarily places constitutional violations beyond the purview of the courts.

It would be relatively simple to achieve the legitimate goal of allowing prison and jail authorities the first chance to solve their own problems, yet to avoid the kinds of problems the PLRA has introduced. The exhaustion provision should not be eliminated, but rather amended to require that prisoners’ claims
be presented in some reasonable form to corrections officials prior to adjudication, even if that presentation occurs after the prisoners’ grievance deadline. Cases filed with claims that have not been presented to prison officials could be stayed for a limited period of time, to allow corrections officials an opportunity to address them administratively.

III. Coverage of Juveniles

The PLRA applies by its plain terms to juveniles and juvenile facilities; 18 U.S.C. § 3626(g)(5) specifies that “the term ‘prison’ means any Federal, State, or local facility that incarcerates or detains juveniles or adults accuses of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law.” But prisoners under age eighteen were not the sources of the problems the PLRA was intended to solve. Even before the PLRA, juveniles accounted for very little prisoner litigation. This dearth of litigation is not surprising. As the recent investigation into alleged sexual abuse in the Texas juvenile system demonstrates, although incarcerated youth are highly vulnerable to exploitation, they generally are not in a position to assert their legal rights. Juvenile detainees are young, often undereducated, and have very high rates of psychiatric disorders. Moreover, youth incarcerated in juvenile facilities generally do not have access to law libraries or other sources of information about the law that might enable them to sue more often. One court has even observed, “[a]s a practical matter, juveniles between the ages of twelve and nineteen, who, on average, are three years behind their expected grade level, would not benefit in any significant respect from a law library, and the provision of such would be a foolish expenditure of funds.”


As with unincarcerated children, when juveniles do bring lawsuits, or otherwise seek to remedy any problems they face behind bars, it is very oftentimes their parents or other caretaking adults who take the lead. It is, after all, parents’ ordinary role to try to protect their children. But the PLRA’s exhaustion provision stymies such parental efforts, instead holding incarcerated youth to an impossibly high standard of self-reliance. The case of Minix v. Pazera, No. 1:04-CV-447, 2005 WL 1799538 (N.D. Ind. July 27, 2005), is a leading example of the result. In Minix, a young man, S.Z., and his mother, Cathy Minix, filed a civil rights suit for abuse that S.Z. endured while incarcerated as a minor in 2002 and 2003 in Indiana juvenile facilities. While in custody, S.Z. was repeatedly beaten, once with “padlock-laden socks.” After one beating, he suffered a seizure, but no one helped him, and he was beaten again the next day. He was raped and witnessed another child being sexually assaulted. S.Z. was afraid to report the assaults to staff—and his fear was natural enough in light of the fact that some of the staff were involved in arranging fights between juveniles, or would even “handcuff one juvenile so other juvenile detainees could beat him.”

Although S.Z. feared retaliation, Mrs. Minix made what the district court termed “heroic efforts to protect her son.” She spoke with staff and wrote to the juvenile judges. She attempted to meet with the superintendent of one of the facilities, though she was prevented from doing so by staff. She contacted the Deputy Department of Corrections Commissioner and the Governor. Ultimately, because of her efforts, S.Z. was “unexpectedly released on order from the Governor’s office.”

Nonetheless, the district court dismissed the Minix family’s federal claims under the PLRA’s exhaustion rule because S.Z. had not himself filed a grievance in the juvenile facility. At the time, the Indiana juvenile grievance policy allowed incarcerated youths only two business days to file a grievance.

Only two months after S.Z.’s suit was dismissed, the Civil Rights Division of the U.S. Department of Justice concluded an investigation and confirmed that one of the Indiana facilities where S.Z. had been assaulted, the South Bend Juvenile Facility, “fail[ed] to adequately protect the juveniles in its care from harm,” and violated the constitutional rights of juveniles in its custody. The federal government further concluded that the grievance system that S.Z. was faulted for not using was “dysfunctional” and “contribute[d] to the State’s failure to ensure a reasonably safe environment.”

Incarcerated children and youths do not not benefit in any significant respect from the courts with lawsuits, frivolous or otherwise. Though they are often incapable of complying with the tight deadlines and complex requirements of internal correctional grievance systems, their lack of capacity should not immunize abusive staff from the accountability that comes with court oversight. Those under eighteen do not file many lawsuits, and are not the source of any problem the PLRA is trying to solve. And they are particularly poorly positioned to deal with its limits. They should be exempted from its reach.

* * *

When federal courthouses are barred to constitutionally meritorious cases, the resulting harm is not merely to the affected prisoners but to our entire system of accountability that ensures that government officials comply with constitutional mandates. The erection of hurdles to accountability should not be seen as “reducing the burden” for correctional administrators—it should be recognized as weakening the rule of law. The PLRA must be amended.

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5 141 CONG. REC. S14,627 (daily ed. Sept. 29, 1995) (statement of Sen. Hatch) (“The crushing burden of these frivolous suits makes it difficult for the courts to consider meritorious claims.”); see also 141 CONG. REC. S19,114 (daily ed. Dec. 21, 1995) (statement of Sen. Kyi) (“If we achieve a 50-percent reduction in bogus Federal prisoner claims, we will free up judicial resources for claims with merit by both prisoners and nonprisoners.”); 141 CONG. REC. S18,136 (daily ed. Dec. 7, 1995) (statement of Sen. Hatch); 141 CONG. REC. H1480 (daily ed. Feb. 9, 1995) (statement of Rep. Canady) (“These reasonable requirements will not impede meritorious claims by prisoners but will greatly discourage claims that are without merit.”).


7 See Schlanger, Prisoner Litigation, supra note 3, at 1644-64.

8 28 U.S.C. §§ 1346(b), 1402(b), 2401(b), 2671-2680; see also United States v. Muniz, 374 U.S. 150 (1963) (allowing a Federal Tort Claims Act lawsuit by federal prisoners for personal injuries caused by the negligence of government employees).


12 See, e.g., Smith v. Shady, No. 3:05-CV-2663, 2006 WL 314514 (M.D. Pa. Feb. 9, 2006) (“Plaintiff’s allegations in the complaint concerning Officer Shady grabbing his penis and holding it in her hand do not constitute a physical injury or mental symptoms.”). But see Liner v. Good, 196...
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F.3d 132, 135 (2d Cir. 1999) (holding that sexual assault constitutes physical injury within the meaning of the PLRA). See generally Deborah M. Golden, It’s Not All In My Head: The Harm of Rape and the Prison Litigation Reform Act, 11 CARDOZO WOMEN’S L.J. 37 (2004).

13 See Jarrett v. Wilson, 162 F. App’x 394, 396-98 (6th Cir. 2005) (prisoner confined for twelve hours in “strip cage” in which he could not sit down did not suffer physical injury even though he testified that he had a “bad leg” that swelled “like a grapefruit” and that caused severe pain and cramps); Myers v. Valdez, No. 3:05-CV-1799, 2005 WL 3147869 (N.D. Tex. Nov. 17, 2005) (“pain, numbness in extremities, loss of mobility, lack of sleep, extreme tension in neck and back, extreme rash and discomfort” did not satisfy PLRA physical injury requirement); Mitchell v. Horn, No. 2:98-CV-4742, 2005 WL 1060658 (E.D. Pa. May 5, 2005) (reported symptoms including “severe stomach aches, severe headaches, severe dehydration . . . and blurred vision,” suffered by prisoner confined in cell allegedly “smear[ed] with human waste and infested with flies” did not constitute physical injury for PLRA purposes).

14 See, e.g., Pool v. Sebastian County, 418 F.3d 934, 942-43, 943 n.2 (8th Cir. 2005) (describing the argument of the defendant jail officials that the stillbirth of a fetus of four to five months gestational age over a jail cell toilet, preceded by days of bleeding, did not satisfy PLRA physical injury requirement).


16 Siggers-El v. Barlow, 433 F. Supp. 2d 811 (E.D. Mich. 2006), concludes that the “jury was entitled to find that the Plaintiff suffered mental or emotional damages as a result of Defendant’s violation of his First Amendment rights [because any other interpretation of § 1997(e) would be . . . unconstitutional],” id. at 816, and noting:

The Court finds the following hypothetical, set forth in Plaintiff’s brief, to be persuasive:

I imagine a sadistic prison guard who tortures prisoners by carrying out fake executions-holding an unloaded gun to a prisoner’s head and pulling the trigger, or staging a mock execution in a nearby cell, with shots and screams, and a body bag being taken out (within earshot and sight of the target prisoner). The emotional harm could be catastrophic but would be non-compensable. On the other hand, if a guard intentionally pushed a prisoner without cause, and broke his finger, all emotional damages proximately caused by the incident would be permitted.

Id. (alteration in original). See also Percival v. Rowley, No. 102-CV-363, 2005 WL 2572034 (W.D. Mich. Oct. 12, 2005) (“To allow section 1997(e) to effectively foreclose a prisoner’s First Amendment action would put that section on shaky constitutional ground.”).


18 See, e.g., Latham v. Pate, No. 1:06-CV-150, 2007 WL 171792 (W.D. Mich. Jan. 18, 2007) (dismissing suit due to tardy exhaustion in case in which the prisoner who alleged that he had been beaten maintained that he was placed in segregation and administrative segregation immediately following assault and that “officers did not provide him with the grievance forms”).

19 See, e.g., Benfield v. Rushton, No. 8:06-CV-2609, 2007 WL 30287 (D.S.C. Jan. 4, 2007) (dismissing suit due to untimely filing of grievance brought by prisoner who alleged that he was repeatedly raped by other prisoners; prisoner had explained that he “didn’t think rape was a grievable issue”); Marshall v. Knight, No. 3:03-CV-460, 2006 WL 374713 (N.D. Ind. Dec. 14, 2006) (dismissing, for failure to exhaust, plaintiff’s claim that prison officials retaliated against him in classification and disciplinary decisions, even though prison policy dictated that no grievance would be allowed to challenge classification and disciplinary decisions).


21 See, e.g., Garcia v. Glover, 197 F. App’x 866, 867 (11th Cir. 2006) (refusing to excuse non-exhaustion in case in which prisoner alleged that he had been beaten by five guards, despite the fact that prisoner alleged that he feared he would be “killed or shipped out” if he filed an administrative grievance); Umstead v. McKee, No. 1:05-CV-263, 2005 WL 1189605 (W.D. Mich. May 19, 2005) (“[I]t is highly questionable whether threats of retaliation could in any circumstances excuse the failure to exhaust administrative remedies.”).

22 See, e.g., Pozo v. McCaughtry, 286 F.3d 1022, 1023 (7th Cir. 2002).

23 Woodford, 548 U.S. at 118 (Stevens, J., dissenting) (“[T]ime requirements . . . are generally no more than 15 days, and . . . in nine States, are between 2 and 5 days.”); see also LSO Amicus Brief, supra note 17.

24 See, e.g., Richardson v. Spurlock, 260 F.3d 495, 499 (5th Cir. 2001).

25 See, e.g., Keys v. Craig, 160 F. App’x 125 (3d Cir. 2005).


27 See Giovanna Shay & Johanna Kalb, More Stories of Jurisdiction-Stripping and Executive Power: Interpreting the Prison Litigation Reform Act, 29 CARDOZO L. REV. 291, 321 (2007) (“In a survey of reported cases citing Woodford in the first seven months after it was decided, the majority of cases in which the exhaustion issue was resolved] were dismissed entirely for failure to exhaust. All claims raised in the complaint survived the exhaustion analysis in fewer than fifteen percent of reported cases.”) (footnotes omitted).

28 See, e.g., Rohm v. Beard, No. 2:07-CV-783, 2007 WL 4454417 (W.D. Pa. 2007) (dismissing case because prisoner had filed an untimely grievance after his case was initially dismissed for incomplete exhaustion); Regan v. Frank, No. 06-CV-66, 2007 WL 106537 (D. Haw. 2007) (“Even though [the court] dismissed Plaintiff’s claims without prejudice to the filing of a new action following proper exhaustion, Ngo makes proper exhaustion of these claims impossible.”).

29 Letter from the Nat’l Prison Rape Elimination Comm’n., supra note 2.


31 There is evidence that prisons and jails have headed in this direction. For example, in July 2002, in Strong v. David, 297 F.3d 646, 649 (7th Cir. 2002), the Seventh Circuit reversed the district court’s dismissal of a case for failure to exhaust; in rejecting the defendants’ argument that the plaintiff’s grievances were insufficiently specific, the court noted that the Illinois prison grievance rules were silent as to the requisite level of specificity. Less than six months later, the Illinois Department of Corrections proposed new regulations that provided:

The grievance shall contain factual details regarding each aspect of the offender’s complaint including what happened, when, where, and the name of each person who is the subject of or who is otherwise involved in the complaint.

ILL ADMIN. CODE tit. 20, § 504.810(b); see 26 ILL. REG. 18065, at § 504.810(b) (Dec. 27, 2002) (proposing amendment).

32 In fact, if an agency chooses to entertain an untimely grievance that merits examination, the agency is barred from asserting a failure-to-exhaust defense at later time. Riccardo v. Rauch, 375 F.3d 521, 524 (7th Cir. 2004).


35 See also, e.g., Williams v. CDCR, No. 2:06-CV-1373, 2007 WL 2384510 (E.D. Cal. Aug. 17, 2007) (“The presence of exigent circumstances does
not relieve a plaintiff from fulfilling this require-
ment.”), report and recommendation adopted, 2007 WL 2793117 (E.D. Cal. Sept. 26, 2007); Ford v. Smith, No. 1:06-CV-710, 2007 WL 1192298 (E.D. Tex. Apr. 23, 2007) (disposing where plaintiff said his safety was in danger and he sought a continuance until exhaustion was completed); Rendelman v. Gal-


pending exhaustion), aff’d, 230 F. App’x 314 (4th Cir. 2007), cert. denied, 128 S. Ct. 378 (2007); Aburomi v. United States, No. 1:06-CV-3682, 2006 WL 2990362 (D.N.J. Oct. 17, 2006) (“It is understandable that Plaintiff would want immediate treatment for a perceived recurrence of cancer, but the administrative remedy program is mandatory regardless of the nature of the relief sought.”).

36 See LYNN S. BRANHAM ET AL., AM. BAR ASSOC. CRIMINAL JUSTICE SEC-
ATION, LIMITING THE BURDENS OF PRO
SE PRISONER LITIGATION: A TECHNICAL-
ASSISTANCE MANUAL FOR COURTS, CORRECTIONAL OFFICIALS, AND ATTOR-
NEYS GENERAL (1997).

37 Dora Schriro, Correcting Corrections: Missouri’s Parallel Universe, in SENTENC-
gov/pdffiles1/nij/181414.pdf; Dora Schriro, Director of the Ariz. Dep’t of Corrections, Correcting Cor-
rections: The Arizona Plan: Creating Conditions for Positive Change in Corrections, Statement Before the Commission on Safety and Abuse in America’s Prisons (Feb. 9, 2006), available at http://www.pris-
oncommission.org/statements/schriro_dora.pdf.

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pdf (“[S]ome large scale studies suggest that as many as 65%-75% of the youth involved in the juvenile justice system have one or more diagnosable psychi-

42 See also Anna Rapa, Comment, One Brick Too Many: The Prison Litigation Reform Act as a Barrier to Legitimate Juvenile Lawsuits, 23 T.M. COOLEY L. REV. 263, 279 (2006).

43 Epilogue: The Minix family re-filed in state court, where the suit avoided exhaustion analysis because S.Z. was no longer incarcerated; the defendants once again removed the case to federal court, and this time the suit was permitted to go forward. Minix v. Pazera, No. 3:06-CV-398, 2007 WL 4233455 (N.D. Ind. Nov. 28, 2007).

44 Letter from Bradley J. Schlozman, Acting Assistant Att’y Gen., U.S. Dep’t of Justice, to Mitch Daniels, Governor of the State of Ind. 3, 7 (Sept. 9, 2005), available at http://www.usdoj.gov/crt/split/
documents/split_indiana_southbend_juv_findlet_9-
9-05.pdf.
The past few months have been very busy at PLN. In addition to publishing our first book, the Prisoners' Guerrilla Handbook Guide to Correspondence Programs in the US and Canada, we have also been making significant administrative changes. We have changed the name of our non-profit organization from Prisoners' Legal News to the Human Rights Defense Center (HRDC). The HRDC will be our umbrella organization which will continue publishing Prison Legal News the magazine, Prison Legal News book publishing and any other publishing projects we may add in the future.

Most significantly, the HRDC is adding a litigation component to our organization which will be HRDC litigation. Thanks to the generosity of an individual donor, we have been able to hire a staff attorney to represent PLN in censorship litigation and also handle other select cases on behalf of other plaintiffs. Dan Manville, best known as the co-author of the Prisoners Self Help Litigation Manual is one of the top prisoner rights attorney in the United States and he has agreed to be the first HRDC staff attorney. We welcome Dan on board. Dan was one of PLN's earliest subscribers and represented us in our 1998 lawsuit against the Michigan Department of Corrections involving the censorship of The Ceiling of America.

We will be creating a new HRDC website and making other administrative changes as we move forward with these different projects. We will announce the changes as they occur. For PLN magazine subscribers nothing will change. Among the prison and jail court cases we will be seeking to assist plaintiffs on, as well as providing referrals, will be death and catastrophic injury cases and jail strip searches of misdemeanor arrestees. We hope to expand our litigation capability if we receive additional funding to do so.

I would like to thank all those who responded to PLN's survey in the March issue of PLN. As this issue goes to press, we have received 514 responses to the survey. 485 of the respondents were men and 502 are currently imprisoned, 413 in state prisons and 83 in the Bureau of Prisons. 499 of the survey respondents think that PLN is a good value for their money and 481 would recommend it to others. 221 think our topic range is “excellent” and 295 say the same about our writing quality. The numbers are 239 and 193, respectively, for those who rate those as “good”. Pretty much all our readers loan their copies of PLN to others with 163 stating they loan them to more than 8 other people. Majorities of 377 voted to keep the cover story size the same and for more in depth stories. 292 readers want a longer news in brief section. 393 want more medical coverage.

Interestingly, 263 readers responded that they did not want graphics in PLN and 302 did not want artwork. It looks like this is the triumph of content over graphics but by a close margin. Basically, the readers who responded to the survey are pretty happy with Prison Legal News the way we are as far as content and appearance goes. I will be reading all the comments on the survey responses over the summer. Thank you for everyone who took the time to respond. The survey responses are an important means for us to know how we can better serve our readers. I am always surprised at how positive and encouraging our readers are. I was very surprised that not a single respondent thought our topic range or writing quality was “bad”. And only two thought PLN is not useful. Those are pretty good numbers. I think people are more likely to complain when they are unhappy about something than when they are happy so the high positive responses are all the more significant.

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

Ninth Circuit Flip-Flops: Denial of Washington Sex Offender’s Community Custody Release Held Unconstitutional, Then Constitutional

Illustrating the axiom that the law means whatever a judge decides it means, in a 2-to-1 decision, a panel of the Ninth Circuit Court of Appeals held that Washington state law creates a liberty interest in a prisoner’s early release to community custody. Two weeks later, however, one of the majority opinion judges died, a new judge was assigned to the panel, and the opinion was withdrawn. The new judge joined the previously dissenting judge to form a new majority, which held that Washington law does not create a liberty interest in community custody release.

In August 1999, 20-year-old Joseph Dale Carver was sentenced to 54 months in prison for his third child molestation conviction. He committed his first sex offense when he was 14 years old. While serving his current prison term he committed 15 disciplinary infractions, including sexual harassment of a prison employee.

Washington Revised Code (RCW) § 9.94A.728(1)(b)(ii)(B)(1) bars early release for sex offenders, but § 9.94A.728(2)(a) allows sex offenders to be placed in community custody – i.e., intense monitoring in the community for at least one year after release or transfer from confinement (aka parole). Community custody eligibility is contingent upon an acceptable release plan. RCW § 9.94A.728(2)(c).

Carver submitted a release plan in March 2002, but it was denied pursuant to a Department of Corrections (DOC) policy that categorically barred community custody eligibility to offenders like Carver, who were deemed sexually violent predators and had been referred for civil commitment. That policy was subsequently invalidated as violating state law. See: In re Dutcher, 60 P.3d 635 (Wa. Ct. App. 2002) [PLN, Feb. 2004, p.26].

As a result of the denial of his community custody release plan, Carver served his full term of confinement. After his release in September 2004, he sued in federal court alleging that DOC officials had improperly denied his release plan without affording him due process of law. The district court granted summary judgment to the defendants, holding that Washington law did not create a liberty interest in early release to community custody, and that the defendants were entitled to qualified immunity.

On June 9, 2008 a panel of the Ninth Circuit reversed in part, with Judges Ferguson and Reinhardt issuing a majority
opinion “holding that Washington law creates a liberty interest in an inmate’s early release into community custody.” However, since that liberty interest was “not sufficiently clearly established” at the time, the Court of Appeals affirmed the grant of qualified immunity. Circuit Judge Milan Smith entered an opinion that concurred with the judgment but dissented as to the existence of a liberty interest in community custody release. See: Carver v. Lehman, 528 F.3d 659 (9th Cir. 2008).

Several weeks later, on June 23, 2008, the parties sought reconsideration. Two days after that Judge Ferguson unexpectedly died. Judge Tallman was drawn as a replacement, and on August 26, 2008 the panel voted to amend its previous opinion, withdrawing it and denying the rehearing petitions as moot.

On December 22, 2008, Judges Smith and Tallman formed a new majority, holding that Washington law does not create a liberty interest in a prisoner’s release to community custody. This time Judge Reinhardt issued a strongly-worded opinion that concurred in the judgment but criticized the new majority for reversing the panel’s prior ruling.

“It is indisputable that the law did not change and the Constitution did not change between the time of the original panel’s decision and the time of the new majority’s opinion,” Judge Reinhardt wrote. “All that changed is the composition of the three-judge panel. To those who question whether the results in constitutional and other cases depend on the membership of the panel … the result in the case currently before our panel is merely a minor illustration of how the judicial system currently operates.”

Judge Reinhardt suggested that the more appropriate course would have been to take the issue up on en banc rehearing. Proceeding in that manner “would help to secure the legitimacy of court decisions and, necessarily, to maintain public confidence in the judicial system,” he argued.

“This is simply a case in which Judge Ferguson and I [on the original panel] tried our best to do our job, including the mundane task of seeing that prisoners, like all other persons, are afforded the rights to which they are entitled under the law,” Reinhardt remarked.

As a side note, the new majority endorsed citing and considering unpublished opinions “so long as they do not conflict with binding precedential decisions.” Judge Reinhardt, however, took issue with “the majority’s lengthy disquisition on memorandum dispositions and published opinions,” saying “it should not be necessary for me to restate the obvious: The law is established in published opinions and published opinions only.”

Were the majority’s view accepted, “the law in this circuit would no longer be declared in opinions; ‘existing’ circuit law could be found in whatever sources suited anyone’s whim or fancy, including the Sewanee Law Review,” said Reinhardt. “What an odd legal system we would be adopting for the Ninth Circuit – one that would be operative in this court only. Surely my colleagues cannot mean what their opinion states. Say it ain’t so, my friends,” he concluded in the amended opinion entered on December 22, 2008, which also included a sharp retort by the majority. See: Carver v. Lehman, 550 F.3d 883 (9th Cir. 2008).

The unusual procedural stance of this case didn’t end there. The December 2008 ruling was itself amended on March 3, 2009, and the new amended ruling entirely avoids the controversy regarding the endorsement of unpublished opinions. Judge Reinhardt’s comments are abridged in the amended opinion, and his “say it ain’t so” remark is no longer included. The majority’s ruling, however, which held there is no liberty interest in community custody release under Washington law, remains unchanged. See: Carver v. Lehman, 558 F.3d 869 (9th Cir. 2009).

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Texas Posthumously Exonerates Man Who Died in Prison

by Matt Clarke

On February 6, 2009, Travis County District Judge Charlie Baird did what no other Texas judge had done before—he exonerated a dead man. Timothy Brian Cole, who died of asthma due to medical neglect while incarcerated in 1999, was declared innocent of the rape charges that sent him to prison.

On March 24, 1985, Michele Mallin, a Texas Tech University student, was raped by a chain-smoking black man when she was walking to her car at night. A series of similar rapes had occurred, and there was great pressure on the police to solve the case. Cole worked several blocks from the crime scene and looked similar to a composite sketch of the suspect; he was arrested and Mallin identified him as her rapist.

Cole, who had only a misdemeanor arrest record and was not identified as the perpetrator by any of the other rape victims, steadfastly proclaimed his innocence and wept over his misfortune while sitting in jail.

Listening to Cole’s suffering was another prisoner, Jerry Wayne Johnson, a chain-smoking black man who had been arrested for, and was later convicted of, two other sex crimes. He also had a history of similar offenses.

Cole was convicted in September 1986 and sentenced to 25 years. He had declined a plea bargain that would have resulted in probation, maintaining that he was not guilty. Cole’s years in prison were not easy. Accused of rape and sent to the Coffield Unit, one of the worst facilities in the Texas Dept. of Criminal Justice, Cole suffered the scorn and abuse of other prisoners. The appeals of his criminal conviction were denied.

Johnson waited until the statute of limitations had expired, then in 1995 wrote to the Lubbock district attorney and judge who had convicted Cole, confessing to the crime. No one was interested. Cole later died in prison on December 2, 1999 due to health problems related to his asthma. He was 33 years old. What ultimately cost Cole his life was systemic medical neglect, which is all too common in the Texas prison system. [See: PLN, May 2008, p.34; June 2003, p.18; Dec. 2002, p.1].

Years later Johnson managed to contact Cole’s mother, who got the Innocence Project involved. Subsequent DNA testing proved that Johnson, not Cole, had committed the rape. By then Cole was long dead, but Mallin, contrite over her faulty identification, along with Cole’s family and the Innocence Project, decided to attempt what had never previously been done in Texas – a posthumous exoneration.

Their efforts led to Judge Baird’s declaration that there was “a 100 percent moral, factual and legal certainty” of Cole’s innocence. Members of Cole’s family testified as “to the devastating impact of his wrongful conviction on their lives,” and Mallin described the “emotional impact of discovering that she had identified the wrong man.” See: In the Matter of a Court of Inquiry, 299th District Court for Travis County, Texas, Case No. D1-DC 08-100-051.

Lubbock officials had ignored strong evidence of Cole’s innocence to make the case against him. His family testified that he was at home with them at the time of the rape, but prosecutors insinuated they were lying to get their relative off. Most strikingly was the fact that Cole’s serious asthma would have incapacitated him had he attempted to smoke, and thus he could not have been the chain-smoker described by the victim. None of that mattered to prosecutors, who were anxious to secure a conviction. Other evidence was ignored, including a fingerprint found at one of the rape scenes that didn’t match Cole, and police photo and lineup identification protocols were flawed.

In a formal opinion issued on April 7, 2009, Judge Baird said “It is no secret that our current system for resolving claims of actual innocence by prisoners is bureaucratic and hypertechnical. Such claims are lost, ignored, or denied on procedural grounds that have nothing to do with whether the petitioner is innocent. The death of Tim Cole in prison four years after Johnson tried to clear him is a tragic example of how broken our post-conviction system has become.” Baird declared that Cole’s case was the “most important decision” of his career.

According to the Innocence Project, 35 current or former Texas prisoners have been exonerated by DNA testing since 1994. State Senator Rodney Ellis has introduced a bill to require reforms in police lineup procedures (SB 117). Lineups would have to be video recorded, and the officer conducting the lineup would have to be unfamiliar with the case and not know which participant was the suspect. An improper lineup was blamed, in part, for the false identification in Cole’s case. The legislation did not pass during this session.

Another bill, called the Tim Cole Act (HB 1736), increases the compensation for wrongfully convicted prisoners to a lump sum payment of $80,000 per year they were incarcerated. Payments would be made to surviving family members for prisoners who die prior to being exonerated. The bill also provides monthly annuity payments, health insurance, and assistance to obtain a college education for wrongfully convicted prisoners. Exonerees who accept these benefits, however, must agree not to file suit.

The Texas legislature approved the Tim Cole Act on May 11, 2009; it is now awaiting the signature of Governor Rick Perry. “The Tim Cole case should serve as a wake-up call to Texas,” said Senator Ellis. “It is time to get our house in order and enact reforms that, wherever possible, can help avert miscarriages of justice before they happen.” Although a worthy goal, 16 state representatives apparently disagreed, as they either voted against the legislation or said they had intended to vote no.

On April 25, 2009, Elliott Blackburn, a reporter for the Lubbock Avalanche-Journal, won an award in the Texas Associated Press Managing Editors journalism contest for his reporting on Cole’s exoneration. “This is what newspapers are supposed to do ... right the wrongs,” stated Avalanche-Journal Editor Terry Greenberg.

This was somewhat ironic, as Judge Baird noted in his ruling that Cole’s 1986 trial was “sensationalized” by the Avalanche-Journal, which “ran articles suggesting that Mr. Cole was guilty of all of the Tech [University] rapes.”

In any event, Mr. Greenberg is incorrect. Righting judicial wrongs are what the courts and the district attorney’s office are supposed to do when presented with evidence of wrongful convictions, as in Cole’s case when they were contacted by Jerry Johnson who confessed to Cole’s crime. Yet it was an independent organization, the Innocence Project, that fought to
obtain DNA testing and clear his name. The state only supplied belated official recognition of Cole’s innocence, fully a decade after his death. 

$226,000 Workers’ Comp Settlement for Pennsylvania Guard Scarred by MRSA

A Pennsylvania prison guard who contracted a staph infection that caused facial scarring has settled a workers’ compensation claim for $226,000. 

While employed at the Graterford Prison in 2003, guard Carol Snyder contracted an infection. She awoke on the morning of December 30, 2003 with facial swelling and went to see her primary health care provider. She was referred to another doctor, who drained the swelling in her face.

Her attorney, Gerald K. Schrom, said Snyder experienced “probably 40 infections” over the next few years, which resulted in “40 separate outbreaks” on her skin. She was diagnosed with MRSA by an open wound specialist on June 28, 2005.

That same doctor stated there was “no question in my mind that Ms. Snyder acquired this bacterial strain while working at the prison.” Pennsylvania prison officials, however, were reluctant to accept that conclusion despite the fact that MRSA is a well-known problem in correctional facilities. [See, e.g.: PLN, May 2008, p.12; Dec. 2007, p.1]

In fact, prison officials were in total denial, according to Schrom. They insisted that Snyder did not have MRSA, claiming her facial scarring was due to acne. “And then they were saying, ‘Okay, you have MRSA, but you can work,’” said Schrom. “So she walks around often with gloves and goes out at night. She’s had a complete change of lifestyle.”

While Snyder tried to put her life back together, prison officials still refused to admit to a MRSA problem. Jennifer Daneker, a public information officer for Graterford Prison, insisted the facility was clean and “all of the institutions in Pennsylvania are accredited by the ACA.” Which, of course, has little to do with whether there are MRSA outbreaks at state prisons. 

Snyder’s workers’ compensation claim settled for $226,000 on December 8, 2008. See: Penn. Dept. of Labor & Industry, Bureau of Workers’ Compensation, Claim No. 3100315 (Bureau No. 219295). PLN has previously reported on rampant MRSA infections in prisons and jails nationwide, and specifically on MRSA problems in Pennsylvania county prisons. [See: PLN, Feb. 2009, p.48; July 2005, p.20].

Sources: www.pottsmerc.com, www.nbphiladelphia.com


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Prison Legal News 13  July 2009
ADA Routinely Violated by Prisons in the case of Deaf Prisoners

by McCay Vernon, Ph.D.

Over the last forty years, Congress has enacted numerous laws specifically designed to assure disabled individuals access to the programs, activities, services, public facilities and other resources available to the general population. This access was originally stipulated in the Bill of Rights, but made more specific by these newer laws and regulations. The most well-known of these are the Americans with Disabilities Act (ADA) and the Individuals with Disabilities Education Act (IDEA). Together, this legislation plus state statutes combine to embody the some of the best legislation for the disabled of any country in the world.

The tragedy is that federal, state and local officials, including law enforcement, blatantly ignore and fail to enforce these laws effectively, especially in three major areas. These are prisons (Musumerci, 2006; Terhue, 2004-2005; and Tucker, 1988), mental health facilities (Geer, 2003; Vernon & Leigh, 2007) and schools (Geer, 2003).

Recently the U.S. Supreme Court has held that states could be liable under Title II of the ADA for this kind of unconscionable conduct (Musumerci, 2006). The cases involved United States v. Georgia and Goodman v. Georgia, 126 S. Ct. 877 (2006).

In another case, the court found that the state prison system violated ADA by inter alia failing to notify deaf prisoners about accommodations available under ADA, failing to give deaf prisoners the opportunity to access TDDs (deaf telephones) and visual alarms as well as the failure to provide interpreter services for educational and vocational classes, alcohol and drug counseling, medical and mental health treatment and disciplinary, grievance and parole hearings (Musumerci, 2006). Because these services were available to other prisoners and the prison failed to provide the accommodations necessary to make them available to deaf prisoners, the prison was liable. (For other cases involving deaf people and laws relevant to them, see Musumerci, 2006).

This article will focus primarily on prisons and their deaf prisoners. However, much of the information has generality to all disabilities and to many other types of public facilities. The reason for the focus on deafness is because it is one of the least understood of all disabilities and the most neglected in prisons. This is due primarily to its invisibility. Other disabilities, such as cerebral palsy, amputations, crippling disorders, etc. are instantly identified and reacted to. In addition, partly because it is not visible, deafness is not seen as being as serious as other handicaps. However, in a prison environment, it is one of the most debilitating.

For readers of Prison Legal News, the reason deaf prisoners are of special interest is that they provide attorneys representing them not only the opportunity to help of group of prisoners in a desperate situation, but also a chance to sue for sizeable damages, including attorney’s fees, due to the rights that have been denied as a result of a failure of prisons to obey ADA regulations. In many cases these deaf prisoners’ rights were also violated during their arrests, interrogations, pleadings, sentencings, and/or trials (King & Vernon, 1999; Miller, 2001; Miller & Vernon, 2001; Vernon & Miller, 2005; Vernon, Raifman & Greenberg, 1006). [Editor’s Note: PLN has reported extensively on the rights of deaf and disabled prisoners in the past. A key issue is that the ADA and RA both have their own attorney fee provisions which are not capped by the Prison Litigation Reform Act, thus attorneys who prevail on ADA and RA claims for prisoners can bill their normal market rates.]

Prelingual Deafness and Prison

For anyone who is deaf, prison is a horror. For example, even with hearing prisoners, their number one fear is that they will be raped; the second is that they will be killed (Ross & Richards, 2003). That both of these fears are justified is confirmed by the data on prison murder, rape and suicide (Human Right’s Watch, 2001). In a prison’s hostile, isolating and threatening environment, the possibility of psychological breakdown greatly increases. Some prisoners commit suicide. The problem is compounded by the paucity of mental health services in prisons and jails and the lack of training for correctional officers as to how to handle such cases.

While information supplied by the Human Rights Watch is not specific to the deaf population, these data and common sense would dictate the situation is much worse for prisoners who are deaf because they are far more vulnerable and subject to attack than hearing prisoners. One reason for this is that they are viewed as being unable to report instances in which they are victimized due to their communications limitations as outlined below (Miller, 2001; Vernon & Miller, 2005).

To understand why this is true, it is important to become familiar with some basic facts about prelingual deafness, i.e., deafness which has its onset at three years of age or younger. Because these individuals never heard language spoken or do not remember it if they heard it, most never learn to speak intelligibly. Just as you and I cannot speak Russian because we have not heard it spoken, prelingually deaf individuals cannot speak English (Vernon & Andrews, 1990). For the same reason, most deaf people fail to master the syntax and the vocabulary of English.

Consequently, as a group they are extremely poor readers and have low educational levels. For deaf prisoners, the problem is even worse because many come from poor homes, attended inferior schools, and have a general history of deprivation. The consequences are exemplified by a study of 99 deaf prison prisoners conducted by Miller (2001). It is the largest in-depth study ever done of this kind of population.

Of these 99 prisoners, 76 lost their hearing before learning to speak or use language. Their mean educational achievement level when they entered prison as adults was second grade, seventh month. By federal government standards, this means they were functionally illiterate. That is despite the fact that their IQ as measured by a performance IQ test was well within the average range (Miller, 2001) In fact, the IQs of deaf people in general are equal to those of hearing people even though their educational achievement levels are significantly lower (Vernon, 2005). This is because of the limitations deafness places on the acquisition of information.

The Burden of Being Deaf in Prison

In prison, the low educational levels of most deaf prisoners coupled with their restricted communication creates major problems. For example, they have severe limitations in understanding what people
say to them. They have to depend on lipreading, which is greatly overestimated as a means of communication. Even under ideal conditions, for example, good lighting, face-to-face contact with the speaker, a speaker who articulates clearly, etc., good lipreaders can understand only about five percent of what is said to them (Vernon & Andrews, 1990).

In addition, the overwhelming majority of prelingually deaf people have speech that is unintelligible. Also, because their educational level is that of a second grader, they can communicate only simple messages by writing and understand equally simple messages by reading.

As a result of these limitations, their communication with detention facility employees, fellow prisoners, medical staff, and others is primitive at best. They cannot understand disciplinary hearings or present effectively their side of the story, nor do they understand the printed material on prison rules and regulations.

In sum, they are in an almost totally compromised position in the dangerous, treacherous environment of rape, abuse and violence that characterizes most prisons.

Sign Language and Access

If introduced to the prison setting, American Sign Language (ASL) and interpreters who know ASL could provide deaf prisoners with access to much of what their deafness otherwise denies them. Most people who acquired their deafness in the first 15 or 16 years of their life learn sign language. They use it to communicate with each other, just as hearing people use English.

Sign Language interpreters, plus assistive devices such as vibrating alarm clocks, hearing aids, special telephones, video phones, flashing alarm devices, etc. can give deaf people basically the same access to information, basic human rights, educational services, mental health counseling, hospital care, drug therapy, prison rules and regulations, religious services, etc. that hearing prisoners have. It is this access that is promised disabled prisoners in the Bill of Rights, ADA, IDEA, and other civil rights legislation that is being so blatantly denied them in state, federal and local prisons and jails. By bringing to the attention of the court this failure to implement these laws in the case of deaf prisoners, damages can be obtained for deaf prisoners and fees will be awarded to their attorneys. Of equal importance, these cases can be costly to the prison and will result in their correcting the injustices, which is far less damaging than ignoring them as is now the case.

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Immigrants aren’t a crime problem. “The foreign-born commit considerably fewer crimes than the native-born,” as President Herbert Hoover’s National Commission on Law Observance and Enforcement concluded in 1931 (National Lawyers Guild Quarterly, 10/39; Immigration Policy Center, Spring/07). While noncitizens now make up more than 8 percent of the U.S. population, the available evidence indicates that they account for no more than 6 or 7 percent of the overall prison population (Myers’ 304,000 figure is almost twice the number we get by extrapolating from published government reports. It doesn’t even match the 10 percent figure Myers gave in the same interview: One-tenth of the current prison population would be about 230,000, not 304,000.

The number also doesn’t seem to match ICE’s own handouts from the next day, March 28, when the agency said it “estimates that about 300,000 to 450,000 criminal aliens who are potentially removable are detained each year in federal, state and local prisons and jails.” The number of noncitizens held in U.S. prisons on criminal charges during the course of “each year” would of course be much larger than the number of these prisoners behind bars on any one day, the number that Myers seems to be giving in the Times article. (The government usually gives statistics for prison populations for a specific day, such as June 30 or December 31.)

A month’s efforts failed to get the ICE press office to explain how the agency came up with these estimates.

Of course, the government itself can influence the statistics through its policies, and right now immigration and Justice Department personnel are working overtime to increase the number of “criminal aliens.” Under a program called “Operation Streamline,” the government has been bringing criminal charges for misdemeanor immigration offenses that it used to treat as civil violations; the result is a surge of criminal immigration convictions that reached 9,350 in March 2008. At this rate, the number of immigrant convicts would increase by more than 100,000 for the year. But the typical sentence is just one month, so the increase at any given time would be less than 10,000 prisoners—a fraction of a percent of the overall U.S. prison population (New York Times, 6/18/08; Transactional Records Access Clearinghouse, 6/17/08).

The case is simpler with Time’s 21 percent figure: It’s wrong, and it’s been abandoned by the person who came up with it. In an otherwise excellent report on recent studies indicating that “increased immigration makes the United States safer,” reporter Kathleen Kingsbury provided “balance” by citing dubious calculations from a June 2007 blog by Indiana University professor Eric Rasmusen that claimed to show that low crime rates for authorized immigrants (who are “by definition unusually law-abiding,” wrote Rasmusen) mask extraordinarily high crime rates for undocumented immigrants.

After being shown that he’d made a series of mistakes in handling the statistics, Rasmusen posted a correction (4/30/08) saying that a more accurate estimate would be 6.1 percent. Time, however, failed to respond to three requests to run a clarification noting that Rasmusen had withdrawn his earlier numbers.

While Preston and Kingsbury failed to question doubtful numbers others gave them, the Lou Dobbs program distorted federal prison statistics to imply that immigrants are disproportionately criminal.

It is true that a large percentage of federal prisoners are noncitizens (although the current figure is 25 to 26 percent, not 30 percent, as Dobbs’ program claimed—4/1/06). But Dobbs and his staff had to know that this statistic doesn’t mean immigrants are an important factor in crime. The federal prison population is less than 10 percent of the national total, and federal prisoners are far less likely than state prisoners to be incarcerated for violent crimes. Noncitizens are overrepresented in the federal system because of the sorts of crimes—such as cross-border smuggling and immigration offenses—that fall within federal jurisdiction. More than 10 percent of the 200,000 federal convicts are imprisoned for immigration offenses (Politics of Immigration, 5/7/08).

Dobbs has had several chances to correct the misrepresentation. New York Times business columnist David Leonhardt pointed it out on May 30, 2007. Instead of retracting the misleading number, Dobbs responded angrily (CNN, 5/30/07) that he was being attacked by “the left wing.” He remained unapologetic when he was confronted over his statistical games on the Democracy Now! radio program on December 4, 2007. Hosts Amy Goodman and Juan Gonzalez played clips of Dobbs magnifying his original distortion by saying that one-third of all prisoners were undocumented immigrants. He finally conceded that he “misspoke.”

The Lou Dobbs show—which highlighted the alleged connection between undocumented workers and crime in a whopping 94 episodes in 2007 (Media Matters, 5/21/08)—continues its policy of “misspeaking” about prison statistics.
On the March 28, 2008 program, CNN correspondent Louise Schiavone seemed to go out of her way to muddle a report on ICE’s already dubious numbers for deportable immigrants in prison. The agency “believes that up to 450,000 criminal aliens, both legal and illegal, will be behind bars in the U.S. and in queue for deportation at any one time this year,” Schiavone said. As noted before, when ICE cited its “300,000 to 450,000” figures, the agency was referring to the number of noncitizens held in U.S. prisons over the course of each year—not on any given day.

Erroneous numbers from the mainstream media on immigrant prisoners are quickly circulated across the Internet, providing ammunition for people who want to believe that a wave of foreign criminals is invading the country. Lou Dobbs Tonight is a favorite source for misinformation among anti-immigrant groups, but more respectable media are also used for this purpose.

Preston’s article on the 304,000 deportable inmates was quickly picked up by websites with names like OutragedPatriots.com (3/28/08) and AmericanPatrol.com (3/29/08), and was run under headlines like “Our Dumb ASSed Politicians Do It Again” (Gather Community Press, 3/29/08).

In an environment “where Latinos are racially profiled and immigrants are dehumanized and persecuted as ‘illegals’ and ‘criminal aliens,’” writes Justin Akers Chacon, co-author, with Mike Davis, of No One Is Illegal, “the hate-filled and the weak-minded will rally to the cause in their own violent way.” He notes that attacks on Latinos have risen “in tandem with the intensification of the immigration debate,” rising 35 percent between 2003 and 2006 (Ventura County Star, 3/27/08).

Fictitious numbers on immigrant crime in the media have undoubtedly done their part in fueling these real crimes.

David L. Wilson is co-author, with Jane Guskin, of The Politics of Immigration: Questions and Answers (Monthly Review Press). Information is available at ThePoliticsOfImmigration.org. This article originally appeared in FAIR and is reprinted with permission.

Florida Guard Convicted of Assaulting Prisoner

On January 16, 2009, a federal jury in Jacksonville, Florida found a former state prison guard guilty of a federal felony civil rights violation for attacking a prisoner in August 2005.

The prisoner, who was not named, allegedly feigned illness by lying on the floor of his cell at Florida State Prison in Raiford. Guard Paul G. Tillis responded by filling a bottle with near-boiling water and pouring it on the prisoner’s chest. Tillis then denied medical treatment to the prisoner, who suffered second-degree burns as a result of the assault.

“It is important that corrections officers realize they may not use their positions of authority to inflict physical harm on inmates as punishment,” said Acting Assistant Attorney General Loretta King. “While the vast majority of law enforcement officers carry out their difficult duties in a lawful and professional manner, the Department of Justice will continue to vigorously prosecute those who cross the line and commit this type of unlawful act.”

In fiscal year 2008, the Criminal Section of the Department of Justice’s Civil Rights Division filed the largest-ever number of federal criminal civil rights cases in a single year, and had the second-highest number of official misconduct prosecutions.

Tillis faces up to ten years in prison and a $250,000 fine. He was ordered taken into custody pending his sentencing hearing, which is set for July 6, 2009.

On June 14, 2007, the Second Circuit Court of Appeals affirmed in part and reversed in part a district court’s denial of the government’s motion to dismiss a lawsuit alleging abuse of pre-trial detainees at the Brooklyn Metropolitan Detention Center (MDC) following the September 11, 2001 attacks. However, the Supreme Court reversed that ruling on May 18, 2009, and remanded the case for further proceedings.

Javad Iqbal, a Pakistani national, was detained in a roundup of foreign Muslim males in the New York area shortly after 9/11. He had false identity papers and was arrested and placed in MDC. There, he alleged, solely due to his religion and national origin, he was held in a newly-created Administrative Segregation Maximum Security Special Housing Unit (ADMAX SHU), which was created for prisoners “of high interest.”

According to Iqbal, to be designated “high interest” a detainee merely had to be a Muslim male of Arab, North African or West Asian origin. Conditions in ADMAX SHU were much harsher than those in the MDC’s general population, or in the “normal” SHU. Prisoners were only released from ADMAX SHU after the FBI cleared them of any ties to terrorist groups. For Iqbal, this process took from January 8, 2002 until the end of July 2002.

While in ADMAX SHU, Iqbal claimed he was severely abused both physically and verbally; subjected to repetitive, unnecessary and abusive strip and body cavity searches; kept in solitary confinement with no review of his classification status; subjected to interference with the exercise of his religious beliefs; denied adequate food, exercise, basic medical care, bedding and personal hygiene items; deliberately exposed to excessive heat, excessive cold and continuous bright lighting; only allowed out his cell one hour a day, in handcuffs and shackles; and prevented from having confidential, direct and rapid communication with his attorney.

Iqbal alleged severe physical injuries from brutal beatings as well as emotional distress and humiliation. He also claimed that his mistreatment was a direct result of discriminatory policies promulgated by high-level officials in the federal government, which caused him to be classified as a “high interest” prisoner based solely upon his race, religion and national origin. Iqbal pleaded guilty to having false identity papers, served his prison sentence, and was deported to Pakistan. He then brought a Bivens action against federal officials.


The defendants appealed the district court’s ruling, and the government arranged a $300,000 settlement with Iqbal’s co-plaintiff, Ehab Elmaghraby, an Egyptian national who was too ill to return to the U.S. for trial. [See: PLN, Sept. 2006, p.30].

The defendants’ main issues on appeal were that Iqbal had not pleaded sufficient facts showing the involvement of high-level government officials such as former U.S. Attorney General John Ashcroft and FBI Director Robert Mueller, and that the emergency situation following the 9/11 attacks presented “exigent circumstances” for which there was no settled law, thereby entitling the defendants to qualified immunity.

The Second Circuit engaged in a lengthy analysis of Supreme Court decisions regarding a heightened pleading standard. The appellate court concluded that such a standard could not be required in a civil rights suit. The Court of Appeals observed that district courts may need to permit “some limited and tightly controlled reciprocal discovery so that a defendant may probe for amplification of a plaintiff’s claims and a plaintiff may probe such matters as a defendant’s knowledge of relevant facts and personal involvement in challenged conduct” before ruling on the issue of qualified immunity.

The Second Circuit held that “exigent circumstances” or “special factors” following the 9/11 attacks might excuse the inadvertent search and/or arrest of the wrong individuals. However, they could not excuse the violation of clearly-established constitutional rights of a pre-trial detainee once the detainee was in custody.

The Second Circuit held that “officials of reasonable competence could have disagreed” about whether some procedural due process beyond waiting for the FBI to clear Iqbal was required to keep him in ADMAX SHU. Therefore, the defendants were entitled to qualified immunity on that issue. However, the law was clearly established in 2002 as to the claims related to conditions of confinement, excessive use of force, unreasonable searches, and racial and religious discrimination.

Furthermore, it was plausible at the current stage of the pleadings that high-level government officials were directly involved in enacting the policies that led to Iqbal’s mistreatment. This could be pursued under 42 U.S.C. § 1985(3) as a claim alleging conspiracy.

The order of the district court denying the defendants’ motion to dismiss was therefore affirmed as to all issues except procedural due process. Iqbal was represented by attorneys Alexander A. Reinert, Keith M. Donoghue, Elizabeth L. Koob, Joan Magoolaghan, Haeyoung Yoon, Mamoni Bhattacharyya and David Ball.

Subsequently, however, the U.S. Supreme Court granted certiorari to review the appellate court’s ruling. In an opinion issued May 18, 2009, the Court first held that the Second Circuit had jurisdiction to hear an interlocutory appeal on the issues raised by the defendants. The Court also assumed, without deciding that, a First Amendment claim was actionable in a Bivens action.

Because vicarious liability does not apply in Bivens and § 1983 cases, the plaintiff must plead that each government defendant, through his individual actions, has violated the Constitution. The Court held that Iqbal had not presented sufficient facts to subject the high-level government defendants to supervisory liability.
Further, under Federal Rule of Civil Procedure 8(a)(2), a complaint must contain a “short and plain statement of the claim showing that the pleader is entitled to relief.” The Supreme Court applied its recent ruling in Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S.Ct. 1955 (2007), and determined that Iqbal had failed to plead sufficient facts to state a claim for purposeful discrimination.

Purposeful discrimination requires more than “intent as volition or intent as awareness of consequences”; rather, it involves a decisionmaker taking a course of action “because of,” not merely “in spite of,” the action’s adverse effects upon an identifiable group.

The Court held that Iqbal’s allegations that the defendants “had agreed to subject him to harsh conditions as a matter of policy, solely on account of discriminatory factors and for no legitimate penological interest; that Ashcroft was that policy’s ‘principal architect’; and that Mueller was ‘instrumental’ in its adoption and execution” were conclusory and “not entitled to be assumed true.”

“It should come as no surprise that a legitimate policy directing law enforcement to arrest and detain individuals because of their suspected link to the [9/11] attacks would produce a disparate, incidental impact on Arab Muslims, even though the purpose of the policy was to target neither Arabs nor Muslims,” the Supreme Court stated.

The Court concluded that Iqbal’s complaint did not contain facts (as opposed to mere conclusory allegations) that indicated the government defendants had intentionally adopted a discriminatory policy of classifying post 9/11 MDC detainees as “‘high interest.’” The case was remanded to the Second Circuit to “decide in the first instance whether to remand to the District Court to allow Iqbal to seek leave to amend his deficient complaint.” See: Ashcroft v. Iqbal, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009).

Justice Souter, joined by Justices Stevens, Ginsburg and Breyer, dissented from “the rejection of supervisory liability as a cognizable claim ... and from the holding that the complaint fails to satisfy Rule 8(a)(2) of the Federal Rules of Civil Procedure.” The dissenting justices noted that the issue related to supervisory liability had not been briefed for the Court, resulting in a risk of error that was “palpable.” Apparently, however, that risk was acceptable for the justices who issued the majority ruling.

$30,000 Settlement in Milwaukee Jail Death

The City of Milwaukee and other city officials settled a case involving a man who died in jail for $30,000. The case was published in April 2008. Felix Hopgood, 38, was arrested for shoplifting in July 2003. About 2½ hours after his arrest, while awaiting processing in the “bullpen” section of the Milwaukee Police Administration Building, Hopgood suffered a heart attack caused by a cocaine overdose. Guards gave first aid which was continued by Milwaukee Fire Department personnel while Hopgood was transported to Sinai Samaritan Hospital. Nonetheless, Hopgood died about two hours after he collapsed.

Hopgood’s estate filed a civil rights suit in federal district court alleging jail overcrowding and a lack of medical screening led to his death. It was implied that jail personnel failed to obtain prompt medical attention for Hopgood, although they knew of his need for it. The defendants denied the allegations and alleged that the death was caused when Hopgood obtained cocaine from another prisoner at the jail or smuggled it into the jail and later used it. City politicians were told that it would cost $30,000 to try the case. They offered the $30,000 to the estate as a settlement and the estate accepted. The estate was represented by attorney Willie Nunnery of Madison.

See: Estate of Hopgood v. City of Milwaukee, U.S.D.C. E.D.Wis., Case No. 06-C-786.
Cardani recommended a 12-18 month prison sentence because Karen "indulged herself in the proceeds of the kickback scheme. ... She took full advantage of these proceeds by enjoying vacations, driving in high-end vehicles, boating and attending sporting events, all paid for with kickback monies." He accused the Monems of living a "very lavish lifestyle." Yet Cardani also acknowledged that Karen had "been behaving well since the time this was found out."

Karen's attorney, Paul Ferder, asked the judge to impose probation rather than prison time, characterizing her as a "minimal participant" in the bribery scheme. She was under the domination and control of her husband, who expected her to behave in the tradition of Middle Eastern women, Ferder argued. She was a "kept woman" who "did what she was told to do."

Aiken sentenced Karen to one year in prison but delayed a decision about when she must surrender to authorities until September 2009. The delay suggests the possibility that Karen's prison sentence could change if Fred voluntarily returns to the U.S. from Iran.

"I hope, for your son's sake, he will do the right thing," said Aiken. Thus far, however, the prospect of serving time in federal prison has not enticed Fred to turn himself in.

The four food brokers who paid the kickbacks, Douglas Levene, Michael Levin, William Lawrence and Howard Roth, all pleaded guilty and began cooperating with prosecutors in 2007. Each faces a maximum of 13 years in prison and a $500,000 fine, but are likely to receive less severe penalties. Their sentencing hearings are scheduled for June 18 and July 1, 2009.

Meanwhile, Monem has been featured on America's Most Wanted and is included on the FBI's wanted fugitives list. A $20,000 reward has been offered for information leading to his arrest and conviction – which amounts to 196,310,000 in Iranian rials.

UNICOR Robs Jobs from Private Sector; Prisoners Sue Over Working Conditions

by Brandon Sample

It is already hard enough for free world workers to hold down a job without having to compete with UNICOR, the prison labor arm of the federal Bureau of Prisons. But that is exactly what a group of more than 300 Pennsylvania employees are going through. The workers, employed by private defense contractors, face layoffs as UNICOR expands its market share of helmet production for the Department of Defense (DOD).

Created in 1934 with the aim of rehabilitating federal prisoners through work opportunities, UNICOR uses cut-rate prison slave labor to provide services and manufacture furniture, clothing and other assorted goods for the federal government. Prisoners are paid as little as $.23 an hour and sometimes work twelve- to fourteen-hour shifts.

In late 2007, UNICOR upped its market share of producing military helmets to 50 percent by invoking the mandatory source rule, which requires federal agencies to first turn to UNICOR when making contracting decisions. As a result, more than 300 workers who make helmets for private defense contractors like BAE Systems in Pennsylvania may lose their jobs.

“I’m outraged,” said U.S. Rep. Paul Kanjorski, who represents the 11th District of Pennsylvania. “BAE Systems is being forced to cut back its workforce during a time when families are already strapped for money. We must ensure that better-qualified, law abiding citizens continue to produce these needed helmets for our troops abroad.”

Rep. Kanjorski and several other federal lawmakers are trying to force the DOD to procure competitive bids for any product when at least five percent of that product is provided by UNICOR. It is often possible for private businesses to offer lower bids for products and services even though UNICOR pays its prisoner employees pennies an hour due to UNICOR’s bloated bureaucracy.

Congress came close to raising the wages for UNICOR workers to minimum wage in 2004, with the passage of the Federal Prison Industries Competition in Contracting Act in the House, but the bill failed to pass in the Senate.

More recently, on October 8, 2008, UNICOR was sued by a group of federal prisoners who worked at a factory in a medium-security facility in Beaumont, Texas, producing military helmets. The prison was evacuated after it was struck by Hurricane Rita in 2005. The lawsuit alleges that the UNICOR workers were returned to the facility two weeks later before it was ready for occupancy; the walls were covered with black mold, and food and water were scarce.

They were returned early, according to the complaint, because UNICOR was falling behind on its helmet contract. The suit alleges that the prisoners were “constantly ridiculed, tormented, and yelled at because of deadlines on million-dollar contracts.” They worked 14-hour days during the first week, which then dropped to 12-hour days.

“At the end of the work day, [UNICOR workers] would come back to their cells with sore and aching feet, blisters on their hands ... feeling totally exhausted and in many cases, traumatized by the ordeal,” the lawsuit states. None however appear to have quit or otherwise refused to produce war material for the Pentagon even under these conditions.

The plaintiffs are seeking damages for negligence, coercion, malice, and cruel and unusual punishment. The litigation is ongoing. See: Trojcak v. United States, U.S.D.C. (E.D. Tex.), Case No. 1:08-cv-00084-RS/AK.

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PLN has previously reported on other onerous aspects of UNICOR, including the exposure of both prisoners and staff to toxic materials in electronics recycling programs. [See: PLN, Jan. 2009, p.1]. A federal lawsuit filed over the toxic exposure is still pending, and on April 23, 2009, six additional plaintiffs sought leave to join the suit. See: Smith v. United States, U.S.D.C. (N.D. Fla.), Case No. 5:08-cv-00084-RS/ AK.

Sources: www.industry.bnet.com, citizens-voice.com, Houston Press
Prisoner’s Right to Mail Announcement of Peaceful Demonstration Trumps Purported Prison Security Claims

by Marvin Mentor

On October 21, 2008, the U.S. District Court for the Eastern District of California upheld a state prisoner’s First Amendment right to send mail after his letters to several media agencies were blocked by prison authorities. The letters asked the media to announce a peaceful demonstration by prisoners against California’s Three Strikes law and double-celling at Corcoran State Prison.

The then-California Dept. of Corrections (CDC) argued that such an announcement would encourage unrest at Corcoran and other facilities, and that CDC staff had a legitimate security interest in censoring the letters. Prison officials argued the letters promoted an unlawful association, which trumped any right to send mail. The district court disagreed, finding the unlawful association claim was speculative since the demonstration was to be peaceful, and holding the emphasis on the association issue was misplaced. Thus, censoring the prisoner’s mail violated his First Amendment rights.

In 2003, Corcoran prisoner Bryan E. Ransom, representing a grassroots organization called the Black Nationalist Prison/Community, sent a press-release letter to KMPH-TV in Fresno (near Corcoran) and to Berkeley radio station KPFA, announcing his position as the Founding President/Minister of the “National Plantation Psychosis Awareness Committee” (NPPAC). He also announced a planned protest, which was described as “a statewide 3-Strike Back Lash demonstration start[ing] February 26, 2003, call[ing] for all CDC inmates to resist CDC’s illegal practice of the forced double celling of unwilling inmates into cells designed for one man occupancy. Thus creating a lethal and barbaric gladiator environment for inmates throughout the State of California....”

Not surprisingly, CDC staff confiscated Ransom’s letters to the media (for over a year), on the grounds that they violated prison rules prohibiting inciting unrest. Ransom, who was written up for a rules violation, later brought suit in federal court asserting his First Amendment right to mail the letters had been violated. The district court held that CDC’s argument, which attacked Ransom’s claim under freedom-of-association restrictions, missed the point. The feared “association” was on its face purportedly peaceful, and thus did not threaten prison security.

Further, the court noted that the “problem with Defendants’ argument is that the claim arises not out of the right of association but out of the right to send mail. Plaintiff is not premising his claim on an unconstitutional disallowance of an inmate demonstration or from an unconstitutional interference with his right to redress his grievance over double celling.”

Censoring Ransom’s mail violated his First Amendment right to communicate with others, including media agencies. Without a demonstrated connection between the mailings themselves and prison security concerns, CDC was not allowed to censor Ransom’s letters. In granting partial summary judgment to Ransom, the district court also held that CDC was not entitled to qualified immunity on the mail censorship issue. See: Ransom v. Johnson, 2008 U.S. Dist. LEXIS 89293 (E.D. Cal., Oct. 21, 2008).

University of Arizona Releases Report on Women Immigration Prisoners

by Matt Clarke

In January 2009, the Southwest Institute for Research on Women (SWIRW) and the Bacon Immigration Law and Policy Program of the University of Arizona published a report on women held in Arizona immigration prisons. It dealt with three locations: Central Arizona Detention Center (CADC) and Pinal County Jail (PCJ), both of which are in Florence, and Eloy Detention Center (EDC) in Eloy. CADC and EDC are privately operated by Corrections Corporation of America under contract to Immigration and Customs Enforcement (ICE). All three are in small, remote desert towns far from the cities of Phoenix or Tucson.

The research was conducted by SWIRW researchers and trained law students who interviewed current and former prisoners and attorneys, paralegals and social workers who work with the immigration prisoners. ICE, PCJ and CCA refused to allow their personnel to be interviewed.

Immigration prisoners are waiting completion of an administrative process, not awaiting trial on criminal charges. Nonetheless, they are often treated worse than prisoners being held for felonies in the same prison.

“Few people realize that we are locking up huge numbers of immigrants every day and holding them for months and, in some cases, years at a time. They are not being punished for a crime, and yet they are held in facilities that are identical to, and often double as, prisons or jails.” SWIRW lead research and report author Nina Rabin said. “Women immigration detainees in particular are an invisible population. We hope this report will raise awareness about women locked up just an hour away from here in conditions that would shock most Americans. We also hope to raise awareness about the U.S. citizen children separated from their mothers right now because of immigration detention. In our small sample...we encountered pregnant and nursing mothers, domestic violence victims, low-wage workers swept up in worksite raids, and asylum-seekers fleeing persecution and sexual violence.”

Immigration prisoners are covered by ICE National Detention Standards. These standards are deficient, especially for the imprisonment of women. However, even the inadequate ICE standards are not codified as laws and have no enforcement mechanism and are apparently largely ignored by the prisons.

Key findings in the report include a lack of adequate medical care—especially for gender-related problems such as pregnancy, miscarriage, ovarian cysts and cervical cancer. A lack of mental health care was also noted which was especially profound due to the large number of women who had suffered domestic and/or sexual violence and were prime candidates for PTSD. Further traumatizing the prisoners was the forced separation from families...
that lived hundreds to thousands of miles away. Many of the women had underage children and some were even nursing babies they were forcibly separated from.

The report also noted inadequate access to telephones, legal materials and legal assistance. Unlike prisoners awaiting a criminal trial, immigration prisoners are not entitled to court-appointed attorneys. However, ICE standards require that they be given free phone access to legal representatives and consulates. This was rarely done. In fact, prisoners were at mercy of an expensive phone system and those with no money often were unable to contact their families, consulates or legal counselors.

The necessity of separating immigration prisoners from prisoners incarcerated on criminal charges and women prisoners from men often results in worse conditions for the women immigration prisoners. For instance, criminal prisoners might be allowed to move about the prison to the library, recreation yards and dining facility while women immigration prisoners are served meals in their wing, brought books on a cart and allowed only very limited recreational opportunities. Similarly, few educational or other programs are offered immigration prisoners. This makes it difficult for immigration prisoners to prove rehabilitation, one of the factors an immigration court takes into account when deciding whether to issue an order of deportation or not. Immigration prisoners are also often transported in shackles and leg irons, even though they are nominally not criminals.

They also complained of low-quality food and small portions. ICE routinely resists and appeals decisions by courts to grant bonds or release pregnant women. ICE rejects or ignores applications for humanitarian parole of refugees, prisoners with serious medical conditions and victims of domestic violence—all classes of prisoners allowed by law to be released on bond. ICE also resists attempts to reduce bonds when families are unable to post the initial bond.

The report contained numerous suggestions on how Congress, ICE and the prisons could improve conditions for women immigration prisoners. Chief among these are changing policies so as not to incarcerate immigration prisoners who pose no flight or security risk and passing laws which make ICE detention standards enforceable. See: Unseen Prisoners: A Report on Women in Immigration Detention Facilities in Arizona, available online on PLN’s website.

$500,000 Awarded to New York Prisoner Raped by Jail Guard; Vacated on Post-Trial Motion

A New York federal jury awarded a woman $500,000 in a lawsuit claiming that her constitutional rights were violated when a guard forcibly raped her. The verdict, however, found the sheriff was not guilty of negligence, and the award was later vacated by the district court.

On December 17, 2002, while held at the Erie County Correctional Center, Vikki Cash was raped by guard Marchon C. Hamilton. Hamilton admitted to the sexual assault and pleaded guilty to third-degree rape. Cash then filed a state court lawsuit against Hamilton, Erie County, the Erie County Sheriff’s Department and Sheriff Patrick Gallivan. The suit was later removed to federal district court.

The court determined that the Sheriff’s Department and County were one entity. When the case went to trial in September 2008, Hamilton did not appear and a default judgment was entered against him.

At trial, Cash argued that her injuries occurred due to the County’s policy, practice and custom of allowing a lone, unsupervised male guard to supervise female prisoners. The jury agreed, and on Sept. 26, 2008 entered a verdict of liability against the county on that claim, awarding Cash $500,000.

However, the jury rejected the claim that Sheriff Gallivan was negligent for failing to ensure the personal safety and welfare of jail prisoners. Gallivan contended that the rape was not foreseeable and was the result of a rogue guard who had been properly supervised and had shown no signs of that type of behavior prior to the incident.

In a March 10, 2009 post-trial order, the district court granted the defendants’ motion for judgment as a matter of law pursuant to Fed.R.Civ.P. 50(a). The court found that Cash had proved that the jail had a policy or practice of allowing unsupervised male guards to oversee female prisoners. However, she failed to show deliberate indifference by the defendants, as she did not present proof that they were aware of “prior incidents of similar violations” resulting from that policy, which would have placed them on notice that “the policy of allowing male guards to be alone and unsupervised with female inmates presented a substantial risk of harm to the plaintiff.”

Consequently, final judgment was entered in favor of the County and Sheriff Gallivan. Both parties have since appealed to the Second Circuit. Cash is represented by Buffalo attorney Robert H. Perk and New York City attorney Derek S. Sells. See: Cash v. County of Erie, U.S.D.C. (W.D. New York), Case No. 1:04-cv-00182(M).
Habeas Hints: Traverse Motion Responses

by Kent A. Russell

This column is intended to provide “Habeas Hints” to prisoners who are considering or handling habeas corpus petitions as their own attorneys (“in pro per”). The focus of the column is on habeas corpus practice under AEDPA, the 1996 habeas corpus law which now governs habeas corpus practice throughout the U.S.

POINTS AND AUTHORITIES IN SUPPORT OF THE TRAVERSE

Short of an Evidentiary Hearing, which is granted in very, very few habeas corpus cases, by far the most critical stage for the Petitioner on federal habeas corpus case is the filing of the Traverse and supporting documents, the most important of which is the “Points and Authorities (hereafter “Ps&As”) in Support of the Traverse”.

Ironically, the Habeas Corpus Rules do not even mention the word “Traverse”, referring to it instead as the “Reply”, and suggesting that it is optional rather than required. (See Habeas Rule 5(e) [“The petitioner may submit a reply to the respondent’s answer or other pleading within a time fixed by the judge.”].) Nevertheless, the local rules of almost every District Court use the phrase “Traverse”, and in the vast majority of cases, the Petition does make it to the Traverse stage, but no further, before it is dismissed. Therefore, the Traverse is absolutely essential to staying alive on habeas corpus, because it is only through the Traverse and supporting documents that the Petitioner can persuade the judge that his or her case is one of those few that should be granted an Evidentiary Hearing instead of being dismissed outright.

Procedurally speaking, the Traverse responds to the Attorney General’s Answer, and comes into play when: (1) The court determines that the Petition is in the proper format, does not contain any obviously unexhausted claims, and orders the Attorney General to file a response to the Petition; and (2) The Attorney General (“AG”) concludes that the Petition is not subject to a Motion to Dismiss based on some potentially fatal procedural defect (the most common being a statute of limitations violation or failure to exhaust all federal habeas corpus claims in the state’s highest court). Where both of these criteria have been met, the AG will file an Answer and supporting Ps&As, and will use the latter to try and convince the District Court to dismiss the case on the basis that the petitioner has failed to comply with AEDPA, which requires a showing that the state court’s previous rejection of the petitioner’s habeas corpus claim(s) was either contrary to, or resulted from an unreasonable application of, U.S. Supreme Court law.

Simply stated, is the Petitioner’s job at the Traverse stage to rebut the showing made by the AG in the Answer, and to persuade the federal judge that the petitioner’s habeas case has enough merit that it is one of those few (less than 1%, statistically) that merits an Evidentiary Hearing rather than an outright dismissal. If the petitioner succeeds in doing so, counsel will be appointed, and the petitioner will get a chance at the hearing to prove, by a preponderance of the evidence (51% or more), that a violation of the Constitution occurred, and that this fundamental rights violation, more likely than not, affected the jury’s verdict. On the other hand, if the Traverse is unsuccessful, the Petition will be “dismissed with prejudice”, which means – barring the very unlikely prospect of a successful appeal – the end of the road on habeas corpus.

The actual “Answer” and “Traverse” themselves are nothing more than pleadings of a couple of pages in length, which use legal jargon to set forth the general contentions of the parties. Although it’s necessary to file the “Traverse” to respond to the contentions in the Answer, this is relatively easy to do (see, e.g., the sample form in my California Habeas Handbook), and there’s not much strategy involved in doing it. Here, instead, the focus is on the supporting Ps&As, which is where the parties lay out the legal and factual arguments that are either going to persuade the judge to order an Evidentiary Hearing or to permanently dismiss the case without any hearing.

T ypically, the Ps&As which the AG files in support of the Answer will run around 20-25 pages in length, and will contain the following sections: (a) a Procedural History of the case (aka “Statement of the Case”, which summarizes the decisions made in all previous courts, starting with the trial court), (b) a Statement of Facts (summarizing the facts which led to the conviction and sentence in the state court), (c) a Legal Argument section, and (d) a “Conclusion”. The Legal Argument section is the guts of the Ps&As, and it will usually start with a “Standard of Review” sub-section summarizing the general legal standards which guide the court in ruling on the Petition. This section will then go on to attack each of the petitioner’s habeas corpus claims on the merits, usually in separate sections bearing roman numerals, one for each claim. The Conclusion will wind up with a very brief statement of the relief that the AG is seeking, which in almost all cases is that the Petition be dismissed with prejudice because of the failure to state a claim that complies with AEDPA’s requirements.

In responding to the AG’s Ps&As with a Ps&As in support of the Traverse, I draw on briefing skills that I have honed over 35+ years of habeas and appellate practice in hundreds of cases. There are, however, some basic strategies which I use, and for you pro-pers who have already taken on the challenge of representing yourselves on habeas corpus, consider the following “Habeas Hints” as you draft your own documents.

Habeas Hints:

Remember, and keep reminding the court, that the purpose of the Traverse is merely to obtain an Evidentiary Hearing, not to win the case outright.

In modern times, virtually no habeas corpus Petition is ever successful unless the court first grants an Evidentiary Hearing. Under AEDPA, a hearing is required if: (1) the petitioner alleges facts which, if true, would entitle him to relief on habeas corpus; (2) the state court has not, after a full and fair hearing, reliably found the facts, and (3) the Petition does not consist solely of conclusory, unsworn statements unsupported by any proof. See, e.g., Phillips v. Woodford, 267 F. 3d 966, 973 (9th Cir. 2001); Earp v. Oronski, 431 F. 3d 1148, 1167 (9th Cir. 2005).

Working backward, #3 is satisfied so long as the Petition is supported by sworn declarations and/or admissible evidence – something that is not terribly hard to do, so long as the Petition and declarations are in the proper form. #2 is met when the
petitioner has requested a hearing in state court but the Petition was denied without one, which is what almost always happens nowadays.

That leaves #1, which is admittedly a demanding requirement. Note, however, that the italicized words require that, in deciding whether or not to grant an Evidentiary Hearing, the court must accept as “true” the facts that the petitioner has alleged. That means that, where there is a factual dispute which needs to be resolved as “true” the facts that the petitioner has alleged. That means that, where there is a factual dispute which needs to be resolved as “true”, the court must accept the Petitioner’s version of the facts and cannot reject them, no matter how loudly the AG argues that they are “not credible”. This is a much easier standard to satisfy than the one which a petitioner would face if an Evidentiary Hearing had been granted, where the petitioner would have to actually convince the court, by the preponderance standard, that the facts s/he has alleged are actually true. Therefore, it is important to remind the court early and often that this lower standard is the only one the petitioner needs to meet on the Traverse. There are several times when that can and should be done: First, when the AG sets forth the “Standard of Review”, normally at the start of the Legal Argument section of the AG’s Ps&As, the AG will always stress how hard it is to satisfy the AEDPA requirements, but will often gloss over or entirely omit the much more forgiving standard of review that governs whether or not to grant an Evidentiary Hearing. Hence, the petitioner should always emphasize that the much lesser standard applies at the Traverse stage, where the court must accept the Petitioner’s facts as true. Second, in the body of the Legal Argument section, whenever the AG has argued that the Petition has alleged facts which are “not credible”, or that witnesses declarations supporting the Petition are “unworthy of belief”, cite contrary facts from the habeas record, and then remind the court that, because credibility disputes can only be resolved at an Evidentiary Hearing, the AG’s arguments attacking the “credibility” of the Petition or the supporting witnesses are, in effect, arguments against granting the summary dismissal that the AG is seeking. Finally, in your Conclusion section, do not request simply that the court grant the Petition, but rather that the court grant an Evidentiary Hearing on the Petition and then grant the Petition.

Use rebuttal evidence to support the Traverse Ps&As.

Although there is no specific rule allowing rebuttal evidence at the Traverse stage, there is no rule against it, and it is a basic principle of the Anglo-American legal system that a party is permitted a fair opportunity to challenge or rebut the contentions made by one’s opponent. Furthermore, the petitioner has the burden of proof on habeas corpus, and the party having that burden traditionally gets to go “first and last” (the Petition being first and the Traverse last). Therefore, I strongly recommend using rebuttal in support of the Traverse, which can be accomplished by submitting a set of counter-declarations entitled “Rebuttal Declarations in Support of Traverse”, which are then stapled, indexed, and filed as a separate document. Common examples of rebuttal declarations are the following: (a) a declaration from a lay witness whose original declaration was attacked in by the AG in the Answer Ps&As, or from an expert witness whose opinions or methodology were challenged by the AG; and (b) a declaration by the petitioner explaining or fleshing out trial testimony or statements.
Kent A. Russell specializes in habeas corpus and post-conviction cases. He is the author of the California Habeas Handbook, which thoroughly explains state and federal habeas corpus and AEDPA. The latest printing of the 5th Edition (completely revised in September, 2006, with seasonal revisions since then) can be purchased for $39.99 (cost is all-inclusive for prisoners; others pay $10 extra for postage and handling). Use the order form available on the website -- russellhabeas.com -- or just send your address and check or money order to: Kent Russell. “Cal. Habeas Handbook”, 2299 Sutter Street, San Francisco, CA 94115.

Sentencing Project Releases Report on Sentencing Policy and Practice

by Matt Clarke

In February 2009, The Sentencing Project released a report on developments in sentencing policies and practices in 2008. The report notes that, with 2.3 million prisoners, 5 million citizens on parole or probation and a worldwide economic crisis, sentencing reforms to reduce the prison population have gained in importance. This is easily understood: “since 1990, state corrections expenditures have grown by an average of 7.5% per year” making it “a substantial contributor to the budget problems faced in many states.”

Arizona enacted SB 1476, allowing the Adult Probation Services of a county to retain up to 40% of the savings associated with a reduction in probation revocations. Kentucky, with HB 406, permitted certain prisoners within 180 days of release to be incarcerated at home, allowed persons incarcerated due to technical parole violations to receive credit for time spent on parole and made prisoners completing drug or education programs eligible for a 90-day earned discharge credit. With SB 2136, Mississippi reduced the percentage of a sentence a prisoner convicted of certain nonviolent crimes had to serve and, with HB 494, allowed compassionate parole for terminally-ill prisoners convicted of nonviolent crimes regardless of amount of time served.

Local initiatives passed in Fayetteville, Arkansas and Hawaii County, Hawaii declaring marijuana the lowest law enforcement priority. Louisiana’s HB 292 allowed a drug conviction to be set aside and prosecution dismissed upon completion of a drug courts diversion program. Massachusetts voters overwhelmingly passed Question 2, decriminalizing possession of one ounce or less of marijuana and making it subject to a $100 civil fine. New Jersey passed AB 1770, allowing special probation for some drug defendants otherwise ineligible for probation and permitting the reduction of fines for financial hardship and reduction of special probation times for exemplary progress. Vermont passed HB 859, expanding the Intensive Substance Abuse Program, community-based substance abuse services for persons under supervision and a authorizing a feasibility study of expanding drug courts statewide. It also allows the prison system to petition a court to reduce a prison sentence to probation for successful progress and limits probation officers’ caseloads.

Connecticut (HB 5933), Iowa (HF 2393) and Illinois (SB 2476) passed legislation establishing methods to study the potential impact of legislation and policy changes on ethnic and racial minorities. Iowa also required grant applications to state agencies to include an impact assessment. Wisconsin’s governor issued Executive Order 251 creating a Racial Disparities Oversight Commission, establishing methods to monitor criminal justice practices for disparate impact and directing the Office of Justice Administration to study the role of prosecutorial discretion in creating racial and ethnic disproportionalities.

Kentucky passed SJR 80 creating a subcommittee to study the efforts of other states in reforming their penal codes with the intent of reducing prison overcrowding by modifying the penal code’s sentencing scheme for nonviolent crimes. South Carolina passed a similar act, S 144. With HB 4, Pennsylvania authorized sentencing courts to allow a conditional minimum sentence, accelerating the release of certain prisoners convicted of nonviolent crimes upon completion of certain programs.

Kentucky’s governor rescinded essay submission, three character reference and
application fee requirements for citizens seeking voting rights restoration following a felony conviction. Colorado passed SB 66 allowing juveniles facing prosecution for certain crimes formerly requiring prosecution as an adult to plead guilty to a Class 2 felony and be incarcerated in the Youthful Offender System. Utah's HB 86 appropriated $150,000 to be used for postsecondary education in prisons.

The report recommended that states reconsider overly harsh sentencing policies—including mandatory minimums, "truth-in-sentencing" and life without parole. It suggested the expansion of incarceration alternatives and sentencing diversion programs, including community-based treatment and training programs. It recommended the revision of parole and probation revocation procedures to include intermediate sanctions and other alternatives to incarceration. It said that parole eligibility criteria should be revised to reduce unnecessarily lengthy times served and provide incentives for program participation. It stated that states should expand eligibility for proven diversion and treatment programs and should especially reconsider restrictions excluding persons with violent, repeat or non-drug crimes. However these haphazard and piecemeal efforts are unlikely to change the steady exponential growth of the nation's prison population which require significant sentencing reform to put a dent in the prison and jail population. See: The State of Sentencing 2008 by Ryan S. King, The Sentencing Project - February 2009.

Oregon Jail Guards Lose Access to Porn Sites

by Mark Wilson

Guards at the Multnomah County Detention Center (MCDC) couldn’t be trusted to stay off Internet porn sites during work hours, so Sheriff Bob Skipper pulled the plug effective December 1, 2008.

Rampant, improper use of the Internet at the jail came to light in 2007 when a guard boasted on an online gaming site that he beat a prisoner without provocation, breaking his eye socket. An investigation revealed that the guard, David B. Thompson, had accessed the gaming website from his work computer more than 1,700 times during the previous eight months. [See: PLN, March 2009, p.25].

While examining a computer hard drive during an unrelated investigation, MCDC officials discovered that three guards had separately used the computer more than a year earlier to look at pornographic images, said Chief Deputy Ron Bishop, who manages the jail. An investigation is pending.

MCDC administrators recently began using new software to track Internet use by sheriff's department employees. According to Bishop, the software showed some people were spending far more time surfing the Internet for personal reasons than previously suspected. “Is it potentially impacting productivity? The answer is yes,” he admitted.

Under a new policy that took effect last December, employees at the county’s two jails will no longer be able to surf the Internet from work computers unless they submit a written request detailing why they need online access. Computers in most of the jail’s monitoring stations and cell blocks will be disconnected.

Since taking office in July 2008 after his predecessor, Bernie Giusto, resigned under fire for ethics violations, Sheriff Skipper has vowed to crack down on employee misconduct that went unchecked on Giusto’s watch. [See: PLN, Jan. 2008, p.12].

Sgt. Phil Anderchuk, president of the union that represents jail deputies, said that while misuse of the Internet had not been a widespread problem, he did not object to the new restrictions. “We’ve worked for decades without the Internet; it’s not the end of the world,” he stated. “There are times it’s useful, but it’s not necessary.”

Source: The Oregonian
Arkansas Sends Toxic Tech Trash to UNICOR Recycling Program

by Matt Clarke

A number of counties in Arkansas have been sending their toxic electronics waste, including broken computers and televisions, to Federal Prison Industries, Inc. (UNICOR), the industry program for the U.S. Bureau of Prisons (BOP).

UNICOR uses prisoners at a federal facility in Texarkana, Texas to process the electronics trash, which contains toxic materials such as mercury, cadmium and lead. The Pulaski County Solid Waste Management District (PCSWMD), which also collects electronics waste from Jefferson, Perry, Prairie, Saline and Wodruff counties, sent 217 tons to the UNICOR program last year. The nine-county Upper Southwest Solid Waste Management District sends 15 tons a year. Fayetteville sent its 17 tons of electronic waste to Washington County, which in turn shipped it to Texarkana.

Questions arose after a November 9, 2008 60 Minutes report revealed that some American companies had illegally exported electronics trash overseas, which was linked to soil pollution in Guiyu, China. Terry Whiteside, a UNICOR factory manager in Texarkana, refused to answer questions about whether UNICOR exported electronic waste, referring all inquiries to the BOP.

However, BOP spokesperson Felicia Ponce declined to answer questions on the subject. PCSWMD deputy director Carol Bevis said Whiteside had told her that UNICOR did not export electronic waste. UNICOR officials in Washington, D.C. also assured the Arkansas Department of Environmental Quality that the recycling program did not export waste to third-world countries. But if that’s true, why won’t UNICOR and the BOP answer questions from the media?

Jim Puckett, founder of Basel Action Network, a Seattle-based nonprofit watchdog group that works to prevent affluent nations from dumping their toxic waste in poor countries, said it was discomfiting to UNICOR recycling everyone. “It lowers the whole bar for everyone,” said Puckett. “It lowers the whole bar for everyone.” Further, UNICOR recycling programs have exposed both prisoners and prison employees to toxic materials. [See: PLN, Jan. 2009, p.1].

A large increase in electronics waste is expected in the near future as the nation transitions to digital television broadcasting and people discard their old T.V.s. [See: PLN, May 2009, p.37]. A 2007 Arkansas state law will prohibit landfills from accepting electronics trash beginning in 2010; unfortunately, this may result in a rush to dump electronics before that deadline. Some waste management facilities are already refusing to accept electronics trash while others are charging per-item fees.

Since 2006, Illinois, Michigan, Minnesota, New Jersey, Rhode Island and Washington have prohibited the use of prisoner labor in recycling programs in most cases, according to Barbara Kyle with the San Francisco-based Electronics TakeBack Coalition. UNICOR, however, still relies on prison recycling programs, which may or may not be dumping toxic electronics waste overseas. []

Sources: Arkansas Democrat-Gazette, Associated Press

New Mexico Abolishes Death Penalty; Similar Efforts Fail in Other States

by David M. Reutter

Regardless of my personal opinion about the death penalty, I do not have confidence in the criminal justice system as it currently operates to be the final arbiter when it comes to who lives and who dies for their crime,” said New Mexico Gov. Bill Richardson, upon signing a bill to repeal the state’s death penalty.

The repeal becomes effective July 1, 2009, but will not affect the two prisoners currently sitting on New Mexico’s death row. For crimes committed after July 1, the maximum sentence will be life without the possibility of parole.

Gov. Richardson, who formerly supported capital punishment, said that signing the bill was the “most difficult decision” of his political life, but that “the potential for ... execution of an innocent person stands as anathema to our very sensibilities as human beings.”

After visiting the state prison that houses the death chamber and touring the maximum security unit where life-sentenced prisoners will be housed under the new law, Richardson said, “My conclusion was those cells are something that may be worse than death. I believe this is a just punishment.”

As of the day he signed the bill, Richardson’s office had received 10,847 phone calls, e-mails and walk-in comments from people voicing their opinion on the legislation to abolish the death penalty, which passed with a Senate vote of 24-18 after clearing the House. Of those comments, 8,102 were in support of repealing the death penalty and 2,745 were against.

The American Civil Liberties Union applauded the governor’s actions. “Gov. Richardson’s decision today to sign the bill abolishing the death penalty in New Mexico is a historic step and a clear sign that the United States continues to make significant progress toward eradicating capital punishment once and for all,” the ACLU said in a written statement. It continued by saying Richardson’s “courageous and enlightened decision” sends a powerful message that Americans “need to take a hard look at our error-prone, discriminatory, and bankrupting system of capital punishment.”

In addition to his concern that minorities are “over-represented in the prison population and on death row,” Richardson said the death penalty “did not seem to me to be good moral leadership and good foreign policy.”

Capital punishment is not used in 91 countries, and according to Amnesty International, 95% of all reported execu-
tions in 2008 occurred in just six nations: China, Iran, Pakistan, Iraq, Saudi Arabia and the United States. The U.N. has called for a worldwide moratorium on capital punishment. [See: PLN, Nov. 2008, p.27].

New Mexico joins 14 other states that do not impose the death penalty; it is only the second state to abolish executions since capital punishment was reinstated by the U.S. Supreme Court in 1976. New Jersey repealed its death penalty in December 2007. [See: PLN, June 2008, p.16].

Connecticut came close to being the third state in recent years to do away with capital punishment, when the House and Senate voted to repeal the death penalty. Governor M. Jodi Rell immediately vetoed the bill, on May 22, 2009.

“I appreciate the passionate beliefs of people on both sides of the death penalty debate. I fully understand the concerns and deeply held convictions of those who would like to see the death penalty abolished in Connecticut,” Rell stated. “However, I also fully understand the anguish and outrage of the families of victims who believe, as I do, that there are certain crimes so heinous – so fundamentally revolting to our humanity – that the death penalty is warranted.”

State Rep. Michael Lawlor called Connecticut’s death penalty “a false promise” and criticized Rell’s immediate veto. The bill would have imposed life-without-parole sentences, and would not have applied to prisoners currently sentenced to death.

Several states, including Kansas, Maryland and Montana, are also considering abolishing capital punishment, partly due to financial reasons. The ACLU of Northern California, for example, estimates that California could save $1 billion over five years by repealing the death penalty.

A Colorado bill to do away with capital punishment and use the savings to pay for cold-case investigations passed the state House by one vote last April, but was killed in the Senate on an 18-17 vote on May 6, 2009. Four Democrats crossed party lines to oppose the legislation.

Some critics contend that imposing life-without-parole sentences is simply trading one form of the death penalty for another, with lifers eventually dying in prison. On May 20, 2009, the Other Death Penalty Project (ODPP), a Lansing, California-based group, mailed over 900 organizing kits to prisons nationwide. The ODPP “aims to end the sentence of life without the possibility of parole, which currently affects more than 33,000 prisoners in this country,” and “plans to challenge those in the anti-death penalty movement who advocate for life without the possibility of parole as an alternative to the more obvious, traditional forms of execution.”


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$4.6 Million Settlements in Death of Quadriplegic D.C. Prisoner

by David M. Reutter

When 27-year-old Jonathan Magbie entered the District of Columbia Jail to serve a 10-day sentence, he was a quadriplegic confined to a mouth-operated wheelchair. Four days later he was dead.

D.C. Superior Court Judge Judith E. Retchin sentenced Magbie to jail after he pleaded guilty to possession of marijuana. He had been arrested when D.C. police pulled his cousin’s car over in April 2003, finding a gun and marijuana in Magbie’s pockets. He had no prior criminal record.

Magbie, who was paralyzed from the neck down since being hit by a drunk driver at the age of 4, admitted he had bought the marijuana. Judge Retchin said she imposed the 10-day jail sentence, rather than the typical first-time offender sentence of probation, because Magbie stated he would continue smoking marijuana to alleviate the pain from his medical condition.

After Magbie was sentenced on September 20, 2004, he was taken to the D.C. Jail. While incarcerated at that facility his medical care was provided by a private contractor, Center for Correctional Health and Policy Studies, Inc. (CCHP).

When Magbie experienced respiratory problems, he was sent to the Greater Southeast Community Hospital (GSCH). At the request of CCHP, he was then transferred to the Correctional Treatment Facility (CTF), where CCHP’s infirmary was located. Over the next two days Magbie “was denied access to food and water, locked in a room where he could not call for help and otherwise mistreated and neglected,” according to a subsequent federal lawsuit filed by his estate.

The main problem was that Magbie required a ventilator to breathe at night, and CCHP did not have one available. When he again experienced respiratory problems on September 24, 2004, paramedics were called. They found him to be “unresponsive and very sweaty” and his underwear “was saturated with urine,” according to a D.C. inspector’s report.

A trip to the hospital was delayed by about 30 minutes because jail staff insisted on proper paperwork and a blood sugar test. Upon his arrival at the hospital, Magbie was found to be “acutely ill.” He died later that night. An autopsy revealed the cause of death was a “displaced tracheotomy tube, which resulted in oxygen failure.”

The defendants in the federal lawsuit blamed each other – the hospital blamed the jail staff, while the jail blamed the hospital. In addition to the District of Columbia, the defendants included GSHP, CCHP, Corrections Corp. of America (which operated the CTF), and two doctors.

On April 25, 2007, D.C. officials agreed to pay $1 million to Magbie’s estate, which was represented by his mother, Mary Scott. The District also made changes in how the jail handles prisoners with disabilities or medical issues.

“The family’s concern was to make certain that, to the extent anyone can prevent it, that this terrible type of event never happens again,” said Elizabeth Alexander, an ACLU attorney who represented Scott. “A series of people dealt with this young man and every single place where something could go wrong, it did go wrong.”

Additional, undisclosed settlements were reached with CCHP, GSHP and the other defendants, with the last settlements occurring in November 2008. The combined settlements, including the payment from the District of Columbia, totaled $4.6 million. See: Scott v. District of Columbia, U.S.D.C. (D. DC), Case No. 1:05-cv-01853-RWR. Additional source: Washington Post

FBI Arrests Former Prisoner Indicted for Hacking Massachusetts Jail Computer

On November 5, 2008, the FBI arrested Francis G. Janosko, 42, for hacking into a computer at the Plymouth County Correctional Facility (PCCF) while he was incarcerated at the Massachusetts jail.

A previously-sealed indictment was handed down a week before the arrest; however, the FBI was unable to apprehend Janosko because he had been on the run since his release on bond in May 2008. He was caught after the FBI traced an e-mail Janosko sent to a jail employee, which led to his capture in North Carolina.

The federal indictment charged Janosko with one count of aggravated identity theft and one count of intentional damage to a protected computer. He was accused of exploiting “a previously unknown idiosyncrasy” in legal research software that jail prisoners were allowed to use.

The software was supposed to limit prisoners’ computer access to legal research only, but Janosko was able to access the Internet and other programs on the jail’s network from October 1, 2006 through February 7, 2007. He was caught when he attempted to access “an important jail management program” using a bogus username and password.

Janosko allegedly downloaded two short video clips, digital photographs of two jail employees and two prisoners, and an aerial photo of the jail. He also accessed a directory that contained data on 1,100 jail employees, using it to obtain information about six PCCF workers. According to the indictment, the directory included the names, home addresses, home phone numbers, dates of birth, past employment histories and Social Security numbers of the employees.

Janosko reportedly shared this information with other jail prisoners. However, Plymouth County Sheriff Joseph McDonnell stated the directory did not contain the employees’ Social Security numbers.

Janosko faces up to 10 years in prison and a $250,000 fine. He was being held at PCCF following his arrest by Plymouth police for using his cell phone to take pictures of a girl in the local library. This was a violation of his probation on child pornography charges, which stemmed from a December 2005 arrest after authorities found nude pictures of children on his cell phone. Further, as a condition of his probation he was ordered not to use computers.

On June 4, 2008, a federal jury in Iowa awarded $750,000 to two political protesters who were arrested at the direction of the Secret Service, taken to jail and unlawfully strip-searched. After the court ordered another trial, a second jury awarded damages in the reduced amount of $55,804.

Alice McCabe and Christine Nelson, both retired school teachers, arrived at Noelridge Park in Cedar Rapids, Iowa on September 3, 2004 to attend a protest. The Republicans had rented the park for the day for a campaign event featuring President Bush. Access was strictly controlled and limited to invited ticket holders.

McCabe and Nelson were wearing anti-Bush buttons and carrying a small sign; they wandered around the perimeter of the event, looking for the protest. There they encountered Secret Service Agent Bruce Macaulay. Macaulay told them to leave the park, and had them arrested when they started to comply. McCabe and Nelson claimed they were singled out for their political opinions because there were many unticketed Republican supporters milling about the perimeter of the park who were not arrested.

McCabe and Nelson were taken to the Linn County Jail. Although they were only charged with misdemeanor trespass, deputy jailer Michelle Mais subjected them to a strip search with visual body cavity inspection. The charges were later dropped.

They filed a civil rights suit in federal court alleging their constitutional rights were violated when they were arrested for their political beliefs and strip searched at the jail. Prior to trial, the court held that the strip search was unconstitutional.

At trial, Macaulay testified that he had arrested McCabe and Nelson because they were being unruly and had refused multiple orders to leave the park. The jury found in favor of Macaulay, but awarded $250,000 to McCabe and $500,000 to Nelson in damages against Mais on the unlawful strip search claim.

Judgment was entered for the remaining defendants, including the United States and the Secret Service. On July 22, 2008 the district court awarded $13,314.85 in costs for the defendants who prevailed at trial, against McCabe and Nelson.

On October 2, 2008, the court granted the defendants’ motion for a new trial and vacated the $750,000 jury award. The plaintiffs were ordered to accept a remittitur in the amount of $75,000 ($25,000 for McCabe and $50,000 for Nelson) or retry the case. The plaintiffs rejected the remittitur and another trial was held in late October 2008.

The second jury awarded damages against Mais in the amount of $10,002 for McCabe and $45,802 for Nelson, for a total of $55,804. On March 16, 2009, the district court granted attorney fees and costs to the plaintiffs in the total amount of $34,025.03, though their attorneys had requested $117,249.37. See: McCabe v. Mais, 2009 U.S. Dist. LEXIS 20717 (N.D. Iowa, Mar. 16, 2009)

McCabe and Nelson have since appealed the court’s rulings, including the order granting a new trial and the order on attorney fees. They are represented by Cedar Rapids attorneys David O’Brien and Matthew J. Reilly. See: McCabe v. Mais, U.S.D.C. (N.D. Iowa), Case No. 1:05-cv-00073-LRR.

Separately, it was reported in August 2008 that McCabe and Nelson received a $50,000 settlement from the state. The Iowa State Appeal Board approved the settlement, which involved claims against two state troopers who participated in their arrest.

Positive Correlation between Mental Illness and Prison Victimization

by Jimmy Franks

In September 2008, the Center for Behavioral Health Services & Criminal Justice Research (the Center) published its Policy Brief regarding a recent survey conducted to determine the quality of life for prisoners in New Jersey’s Department of Corrections (DOC). The survey was funded by the Prison Rape Elimination Act of 2003 and authored by Rutgers University Professors Nancy Wolf, Ph.D., and Jane Seigal, Ph.D., along with Center statistician, Jing Shi, M.S. A random sample of approximately 7,500 male and female adult prisoners was selected from 13 male institutions and one female institution. The purpose of the survey was to determine the prevalence of physical and sexual victimization in New Jersey prisons and their correlation with mental illness. Although there is an across-the-board correlation between mental illness and abuse, the survey concluded “physical victimization was more common than sexual victimization among both male and female inmates.”

One disturbing trend uncovered in this study was the increased prevalence of victimization among prisoners who reported a history of sexual or physical abuse prior to age 18. In point of fact, both male and female prisoners who reported a pre-adult history of sexual victimization were shown to have a two to four times greater likelihood of being similarly victimized in prison compared to prisoners without the history of abuse.

Specific mental illnesses were also found to predict specific types of victimization. For instance, male prisoners previously treated for depression, Post Traumatic Stress Disorder or anxiety were shown to be at a greater risk of being sexually assaulted by other prisoners. On the other hand, those previously treated for schizophrenia or bipolar disorder may experience inappropriate sexual contact but not sexual assault.

Overall, this study succeeded in shining a much-needed light on the plight of many mentally ill prisoners in New Jersey and, by inference, all other states. It really should come as no surprise that people who are victims of abuse in their pre-adult years are more likely to be victimized in prison. What some may consider a weakness in this study may be found in the relatively small number of female prisoners surveyed and whether they provide an accurate random sample representative of the total female prison population.

However, even if the results are slightly skewed, there should be no doubt as to the positive correlation between mental illness and victimization in prison. In light of this study, New Jersey’s DOC enhanced its guard training to include new curricula on victimization. Additionally, a “zero tolerance policy” regarding prison rape was instituted, as well as a prisoner education program geared toward preventing, reporting and treating sexual victimization. If similar programs and initiatives were to be mandated in prisons nationwide, it would certainly lessen the incidence of victimization for our prisons’ most vulnerable residents, the mentally ill. Allowing current abusive trends to continue and even worsen will negatively impact not only the prison environment but society at large as the predators who commit the violence are set free.

Source: Center for Behavioral Health Services & Criminal Justice Research, Policy Brief - Victimization Inside Prisons.

Santa Cruz County, Arizona Pays $3 Million in Strip Search Suit

by Jimmy Franks

On November 25, 2008, following two days of negotiation mediated by retired Pima County, Arizona Superior Court Judge, Honorable Lawrence Fleshman, the parties involved in a Class Action complaint regarding unconstitutional strip searches reached a satisfactory settlement, which now is subject to approval by an Arizona district court.

The complaint was filed pursuant to 42 U.S.C. §1983 on February 25, 2008 by George Victor Garcia against Santa Cruz County, Santa Cruz County Sheriff Tony Estrada and a number of Sheriff’s Deputies. At issue was the alleged Fourth Amendment violations in connection with the County’s practice of strip searching pre-arraignment arrestees “for whom there was no reasonable suspicion that they may be attempting to conceal contraband or weapons, and the strip searches were conducted in an area where others, not participating in the searches, could observe the person being strip searched and who included members of the opposite sex.” The Class Members represented in this action include all arrestees who were booked into any Santa Cruz County detention facility between February 25, 2006 and August 26, 2008 that were strip searched prior to arraignment.

The terms of the settlement leave the individual Class Member payments will vary depending on a number of factors. For instance, although some Class Members, depending on their crime and specific circumstances at the time of their booking and strip search, will be entitled to receive $15. Others may receive up to $70. And still others, as much as $3,500. Added to this amount, comes what are referred to as “Enhancements,” which consist of an additional $250 payment for EACH of three possible conditions: (1) they were under 21 or over 60 at the time of the qualifying strip search; (2) they had a physical or mental disability at the time of the strip search; (3) they were pregnant at the time of the strip search. Lastly, Class Members who are able to

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Provide records or reports from a licensed professional establishing that he sustained and received treatment for a physical, emotional or psychological injury caused by the strip search, will be entitled to an additional award of not less than $1,000 and not more than $5,000.

All these terms are subject to court approval, and the specific amounts will be adjusted as necessary in order to provide proportional payments to each verified Class Member and to insure the total amount does not exceed $2,162,300. The bar date for anyone wishing to join the action was May 16, 2009. All claim forms must be post-marked by May 16, 2009 in order to qualify for any possible payment. Anyone who believes he is a Class Member and wishes to obtain a claim form is urged to write Garcia v. County of Santa Cruz Strip Search Class Action, c/o Claims Administrators, P.O. Box 8060, San Rafael, California 94912-8060. Or contact the Law Office of Mark E. Merin, 2001 P Street, Ste. 100, Sacramento, California 95811, (916) 443-6911, email: office@markmerin.com.

See: Garcia v. Santa Cruz County, U.S.D.C.-AZ, Tucson, #cv-08-00139-TUC-RCC. Stipulation of Settlement

$10,000 Verdict in Sexual Assault by Virginia Guard

On October 20, 2008, a Virginia federal jury awarded a former Pittsylvania County Jail prisoner $10,000 in a lawsuit that claimed a guard had “sexually molested, harassed, and assaulted” her. The suit alleged that jail guard Hank Hazelwood violated Sheril Ann Carr’s Eighth and Fourteenth Amendment rights while she was a prisoner in 2006.

Carr testified that there were other incidents, but they were dropped from the lawsuit due to the statute of limitations. The issue at trial concerned how Hazelwood, a sergeant, took Carr into an office to make a telephone call. As she used the phone, Hazelwood groped her so forcefully that she later urinated blood. Another woman’s videotaped deposition was admitted at trial. She testified to a similar incident involving Hazelwood.

Both women’s complaints were dismissed by Sheriff’s investigators because they could not be substantiated. Carr studied the law and filed her § 1983 complaint pro se; she was later helped by a new program launched by the federal courts and the University of Virginia School of Law. The program uses law students to assist attorneys who agree to take cases pro bono.

Prior to trial, the district court had adopted a magistrate’s recommendation to deny Hazelwood’s motion for summary judgment, finding the defendants had waived the affirmative defense of failure to exhaust and Carr had in fact exhausted her available administrative remedies. See: Carr v. Hazelwood, 2008 U.S. Dist. LEXIS 88672 (W.D. Va., Nov. 3, 2008).

Taking only 40 minutes, the jury found for Carr despite Hazelwood’s testimony that he did not molest her. Following the jury’s $10,000 verdict, Carr’s counsel moved for attorney fees and was awarded $15,000 on December 8, 2008. Carr was represented by George P. Sibley III and Harry M. Johnson III of the Hunton & Williams, LLP law firm. See: Carr v. Hazelwood, U.S.D.C. (W.D. Va.), Case No. 7:07-cv-00001.
The Bureau of Justice Statistics (BJS) released a report on the prevalence of sexual misconduct and violence at juvenile residential facilities. The report, titled *Sexual Violence Reported by Juvenile Correctional Authorities 2005-06*, is in accordance with the Prison Rape Elimination Act of 2003 (PREA). The PREA requires the BJS to collect data on the incidence and prevalence of sexual violence and misconduct in adult and juvenile correctional facilities nationwide.

The BJS conducted the 2005 Survey of Sexual Violence (SSV) between January 1 and June 15, 2006 and the 2006 SSV between January 1 and June 31, 2007. The surveys included state juvenile correctional systems and local or private juvenile facilities and were designed to measure the number of youth-on-youth (YOY) sexual violence as well as staff-on-youth (SOY) sexual misconduct and harassment. All fifty states plus the District of Columbia reported for state facilities and a representative sample was drawn from the local and privately operated facilities. Only three states – Montana, New Hampshire and Wyoming – reported no allegations at all.

Each year, more than 2,000 allegations are recorded at juvenile facilities. About 57% of reported allegations were YOY and the remaining 43% were SOY. For both 2005 and 2006 there were approximately 4,072 allegations, 732 of which were eventually substantiated. All allegations were classified as one of the following four categories: substantiated, unsubstantiated, unfounded or investigation ongoing. Substantiated incidents are generally higher in juvenile facilities than in adult prisons and jails. According to the report, the youth rate was 3 substantiated incidents per 1,000 juveniles and adults were less than one per 1,000.

Victims of YOY incidents were more likely to be males while victims of SOYs were mostly females. According to the report, around 55% of SOY perpetrators were males between the ages of 25 and 290. Among staff perpetrators 44% were black and 37% were white while only 19% were Hispanic. More than a quarter of male SOY perpetrators had less than 6 months tenure. While nearly half of female staff perpetrators had less than 6 months on the job.

Most youth perpetrators received punishment for their actions with 63% facing legal ramifications. Others were punished internally by the individual facility. While local and private facilities fired 87% of staff involved outright, state-run programs only fired 35%. A total of 99% of staff in local and private and 75% in state facilities lost their jobs due to individuals resigning in lieu of being discharged.

According to the report, the BJS has developed a new system to gather information about youth sexual misconduct directly from the juvenile victims. The new method, called the National Survey of Youth in Custody, will utilize anonymous, self-administered surveys using audio computer-assisted interview procedures. The BJS hopes youths will feel more comfortable using the new system, thereby allowing for more accurate reporting on this sensitive subject.

Sources: *Sexual Violence Reported by Juvenile Correctional Authorities, 2005 – 2006*, Bureau of Justice Statistics. This report is available on PLN’s website.

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**Report Says Unfinished Prison Project Is Single Greatest Iraq Reconstruction Failure**

_by Matt Clarke_

On February 2, 2009, Stuart W. Bowen, Special Inspector General for Iraq Reconstruction, released a report on the United States’ appropriation of $50 billion for rebuilding efforts in Iraq. The report, titled *Hard Lessons: The Iraq Reconstruction Experience*, blamed many of the problems encountered in reconstruction projects on pre-war planning that was “blinkered and disjointed,” and on poor security in the post-war phase.

“Why was an extensive rebuilding plan carried out in a gravely unstable security environment?” asked Bowen, who served under former President George W. Bush in various capacities. “This question underscores an overarching hard lesson from Iraq: Beware of pursuing large-scale reconstruction programs while significant conflict continues.”

Although there was a fragile improvement in the security environment in Iraq, the report criticized the U.S. occupation forces for having “neither the established structure nor the necessary resources to carry out the reconstruction mission it took on in mid-2003.” The report also noted that “U.S. reconstruction managers were overwhelmed by the challenges of building in a war zone” and hampered by “weak unity of command and inconsistent unity of effort,” which resulted in a high rate of personnel turnover and lack of cooperation among government agencies.

Another costly error was the disbanding of the Iraqi police force and military, and the de-Baathification of the Iraqi government. This meant that the U.S. occupation “had to build entirely new Iraqi security forces, a task that would ultimately consume more than half of all U.S.-appropriated reconstruction dollars.”

While noting that incidents of out-and-out fraud constituted a relatively low percentage of the funds spent on reconstruction, there were some “egregious examples of fraud” which, along with other waste, “grossly overburdened” rebuilding efforts.

The report especially criticized the “overuse of cost-plus contracts, high contractor overhead expenses, excessive contractor award fees and unacceptable program and project delays,” which “contributed to a significant waste of taxpayers’ dollars.” An estimated $4 billion in Iraq reconstruction funds was deemed “waste.”

The report singled out a prison project in Khan Bani Saad as “perhaps the single greatest project failure in the U.S. reconstruction program.” The U.S. spent $40 million on the maximum-security prison, but has nothing to show for it except a “skeletal, half-built” shell that “will probably never house an inmate.”

According to the report, “poor security and weak subcontractor performance” resulted in suspension of the prison construction project, which is unlikely to ever be completed. “It’s a bit of a monument in the desert right now because it’s not going to be used as a prison,” Bowen stated.
The 1,800-bed prison project began in March 2004 when the U.S. Army Corps of Engineers awarded the contract to Pasadena, California-based Parsons, a construction and engineering company. The prison was supposed to be finished in November 2005. After numerous delays, work was suspended in June 2006 due to “continued schedule slips ... and massive cost overruns.” Parsons said the project was too dangerous to complete due to high levels of violence in the region.

Subsequent efforts to restart the project were unsuccessful, and the unfinished prison was eventually turned over to Iraq’s Justice Ministry. Due to substandard construction, including crumbling concrete and the improper use of reinforcement bars, some parts of the facility will have to be demolished.

Sayyed Rasoul al-Husseini, head of the Khan Bani Saad municipal council, described the failed prison project – which would have created 1,200 jobs – as “a big monster that’s swallowed money and hopes.” Which, ironically, is also an apt description of the penal system in the United States.

Sources: www.cnn.com, Associated Press

Ohio Limits Electronic Monitoring to Only Those Who Can Pay

If you’re convicted in Ohio and can afford to pay, you may be able to obtain release on electronic monitoring. If not, you can serve your time in the Corrections Center of Northwest Ohio (CCNO). That is the new policy adopted by CCNO to deal with a projected $200,000 budget shortfall.

“We formalized that we need only paying customers to get through this financial crisis,” said Jim Dennis, CCNO’s executive director. “The judges cooperated with us and started giving us people that could pay, which severely limited the debt we were going to have.”

The electronic monitoring program allows people convicted of misdemeanors and minor felonies to work while they serve their sentences. The program had 1,203 participants enrolled in 2008. The problem cited by CCNO is that about one-quarter of those persons were unable to pay the $10 per day cost for electronic monitoring or the $15.50 per day cost for GPS monitoring.

The program has a 2009 budget of $460,000, of which $228,000 is from state grants and $232,000 is projected to be paid by the participants. That budget is predicated on a monthly average of 100 to 120 people enrolled in the program. Currently 87 people are in the electronic monitoring program, and of those only three are unable to pay.

With fewer people in the program than expected, the revenue will be less. “We realize that this clientele is traditionally in dire economic straits,” said Dennis. “We need to increase the numbers of paying customers to be able to make budget.”

Aside from the obvious injustice of only allowing those who can afford to pay to participate in the release program, the decision to incarcerate people who can’t pay, at a cost of about $70 per day, makes no fiscal sense in light of the much lower cost of electronic monitoring.

Source: Toledo Blade
Miami’s Sex Offender Bridge Encampment Continues to Grow

**by David M. Reutter**

Population: 52. That’s how many sex offenders have been forced to live under the Julia Tuttle Causeway in Miami, Florida as of March 2009. In late 2007, the population was only 19. [See: *PLN*, June 2008, p.1].

With city and county laws creating restricted residency zones, the number of sex offenders who reside under the causeway bridge is bound to continue growing. The strict laws forbid sex offenders from living within 2,000 or 2,500 feet of schools, day cares, parks, playgrounds and school bus stops. The bridge is the only place available for many released sex offenders in Dade county.

“We have talked to them, they demonstrate that they’re looking, but they just haven’t been able to find anything. There’s so many restrictions in that area of Florida,” remarked Jo Ellyn Rackliff, a Florida Dept. of Corrections spokeswoman. “It’s just a situation that’s unsolvable at this point.”

Officially, the state of Florida does not require sex offenders who have completed their sentences to live in such squalid conditions, but parole officers tell them they can either stay under the bridge or return to prison. “They check us here every evening. We’ve got to be here or we go back to prison,” said a sex offender identified as M.C., who has been living under the Julia Tuttle Causeway for two years.

There are 15 tents, three mobile homes, two shacks, a van and a few cars jammed under the bridge as makeshift homes. The residents have a toilet made of a dumpster, sanitary toilet or running water, while exposing them to the weather, creates a haven for communicable diseases. “It’s horrible. It makes no sense,” stated Dr. Joe Greer. “Not only does that camp endanger the public, but it’s inhumane.”

The makeshift camp may endanger the public in other ways, too. Without a stable living situation and an opportunity to reintegrate into society, homeless sex offenders who are forced to live under the bridge may be at higher risk of re-offending. On March 2, 2009, a former bridge resident who had left the camp was charged with molesting a 7-year-old child while visiting a friend’s house.

Ironically, the harsh residency restrictions imposed on sex offenders may, in this case, have created another sex abuse victim.

Sources: *Miami Herald, Miami New Times*

BOP Failed to Protect Female Prisoner
Informant from Rape, Sexual Abuse by Guards

**by Brandon Sample**

The federal Bureau of Prisons (BOP) was “woefully deficient” in failing to protect a female prisoner from sexual abuse by BOP guards. U.S. District Court Judge Cecilia M. Altonaga concluded in November 2008, following a bench trial in a suit filed under the Federal Tort Claims Act (FTCA). Ultimately, though, the BOP escaped liability as the prisoner’s claims were barred by the statute of limitations.

A 34-year-old lesbian prisoner informant, identified in court documents as “S.R.,” made multiple trips from the Federal Correctional Institution in Danbury, Connecticut to the Federal Detention Center (FDC) in Miami, Florida between 2002 and 2005 to testify on behalf of the government at drug-trafficking trials. Her stays at FDC-Miami were less than pleasant: S.R. claimed she was sexually assaulted and raped by four BOP guards – Damioun Cole, Charles Jenkins, Antonio Echeverria and Isiah Pollock III.

Jenkins, Echeverria and Pollock, for example, would not let S.R. use the telephone, obtain clean clothes or read the newspaper until she masturbated for them, placed objects inside her vagina and allowed them to digitally penetrate her. Cole, on the other hand, reportedly raped and sodomized S.R. over a dozen times.

In December 2003, a year after the abuse began, S.R. notified the BOP of the sexual assaults. Additionally, she wrote a letter to Assistant U.S. Attorney Karen Rochlin, stating that the sexual assaults were “embarrassing, degrading and I don’t want to go through this anymore.” S.R. requested to leave FDC-Miami “as soon as possible,” and indicated her desire to “press charges” against the guards who had “violated” her.

Not much came of S.R.’s complaints, though. The BOP wrote S.R. off as being “mentally ill,” as she had a history of mental health issues and was on medication. A Supervisory Deputy U.S. Marshal called her allegations “fabricated.” The Justice Department’s Office of the Inspector General closed its investigation into S.R.’s complaints in 2005 after it could not substantiate her accusations. All the while she was testifying against other criminal defendants on behalf of the same government that found her not to be a credible witness!

Amazingly, just one month after being interviewed by the Inspector General’s Office, S.R. was again transferred to FDC Miami. This time her testimony was requested in the criminal prosecution of Cole for sexually abusing a different prisoner. After Cole learned that S.R. was prepared to testify against him, he pled guilty. In a deposition, FBI agent James Kaelin stated he had enough evidence to charge Cole with sexually assaulting S.R., too.

“The system took advantage of me,” S.R. told the *Miami Herald* in a phone interview. “They knew when to pull me to testify. I was a very credible witness. I was competent. But then when I needed them, I was mentally ill. I was incompetent.”

After her release from federal custody in June 2006, S.R. obtained counsel and sued the federal government along with
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Ask your family and friends to visit www.theotherdeathpenalty.org. If we work together we can end this pointlessly cruel sentence. Note: We do not offer legal advice of any kind.

Echeverria, Pollock, Cole and Jenkins. She settled with three of the guards but her remaining claims against the United States went to trial.

Following a bench trial in July 2008, Judge Altonaga concluded that “S.R. was sexually abused on numerous occasions by the individual defendants. The BOP and FDC-Miami did have notice of the illegal conduct taking place, and were woefully deficient in addressing it and giving S.R. protection.”

However, because S.R. had failed to file a tort claim within two years of the sexual abuse, her negligence claims against the government were barred by the statute of limitations; further, she was not entitled to equitable tolling of the limitations period. “[R]egrettably, S.R. has not shown that extraordinary circumstances both beyond her control and unavoidable even with diligence existed, entitling her to an equitable tolling of the jurisdictional requirements of the FTCA,” the court stated. See: S. R. v. United States, U.S.D.C. (S.D. Fla.), Case No. 1:07-cv-20648-CMA; 2008 U.S. Dist. LEXIS 89741 (S.D. Fla., Nov. 5, 2008).

“On one hand, the federal prison system doesn’t have the proper mechanisms to report and investigate sexual assaults by corrections officers against inmates,” said Matthew Sarelson, S.R.’s attorney. “Then you have the U.S. Attorney’s Office dropping the ball. You had assistant federal prosecutors who knew what was going on yet did nothing. That is troubling.”

Cole was sentenced to one year in prison and one year supervised release on the sexual assault charge involving another female prisoner. The U.S. Attorney’s Office did not prosecute him for raping S.R. Echeverria continues to deny sexually abusing S.R. In 2006, he lost his job and was sent to federal prison after pleading guilty to selling a gun to a convicted felon who was a police informant. Pollock resigned from the BOP in 2003, citing personal reasons; he was under investigation for misconduct at the time. Jenkins is still employed with the BOP.

“Closure for me is seeing all four of those men who sexually abused me punished or dead,” said S.R., who has been slowly rebuilding her life after her release.

This is just one prisoner’s experience with rape and sexual assault by prison employees, and unfortunately it is neither unusual nor uncommon. According to a report by the U.S. Dept. of Justice released last year, an estimated 38,600 state and federal prisoners self-reported being sexually victimized by prison staff in 2007. Sexual abuse by prison and jail officials was the subject of PLN’s May 2009 cover story.

Sources: Miami New Times, Miami Herald
On December 2, 2008, a federal jury awarded Richard Petrig, a former prisoner, $3,200 for negligent medical care.

Petrig was attacked by his cellmate while incarcerated at the Posey County Jail in Indiana. After the attack, Petrig told jail officials that he needed help. He was seen by a nurse who gave him ice and Tylenol. The pain continued, and Petrig continued to request medical care. He was given more ice and Tylenol. Some twenty-seven hours after the attack, Petrig was finally taken to a hospital where he was diagnosed as having a lacerated spleen. Emergency surgery was performed and his condition improved.

Petrig sued jail officials alleging negligence and Eighth Amendment violations. He argued that the defendants were deliberately indifferent to his medical needs and had acted negligently in failing to timely treat his condition. He also cited evidence of a custom of indifference at the jail. The defendants contended they were responsive to Petrig’s medical complaints, and denied the existence of a custom of indifference.

The jury found for Petrig on his negligence claims and awarded him $3,200, but concluded the defendants did not violate the Eighth Amendment. On January 8, 2009, the district court taxed costs against the defendants in the amount of $1,574.64. Petrig was represented by William D. Nesmith of Dunlap & Nesmith LLP, an Evansville, Indiana law firm. See: Petrig v. Fols, U.S.D.C. (S.D. Ind.), Case No. 3:07-cv-00080-WGH-RLY.

New York Prisoner Awarded $5,000 for Assault by Cellmate

A New York Claims Court awarded a prisoner $5,000 for being assaulted by his cellmate. The Court found that prison officials knew or should have known that a threat existed and they failed to act to prevent it.

While incarcerated at the Upstate Correctional Facility, prisoner Michael Gonzalez was assaulted by his cellmate, Carlos Gonzales. The men are not related. The August 3, 2001 assault resulted in Michael receiving a scar on his chin.

Shortly after he was received in July 2001 at Upstate, Michael was double-bunked in a cell with Carlos. From the start, there were problems. Michael testified at the May 8, 2008 videoconference trial that Carlos “came in aggressive. He had a set way of how things were going to be as far as shower schedules, cleaning schedules. And if there was any disagreement between us, he got upset, argumentative, and aggressive. He would berate me verbally – a lot of belittlement – we argued a lot.”

In mid-July, Michael wrote a letter to Upstate’s superintendent, asserting Carlos tried to start fights with him and requesting another cellmate. That letter was referred to Captain Racette, who responded on August 10 that a sergeant had investigated the matter and that it appeared Carlos and Michael were getting along, so a change was not necessary. Ironically, that reply came a week after Michael was assaulted.

On the day of the assault, Carlos had a misbehavior report for writing a letter that threatened the superintendent. That letter advised that Carlos had a bad temper, could not be double-bunked with other prisoners and that if he was not moved to a single cell, he was “going to do what I have to do.”

When Carlos came in from the hearing, Michael could see that Carlos was “anxious and irate and carrying on, and I felt the problem was reaching a head.” Michael asked guard Jonathon Price to take action to move him. Later that evening, Michael was talking to Price about the matter when Carlos came up and hit him in the back of the head. After Michael fell to the ground, Carlos continued to punch him.

It was later learned that Carlos had numerous prior assault and violence violations in prison. Just a month before his assault of Michael, Carlos received one SHU confinement for assaulting his previous cellmate. Carlos had been involved in five cell fights and moved six times because “he feels he can’t be double-bunked.”

On October 2, 2008, the Court entered an order holding the state of New York liable for the assault and it awarded Michael $5,000.

See: Gonzalez v. The State of New York, New York Court of claims, Claim No. 10507.

Postal Service Panics Over Sex Offender Participant in Christmas Program

by Matt Clarke

On December 18, 2008, just a week before Christmas, the U.S. Postal Service abruptly suspended its decades-old Operation Santa Claus, a holiday program in which volunteers sift through children’s letters addressed to Santa, “adopt” one or more letters, and then provide gifts to needy children.

The reason for the suspension? A Maryland postal worker recognized a registered sex offender who was participating in the program. Postal Service employees confronted Carl Elmer Ranger, 68, who said he was genuinely trying to do a good deed. Ranger had pleaded guilty to a charge of sexual abuse of a minor in 2000.

Postal authorities confiscated the letter, which contained the child’s name and address, and informed the child’s family of the incident. They then canceled Operation Santa Claus nationwide, including the New York program which receives 500,000 letters a year.

The Postal Service acknowledged that there had never been a problem with the program before. Nonetheless, in 2006, it began requiring participants to fill out a form and provide identification.

Initially no explanation was given to people who appeared at post offices wanting to take part in the program. A sign merely stated that, for the remainder of the holiday, the Santa letters would be handled by postal employees.

The Postal Service later announced that it intends to reinstate the program with changes to ensure the anonymity of the children who write letters. Their names and addresses will be blacked out and the letters assigned a number. Operation Santa Claus participants will give gift-wrapped presents to Postal Service employees instead of delivering them in person, and postal workers will then deliver the gifts.
Unfortunately, removing the personal contact between benefactors and families deprives the program of much of its warmth and appeal. It regresses the program to the 1920s, when Operation Santa Claus first began and postal workers were the only persons involved. Members of the public have participated since the 1940s.

The Postal Service’s panicked response to a possibly nonexistent problem was highly questionable. Program participants have never had unsupervised meetings with the children receiving the gifts, but sex offender paranoia prevailed.

If the Postal Service wanted to exclude registered sex offenders from taking part in the program, it could have added that prohibition to the forms it was already using and checked participants against the sex offender registry, rather than imposing restrictions on everyone. No, Virginia, Operation Santa Claus will never be the same again.


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**PLN Files Suit Against Los Angeles County for Failure to Comply with Public Records Act**

As part of ongoing research, **PLN** submitted a public records request to the Los Angeles County Sheriff’s Department on January 29, 2008, seeking records related to settlements and verdicts resulting from tort, overdetection and civil rights claims involving both jail prisoners and employees. Until 2007 the county posted such settlement and verdict information on its website, but it now does so only sporadically. The decision to shroud the outcome of these cases in secrecy by not making them publicly available online was decried at the time by the media and government watchdog groups.

The Office of County Counsel, which represents the Sheriff’s Department, initially argued that some of the documents requested by **PLN** may be exempt from disclosure, and that it was not “reasonably possible” to conduct a search for the records. Despite a November 2008 follow-up letter from **PLN** expressing a willingness to work with the county, none of the requested records were produced.

**PLN** filed suit on March 3, 2009 against Los Angeles County, the Office of County Counsel and the Sheriff’s Department, to ensure that county officials comply with California’s public records act. The lawsuit notes that pursuant to state law, “public records are open to inspection at all times during the office hours of the state or local agency and every person has a right to inspect any public record.” California Gov’t. Code § 6253(a).

**PLN** contends that the release of the requested records is in the public interest, would shed light on the operations of the Sheriff’s Department, would provide the public with a better understanding of how the county’s jail system is managed, and would reveal how much money jail-related claims have cost the taxpayers.

“We have a client that’s a public-interest publication that’s just trying to access information to which it has a right and we’ve pretty much been stonewalled by the defendants, so hopefully this will get them moving,” stated **PLN** attorney Elizabeth H. Eng. In addition to Ms. Eng, **PLN** is ably represented by Sanford Jay Rosen and Kenneth M. Walczak of Rosen, Bien & Galvan LLP, a San Francisco law firm, and Najeeb N. Khoury and Padraic Glaspy of Howarth & Smith, a Los Angeles law firm. See: **PLN** v. Los Angeles County, Superior Court, County of Los Angeles, CA, Case No. BS119336.

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Author of five book chapters on Criminal Law and other topics. Author of 150 legal articles. Who’s Who in America. 25 years experience, nationwide. Appeals, Trials, Habeas Corpus, Sec. 1983 Prisoner’s Rights Suits, including failure to provide medical care and police beatings, Parole Hearings.
This is a *Survivor Manual* by survivors—so it can’t get much more real than that. Most of its contributors have spent many years in Control Units, some are still there while others have been back and forth multiple times.

A Control Unit, Control Prison, Supermax or SHU is by whatever name a Long-term Lock-down Unit designed to isolate, punish and preferably to break prisoners, sometimes maiming or killing them in the process. Control Units are serious business and are not to be taken lightly so that any valid information on how to survive them is valuable indeed. This small booklet provides that.

Each contributing man, woman or child tell in their own words how they survived or how to survive Control Units: the domestic Abu Grahais and Guantanamo that dot American soil. Their stories tell not so much of the day to day atrocities of the Control Unit, though enough of its horrors are adequately described and artistically illustrated therein, but mainly they tell how to survive, how to come out perhaps bruised and definitely changed but with one’s core intact, oftentimes stronger than when one first entered or maybe even weaker - because horrors and deprivations do take their toll - but either way still able to look yourself in the eye, knowing you survived without selling your soul. There are many who don’t.

And that’s the value of this booklet. It tells how to keep alive, how to keep one’s sanity, body and soul intact - in other words, how to survive. Many of the contributors I know personally or am familiar with them through their works. They know what they are talking about. The booklet is a gold mine of survival tips and guidelines that are worth the cost. Read it. Heed it...

That is, except for a slight error by the Editor, a most cherished comrade of mine, in her proclamation that the permanent lock down at USP Marion, Il., created the first Control Unit in 1983... which was long after the creation of Marion’s infamous H-Unit: the Control Unit made up of cruel Box car cells...and was also after Trenton State Prison’s creation of its Management Control Unit in 1976... which was copied from the Management Control Unit of San Quentin’s “O” Wing of the early ’70 and perhaps the ’60. Other than that slight miscue the work is excellent and the Editor has done a magnificent job of putting together a much needed book that can save lives, sanities, bodies and souls. Cost is $2.50. Available from: American Friends Service Committee, 1501 Cherry St., Philadelphia, PA 19102-1403.

**Causal Link Established by Prison Officials’ Failure to Protect Prisoner from Specific Threats**

The Eleventh Circuit Court of Appeals held that two Florida prison officials could be held liable under 42 U.S.C. § 1983 for failure to act upon a prisoner’s request for protection when he specified the nature of the threat.

Before the Court was the appeal of Everglades Correctional Institution (ECI) prisoner Miguel V. Rodriguez, who was stabbed in the back and chest by Latin Kings “enforcer” Arnold Cleveland. Rodriguez’s Eighth Amendment claim hinged upon the failure of Assistant Warden Raymond Kugler and Colonel Charles Johnson to act on his request to protect him from gang members.

While on Close Management (CM) at ECI in early 2001, Rodriguez learned that gang members at ECI wanted to kill him for renouncing his gang membership. Kugler and Johnson were already aware Rodriguez was on CM for assaulting another prisoner and for gang activity. Rodriguez was stabbed within hours of being released into general population on April 10, 2002.

The district court granted summary judgment to Kugler, holding that Rodriguez’s complaints did not contain “specific facts” to show Kugler had subjective knowledge of the risk of harm. The claim against Johnson proceeded to trial. After Rodriguez presented his case, the district court held that Johnson was entitled to judgment as a matter of law because he did not have final authority to order his release from CM. The Eleventh Circuit rejected those arguments.

In the summary judgment proceeding, Rodriguez provided a declaration stating he had verbally informed Kugler on two separate occasions of the threat against his life by gang members, and had requested protection and a transfer to another prison. The appellate court held that such evidence, in conjunction with Kugler’s denial of Rodriguez’s allegations, created a genuine issue of material fact precluding summary judgment.

Similarly, Rodriguez also spoke with Johnson several times about the threats. While Johnson promised he would “look into” it and “get with” classification about the matter, he did not inform anyone about Rodriguez’s safety concerns.

The Court found Johnson was aware of the threat of harm because Rodriguez advised him that (1) he was a former Latin King who had renounced his membership; (2) he was threatened with death by gang members for that renunciation; (3) ECI was heavily populated with Latin Kings; and (4) he needed protection to prevent an attempt on his life.

When addressing the causal connection, the Court found the same factors applied to both Kugler and Johnson. The Eleventh Circuit ruled that in the face of Rodriguez’s request for protection at a hearing on his release from CM, Kugler and Johnson recommended his release and told him he would be subject to disciplinary action if he refused to return to general population. Kugler and Johnson argued that because their action was only a recommendation to the State Classification Office, they had no final authority to release Rodriguez from CM.
However, both Johnson and Kugler had the authority to set in motion procedures to immediately place Rodriguez in administrative confinement and initiate a protective management review, which could have resulted in a transfer to another facility if the threat of harm was substantiated.

Instead, neither Johnson nor Kugler took action to protect Rodriguez. Rather, the only action they took was to recommend that Rodriguez be returned to the compound—where he would have no protection at all from the Latin Kings who had threatened his life.” Therefore, the Eleventh Circuit found a “necessary causal link” between Johnson’s actions and Rodriguez’s injury,” and vacated the district court’s judgment as a matter of law in favor of Johnson. See: Rodriguez v. Sec’y for the Dep’t of Corr., 508 F.3d 611 (11th Cir. 2007).

Following remand, the case went to a federal jury trial on April 8, 2008, and the jury found in favor of the defendants, Kugler and Johnson, on all claims. Rodriguez was represented by the Miami law firms of Akerman Senterfitt, Berger Singerman, and Kasowitz Benson Torres & Friedman, LLP.

$3.3 Million Settlement Fund Established in New Mexico Jail Strip Search Settlement

A $3.3 million settlement fund has been established in a class action lawsuit alleging an unconstitutional blanket strip search at the Valencia County Detention Center (VCDC) in New Mexico violated the rights of the class. VCDC was operated under contract by private prison vendor Cornell Companies, Inc.

The lead plaintiffs in the action, Jose Torres and Eufrasio Armijo, were arrested on minor charges in separate incidents and taken to VCDC and strip searched “without regard to the nature of” the alleged offenses for which Plaintiffs had been arrested, and without Defendants having a reasonable belief that the Plaintiffs possessed weapons or contraband, or that there existed facts supporting a reasonable belief that the search would produce contraband or weapons.”

The complaint sought to discontinue the blanket strip search policy to require such searches only when there is “individualized reasonable suspicion.” HCDC contended the policy was related to “legitimate penological interests in deterring the introduction of weapons, drugs, or other contraband into the detention center.” The parties engaged in three days of mediation that resulted in a settlement on September 22, 2008.

That settlement established a class period from April 3, 2004 to April 3, 2007. The strip search policy changed on December 5, 2006 as a result of efforts between the parties. The settlement class members include persons arrested on “Non-VDW offense[s]” on the charge list that is part of the settlement.

Torres and Armijo were allocated $85,000 to be split evenly amongst them for their efforts in the lawsuit. The attorneys for the class will receive $1,100,000 for attorney fees and costs. The costs to administer the fund will also come out of the Settlement Fund.

The Administrator is to notify the class members by using the last known information in HCDC’s database. They then must submit a valid and timely claim to receive funds from the settlement. Failure to file a claim or voluntary opt out will preclude receipt of any funds from the settlement.

The class was represented by Santa Fe attorneys Robert Rothstein, Mark H. Donatelli and John C. Bienvenu, as well as Las Cruces attorneys Michael W. Lilley and Marc A Lilley. See: Shannon v. Hidalgo County Board of Commissioners, USDC D. New Mexico, Case No: CIV-08-0369 JN/LFG.
A former typist for the California Dept. of Corrections and Rehabilitation (CDCR) was convicted of having confidential prison gang files in her Sacramento home. The files also included the names and social security numbers of 5,500 state employees.

Convicted of theft in November 2008, Rachel Rivas Dumbrique (Rivas) was sentenced to one year in county jail plus five years probation. She was also ordered to pay $122,000 in restitution to cover the Department of Consumer Affairs’ costs in taking steps to protect state employees against any resultant identity theft.

Rivas was married to CDCR prisoner Edward Dumbrique. She met Edward, a Mexican Mafia gang member doing life for murder, when she served as an alternate juror in a 2005 trial where he was acquitted of assaulting a prison guard. She was hired by the CDCR in March 2006, and worked there for six months before transferring to another state job position.

While she was at the CDCR, Rivas downloaded a personnel roster and e-mailed it to a private account, “dumbrique.luv.” When suspicious Consumer Affairs investigators raided her house looking for the roster, they also found four other documents stamped “confidential” in her bedroom closet. Those highly sensitive files included CDCR reports on prisoners who were documented members of the Northern Structure Gang, Aryan Brotherhood and Mexican Mafia, as well as debriefing reports on gang activity within CDCR facilities.

Prosecutors did not say whether the gang-related files had been shared with Edward. Rivas’ defense attorney, Jeremy Van Etten, postulated at sentencing that she was only a pawn and the documents had been planted in her home.

Superior Court Judge Steve White wasn’t impressed with that argument. He described Rivas’ crime as a “serious matter,” and denied requests for leniency based upon Rivas having three children and no previous criminal record. Rivas and Edward Dumbrique have since divorced.

Sources: Sacramento Bee, Associated Press

California Jury Awards Deaf Prisoner $5,000 for Failure to Provide Interpreter; $193,582 in Fees Awarded by Court

A state court jury has awarded $5,000 to a deaf prisoner against the County of Los Angeles for failing to provide him with a sign language interpreter while he was in jail. The jury, however, found no liability for the same claim brought against the City of Torrance.

When Humberto Suarez was arrested as the result of mistaken identity on August 8, 2005, he spent several days at the Twin Towers Correctional Facility in Los Angeles. On November 20, 2005, he was again arrested due to mistaken identity by the City of Torrance. He spent less than 24 hours in jail for the latter arrest.

Suarez filed suit, alleging that the failure to provide him with an American Sign Language interpreter while he was jailed violated his rights under the Americans with Disabilities Act (ADA). At trial, which lasted two weeks, the County of Los Angeles and City of Torrence disputed that Suarez needed an interpreter.

After two days of deliberation, the jury found against Los Angeles County and awarded Suarez $5,000. It found no liability as to the City of Torrance. Suarez was represented by Los Angeles attorneys Daniel M. Holzman and Thomas L. Dorogi of the Caskey & Holzman law firm. In a post-trial order, they were awarded $193,582.50 in attorney fees.

Louisiana Private Prison Warden Arrested for Malfeasance

Leroy Holiday, Sr., 55, a regional warden for LaSalle Management Company, LLC (LMC), a private prison firm, was released on $5,000 bond after being arrested and booked into the LaSalle Parrish Jail in November 2008.

According to LaSalle Parish Sheriff Scott Franklin, Holiday was charged with improperly using prisoners and employees at a minimum-security prison for personal purposes. Franklin said Holiday had been charged with only one count of malfeasance, but his office had enough evidence to charge him with 40 additional counts and the investigation was ongoing.

Holiday was the warden of the LaSalle Correctional Center (LCC) in Urania, Louisiana, where the malfeasance is alleged to have occurred. He also oversaw LMC-managed facilities in Catahoula, Concordia and Ouachita parishes.

LCC is run in cooperation with the sheriff’s office, which retains the ability to hire and fire employees and commission them for law enforcement. However, Franklin said Holiday was an employee of LMC, and referred questions about his employment status to company officials. Franklin also noted that Holiday’s law enforcement commission had been revoked and he would not be allowed back on LCC grounds.

Source: www.thetowntalk.com
On December 30, 2008, a Massachusetts state court awarded a former prisoner $547,566 in attorney fees and $2,741 in costs and litigation expenses in a civil rights action in which the plaintiffs were awarded only nominal damages.

Stephen Doherty and ten other Massachusetts state prisoners filed a civil rights suit pursuant to 42 U.S.C. § 1983 in superior court alleging they were subjected to inhumane conditions for three weeks following a disturbance at MCI-Cedar Junction, in violation of the Eight Amendment’s prohibition against cruel and unusual punishment.

The jury found that they were deprived of “sanitary living conditions, including clean water, working toilets, healthy meals, and breathable air,” and that feces was smeared on the walls, floors and tables of the unit where they were held. Despite knowing that most of the plaintiffs were serving life sentences for serious crimes, the jury returned a verdict in their favor but only awarded nominal damages of $1.

Doherty, who was represented by Bonita Tenneriello and Peter Berkowitz of Boston-based Massachusetts Correctional Legal Services, Inc., filed for attorney fees and costs pursuant to 42 U.S.C. § 1988 and Mass.R.Civ.P . 54, requesting $842,408.70 in fees for the three attorneys and one paralegal who worked on the case. The superior court found that Doherty’s attorney fee request was not subject to the PLRA cap because he had been released from prison before the suit was filed. It also found that Doherty was the prevailing party and thus was entitled to attorney fees.

Furthermore, the court held that “Doherty’s victory was not merely technical or de minimus,” and because the attorneys did the same work for Doherty as for the other plaintiffs, the work they did on his case was not severable. Doherty did not prevail on all his claims, but the claims were interrelated and the attorneys would have had to do most of the same work had the unsuccessful claims not been raised. Also, the nominal damages award did not diminish “the value of a favorable verdict for the plaintiff,” as it “may simply reflect the unquantifiable nature of some harms.”

However, the court reduced the requested attorney fees by 35% due to the “gap between the damages sought and the damages awarded,” and granted a combined total of $550,307 in attorney fees and costs. See: Ashman v. Marshall, MA Superior Court-Suffolk, Civil Action No. 00-05618. The ruling is posted on PLN’s website.
**$75,000 Settlement for Shutting Off Water in Seattle Jail Prisoner’s Cell**

Washington State’s King County Jail has settled a pre-trial detainee’s claim that he was constitutionally punished. The Jail settled the matter for $75,000. The basis of the claim was a guard shutting off the water in the prisoner’s cell for 30 hours.

Sidney Charles Randall was housed on the tenth floor of the Jail on August 5, 2005. Guard Theodore Larson let Randall out of his cell twice that day. The first was for a seventy minute recreation period. The second time was for forty minutes, with an option to take a shower or use the telephone.

After that second time period, Randall was escorted to court. When he returned, he asked Larson to allow him to take a shower because he missed the opportunity by going to court. When Larson refused, Randall said he would wash in his cell. Larson told him twice that he would not, and when Randall said he couldn’t stop him, Larson shut the cell’s water off. He then told Randall, “You’re going to burn in hell, you better take some barbeque sauce with you, it’s going to be hot.”

Over the next 30 hours, Randall complained that he was thirsty and his cell smelled bad from the accumulation of feces and urine in his toilet. After 30 hours, Randall fainted. A nurse revived him with drinking water and his cell water was turned back on. Randall claimed he injured his back from the fall when he fainted, providing documentation to support it.

He filed a civil rights action and both parties moved for summary judgment. The Washington federal district court granted Randall’s motion and denied Larson’s. The Court then appointed Randall pro bono counsel to prepare for a damages trial.

On February 2, 2009, Randall received $75,000 to settle the matter. He was represented by Perkins Coie. The documents related to this care are on PLN’s website. See: Randall v. Larson, USDC, W.D. Washington, Case No: C06-0798-JCC.

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**Oregon Teenage Girls Stage Brazen Escape Attempt**

A bold and bloody escape attempt from an Oregon lockup sent three guards to the hospital. In a stunning twist, the masterminds behind the well-planned, brazen attempt were not hardened criminals, but rather a group of eight teenage girls ranging from 13 to 17 years old.

Close to midnight on December 20, 2008, several girls staged a fight in a 19-bed dormitory at the Oak Creek Youth Correctional Facility in Albany, according to Oregon Youth Authority spokeswoman Perrin Damon.

When three male guards entered the dorm to break up the fight, they were ambushed. “The kids rushed them,” Damon said. “They had weapons and overpowered them. ... They had weapons fashioned from everyday things.” Damon refused to describe the weapons but said they were used as clubs.

The guards fled to another building as the girls entered the recreation yard, where they attempted to flee through a gate, according to Damon. “They never breached the perimeter,” she said, because a pair of high fences prevented their escape.

Albany police and Linn County sheriff’s deputies were called to help restore order. Officers maintained a presence outside the fences, while others took the girls back into custody. Meanwhile, the three guards were transported to Samaritan Albany General Hospital. One guard suffered a head wound that required 32 staples; the other two had minor injuries. They were treated and released.

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**California: Waiver of Private Psychotherapist-Patient Privilege an Unreasonable Condition of Parole**

The California Court of Appeal (2nd District) agreed with a superior court that it was unreasonable for a parole officer to insist that a parolee must, as a condition of parole, waive his confidential privacy privilege with his private psychotherapist.

Reynaldo Corona was released on parole in May 2006 after serving 3 years for molesting his stepdaughters over a span of several years. He was given five special conditions of parole: (1) attend the parole outpatient clinic, (2) participate in programs specific to his offense history as directed by his parole officer, (3) participate in an approved psychiatric treatment program, (4) participate in the sexually violent predator program, and (5) submit to any psychological or physiological assessment to assist in treatment planning and parole supervision due to his prison psychological history.

Corona asserted he followed all of those conditions to minimize his chances of reoffending, and also retained a private psychotherapist specializing in sex offenders.

Six months later, Corona’s parole officer asked him to sign a privilege waiver permitting his private therapist to share information with parole officials. Corona was told he must sign the waiver if he wanted to continue seeing the private therapist. He declined and instead filed a habeas petition in superior court.

The court ruled that “it would be against public policy to prohibit [Corona] from seeking private counsel and being able to disclose to them in a confidential manner the things in his life that may be needing to really be addressed if he’s going to get over this problem. So I’m going to prohibit that.”

The parole officer appealed, claiming that the requested waiver fit into the fourth parole condition. However, Corona took the fourth condition to be a waiver of privilege for a state-supplied thera-
pist. The officer persisted, claiming that Corona was revealing more to his private therapist than to his state therapist.

At the outset, the appellate court noted that participation in private therapy was not prohibited by Corona’s conditions of parole. The court relied on In re Stevens, 119 Cal.App. 4th 1228 (Cal.App. 2d Dist. 2004) [PLN, July 2005, p.22] for limitations on restrictions that may be placed on parolees. At a minimum, such restrictions must be reasonably related to the compelling state interest of fostering a law-abiding lifestyle. A condition that bars lawful activity must be related to the crime of conviction or be for the purpose of deterring future criminality. However, in examining the record, the appellate court could not identify a “nefarious reason for Corona’s decision to engage in additional therapy.”

The court also rejected the parole officer’s reliance on Evidence Code §§ 1012 and 1024 as exceptions to the privilege rule. Those provisions require a therapist to warn an intended victim or the police if he or she determines that a patient presents a serious danger of violence to another. There was no such indication in this case.

Further, the appellate court was incensed that Corona was threatened with violation of his parole for refusing to sign the waiver, because that implicated his right to due process. Accordingly, the superior court’s decision was affirmed. See: In re Corona, 160 Cal.App.4th 315 (Cal.App. 2d Dist. 2008).

Ohio’s Hancock County Jail agreed to pay $445,000 in the death of a prisoner. The settlement provides no liability of wrongdoing in the April 26, 2006 death of prisoner Lisa Waddell.

The suit was brought by Waddell’s daughter. Waddell was found unresponsive in her cell on April 25 and she died the next day at a local hospital. Details on the cause of death were not available.

What is known is that guard Jeffrey T. Baney was fired in November 2006 because of the event. In August 2007, Baney, who was in charge of ensuring prisoners received medical care, was found guilty of a second degree misdemeanor for dereliction of duty. He was sentenced to 30 days in jail.

The January 24, 2009 settlement provides for the defendants to pay the costs of the litigation. The plaintiff was represented by attorney Paul Belazis. See: Shoemaker v. Heldman, USDC, N.D. Ohio, Case No: 3:07CV00617.

Additional Source: Toledo Blade.
State, Not County, Required to Pay Attorney Fees in Georgia Death Penalty Cases

On March 9, 2009, the Georgia Supreme Court affirmed a lower court’s order holding the Georgia Public Defender Standards Council (“Council”), in contempt for refusing to pay two defense lawyers in a death penalty case.

The Supreme Court’s unanimous decision involves the Council’s failure to pay $68,946.61 to attorneys Michael Garrett and J. Randolph Frails for defending Willie W. Palmer, who had been retried for capital murder. The Council, a state agency, contended that because Palmer had been indicted prior to enactment of the statute that created the Council, the cost of his representation should be borne by Burke County, where the trial was held.

In 1997, Palmer was sentenced to death for the murder of his estranged wife and her 15-year-old daughter. His conviction was overturned in 2005 when it was discovered that prosecutors had failed to disclose a $500 payoff to the state’s key witness. A new trial was ordered. The trial court appointed Garrett, who employed Frails as co-counsel, after the Council’s director informed the court “that all attorney’s fees and expenses would be paid by the Council.”

Palmer was again convicted and sentenced to death. Following the retrial, the Council balked at paying Garrett and Frails’ fees, contending that as Palmer had been indicted prior to the January 1, 2005 effective date of the legislation that created the Council, the county was required to pay the cost of his legal representation.

The trial court disagreed and when the Council still refused to pay, the court entered a contempt order. The Council appealed. The Georgia Supreme Court rejected the Council’s contention that the legislation only contemplated payment of attorney fees in contemporaneous or future death penalty cases.

The Court held that the Council’s argument ignored the fact that once a conviction is overturned, the state and the defendant start anew with a clean slate. Whether a new trial even occurs depends upon the state.

If the Council’s position was accepted, whenever a case is retried the court would have to follow the original statutory scheme for the defendant’s legal representation, which “the General Assembly has determined to be deficient and which has [since] been remedied by a new statutory scheme.”

Under current law the state is required to pay the cost of legal representation for indigent defendants in death penalty cases. As such, the trial court’s order holding the Council in contempt was affirmed. See: Georgia Public Defender Standards Council v. The State, 285 Ga. 169 (Ga. 2009).

Pennsylvania County Sex Offender Residency Ordinance Voided

by David M. Reutter

On March 20, 2009, a Pennsylvania federal district court held that an Allegheny County ordinance which restricted where sex offenders could live was in conflict with state law, and thus was invalid.

The plaintiffs in this case were a group of sex offenders whose residency was affected by the county ordinance. Their complaint alleged the ordinance violated various constitutional guarantees, the Fair Housing Act and state law. Under the ordinance, sex offenders who are required to register under what is commonly known as Megan’s Law cannot live within 2,500 feet of any child care center, school, public park or public recreation facility.

The county published a map on its website indicating where sex offenders could and could not reside. The vast majority of the county, and virtually all of the City of Pittsburgh, fell within an area of restricted residency. Permissible areas were generally confined to outlying, suburban communities.

After each party in the lawsuit complied with the district court’s order to file summary judgment pleadings, the court rendered its decision. In Pennsylvania, under the Home Rule doctrine, municipalities can enact local governance ordinances without express authorization by state statute, so long as they do not conflict with state law. A local ordinance may be preempted under one of three theories: express preemption, implied (or field) preemption, and conflict preemption.

At issue here was conflict preemption, which applies when there is an actual, material conflict between a state law and a local ordinance, and the interests of the wider constituency can only be protected by striking down the ordinance.

Allegheny County’s ordinance had a stated objective of protecting children yet it was imposed on sex offenders who never committed a crime against a minor, as Megan’s Law applies to all sex offenders regardless of the age of the victim. The intent behind the ordinance, however, was not of primary importance in the court’s conflict preemption analysis.

What was dispositive was a conflict between the operational effect of the ordinance and Pennsylvania’s uniform system of sentencing, parole and probation. Not only did the ordinance fail to include statewide goals of rehabilitating and reintegrating offenders, avoiding unnecessary incarceration and maintaining uniformity in the supervision of parolees and probationers, but it served as an obstacle to those goals by placing strict limits on areas where sex offenders could live.

Further, the ordinance conflicted with Pennsylvania’s explicit objective to establish a uniform, statewide system for supervision of offenders on probation and parole. For example, parole agents had to replace their statewide guidelines for offenders’ home plans with new directives to comply with Allegheny County’s ordinance.

The statewide impact of the ordinance was demonstrated by a “ripple effect” that would result in neighboring communities enacting similar laws after receiving an influx of sex offenders leaving Allegheny County due to the residency restrictions. This would leave parole officers with few options for offender placement. Finally, state law allows even the most egregious Megan’s Law offenders – sexually violent predators – to live within 2,500 feet of a school, college or day care center, provided the institution is directly notified of their presence.
Moreover, parole agents review each offender’s circumstances prior to approving their residence. The Allegheny County ordinance would overrule a determination by a parole agent (or court) that an offender’s residence was appropriate, due to the blanket residency restrictions.

As such, the district court predicted the Pennsylvania Supreme Court would find the ordinance was preempted by state law, and thus held it was invalid and unenforceable. The court did not reach the federal issues raised by the plaintiffs. See: Fross v. County of Allegheny, 2009 U.S. Dist. LEXIS 24472.

Allegheny County has since appealed this ruling to the Third Circuit Court of Appeals.

$9,000 Award for Hawaiian Prisoners Bitten By Dogs at Oklahoma CCA Prison

On October 31, 2008, a Hawaiian state court awarded $3,000 each in damages to three Hawaiian prisoners who were bitten by dogs while incarcerated at a private prison in Oklahoma.

Jonathan K. Lum, John Daffron and Frank Frisbee are Hawaiian state prisoners who were incarcerated at the Diamond Back Correctional Facility in Watonga, Oklahoma, a private prison run by Corrections Corporation of America (CCA). They alleged the prison was engaged in a for-profit program of training dogs donated by animal shelters then selling them. All three were bitten by dogs, two by the same dogs in separate incidents. They filed suit against Hawaii and CCA in Hawaiian state court.

Plaintiffs alleged defendants were negligent and grossly negligent because they had prior notice the dogs were dangerous and had bitten other prisoners. They alleged bleeding, scarring, fright, emotional distress and tear duct injury on one prisoner. The case was sent to arbitration. The defendants claimed that the program was not for profit because they gave the dogs away and they had given free medical attention to the plaintiffs who suffered minimal injury and scarring. They claimed Lum was never bitten by a dog, but had fallen down in a bathroom, and alleged Daffron had contributed to his injury. The arbitrator awarded $3,000 to each plaintiff for general damages solely against CCA. Plaintiffs were also awarded costs of $277.67. Plaintiffs were represented by attorneys John L. Rapp and Meyers S. Briner. See: Lum v. Hawaii, Hawaii 1st Circuit, Civil No. 071570.

Florida and Oregon Prison Employees Face Sex Charges

On November 7, 2008, prison guard Geno Lewis Hawkins was arrested by the Florida Department of Law Enforcement (FDLE) and the Inspector General’s Office of the Florida Department of Corrections (FDOC) on a charge of sexual battery.

In August 2008, FDLE and FDOC initiated a joint investigation of Hawkins, a 43-year-old Corrections Corporation of America (CCA) employee, for having a sexual relationship with a female prisoner at the Gadsden Correctional Facility.

Hawkins was charged with one count of sexual battery and booked into the Leon County Jail without bond. His prosecution is still pending.

In an unrelated case, Oregon Department of Corrections groundkeeper Paul William Golden, 37, was arrested on January 16, 2009 for sexually abusing six female prisoners at the Coffee Creek Correctional Facility.

Golden worked as a landscaper at Coffee Creek from October 2004 until his April 2008 resignation, and supervised prisoner work crews. He was arraigned on 31 counts of custodial sexual misconduct, rape and supplying contraband, according to Lt. Gregg Hastings, a spokesman for the Oregon State Police. Golden has pleaded not guilty; his trial is set for June 23, 2009.

These are only two of numerous cases involving sexual abuse by prison staff nationwide, which occur with disturbing frequency. [See: PLN, May 2009, p.1].

Sources: FDLE Media Release, The Oregonian

Actual Innocence

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See page 53 for more information
The U.S. Fifth Circuit Court of Appeals ruled that a Texas parole law created in 1993, but applied retroactively to capital offenders in 1995, was not ex post facto.

Billy Ray Wallace was sentenced in December 1981 for the crime of capital murder. At the time of his offense, Wallace was under a parole law that required him to obtain two votes from a three-member panel in order to make parole.

In 1993, as part of Texas’ get-tough-on-crime initiative, the legislature created an 18-member parole panel and required newly-convicted capital offenders to obtain a minimum of two-thirds approval (12 votes) to make parole. In its original wording, Senate Bill 1067 of the 73rd Texas legislature was prospective. However, in 1994, on its own initiative, the parole board began to apply the law retroactively.

When Wallace came up for parole he received two favorable votes from board members in his region. However, as the voting continued he did not receive the twelve votes required under the 2/3 approval rule as it was being applied by the board.

Wallace filed a writ of habeas corpus in state court, which was denied without a written order. He then filed a habeas petition in federal district court. That writ and the accompanying certificate of appealability (COA) also were denied.

Finally, Wallace appealed to the Fifth Circuit where the appellate court granted his COA and reviewed the merits of his claim.

The Court of Appeals first reviewed the language of the law in effect at the time Wallace was sentenced, specifically the phrase that read, “the parole board members and commissioners may act in panels comprised of three persons in each panel.” The Court found that the wording in the original law was discretionary and did not hold the board to any fixed number of voting members.

Next, the appellate court reviewed the 1995 version of the Texas statute that was being applied to Wallace, and determined that the wording of the law was merely a guideline on how parole suitability was to be determined. The Fifth Circuit used precedents established in Shears v. United States, 822 F.2d 556 (5th Cir. 1987) and Portley v. Grossman, 444 U.S. 1311 (1980) to establish the wide latitude of discretion exercised by the board in its application of parole guidelines.

The Court then relied on Simpson v. Ortiz, 995 F.2d 606 (5th Cir. 1993) to make a distinction between the concepts of parole eligibility and parole suitability. According to the appellate court, Simpson held “[t]he Parole Commission determines a prisoner’s suitability for parole, not his eligibility. The code that Wallace contests addresses parole board decision-making: it relates directly to the Commission’s determination of suitability for parole and does not have ex post facto implications.”

The Fifth Circuit acknowledged that “parole board discretion does not displace the Ex Post Facto Clause’s protections.” Garner v. Jones, 529 U.S. 244 (2000). However, the Court found that even though Wallace had provided proof that he obtained two favorable parole votes, which was the original suitability standard, his claim presented only “speculative evidence that the new rules produced a risk of increased confinement.” The district court’s order denying Wallace’s habeas petition was therefore affirmed. See: Wallace v. Quarterman, 516 F.3d 351 (5th Cir. 2008).

Fifth Circuit Rules Texas Parole Law Not Ex Post Facto

No Qualified Immunity for Pepper Spraying Alabama Prisoner; Case Settles After Remand

by David M. Reutter

The Eleventh Circuit Court of Appeals held that pepper spraying a prisoner, keeping him in a small cell for longer than necessary to gain his compliance, and not allowing him to decontaminate properly or receive medical care after being sprayed can constitute excessive force and deliberate indifference to serious medical needs. The appellate court also held that jail supervisors could be liable for failing to prevent this practice where they had notice through reports and complaints concerning the guards involved in the abusive pepper spraying.

When Kevin B. Danley was arrested on July 11, 2004 for driving under the influence, he was taken to Alabama’s Lauderdale County Detention Center and placed in a communal cell that had no toilet. Upon asking the guards to use the bathroom, Danley was taken to a small 5x7’ cell that had an “unsanitary” toilet with no toilet paper and no running water.

After he finished Danley asked jail guards Ruby Allyn, Jeff Wood and Steve Woods if he could have some toilet paper to wipe himself. Allyn told Danley to watch his profanity-laced mouth, to shut up, and to get back in the small cell. He protested that he was done with the small cell, and Allyn threatened to spray him.

When Danley asked what “spray” him meant, Allyn told Wood to use pepper spray. After a “close range” spraying of 3-5 seconds with pepper spray designed for large-scale crowd control, Danley was pushed into the cell. He had trouble breathing, began to hyperventilate and screamed that he could not breathe. In response, the guards laughed and made “mock-choking” gestures by placing their hands at their necks. They also told Danley that “if he did not shut up he would not be let out.”

After ten minutes he quieted down, but the guards left him in “the small, poorly ventilated cell for approximately 20 minutes.” They then allowed him to take a two-minute shower, made him put the same clothes back on and returned him to the communal cell. Thirty minutes later, Danley’s cellmates’ eyes were still burning from the pepper spray residue on his clothes.

Danley continued to suffer asthma-like symptoms, and his eyes burned and swelled so badly he could hardly see. His requests and those of another detainee for medical help were ignored. After twelve or thirteen hours of suffering, he was released on bond and went to see his doctor, who prescribed “appropriate medication.”

Danley complained to the jail administrators but they merely ratified the guards’ actions. He then sued and the U.S. District Court denied the county defendants’ motion to dismiss on qualified immunity grounds. They appealed, and their first argument was that the Eleventh Circuit should separate the pepper spraying incident from Danley’s confinement in the small cell.

The appellate court declined to do so,
sive,” the appellate court held. After the incapacitated – that use of force is excessive force.

if it was only the initial pepper spraying that resulted from Danley’s failure to comply with Allyn’s commands, there would be no Fourteenth Amendment violation. The court found a difference in this case. Although less common than the direct application of force, subjecting a prisoner to special confinement that causes him to suffer increased effects of environmental conditions – here, the pepper spray lingering in the air and on him – can constitute excessive force.

“When jailers continue to use substantial force against a prisoner who has clearly stopped resisting – whether because he has decided to become compliant, he has been subdued, or he is otherwise incapacitated – that use of force is excessive,” the appellate court held. After the pepper spray had its intended effect to disable Danley, the use of force through extended confinement was excessive. Thus, the defendants were not entitled to qualified immunity.

The Eleventh Circuit further found that the failure to provide Danley with medical treatment or allow him to properly decontaminate constituted deliberate indifference to his medical needs. Finally, the court held that jail administrator Jackie Rikard and Sheriff Ronnie Willis had received “force reports and similar documents, inmate complaints, jailer complaints, attorney complaints, judicial officer complaints, and personal observation” that guards at the jail “regularly used pepper spray excessively as a means of punishment and not for legitimate reasons.”

The Court of Appeals found Danley’s allegations were sufficient to overcome the defendants’ claims of qualified immunity, and to impose supervisory liability on the jail administrators. The district court’s order was therefore affirmed. See: Danley v. Allyn, 540 F.3d 1298 (11th Cir. 2008).

Following remand, the case settled in March 2009. The monetary amount of the settlement was confidential, but a separate part of the settlement mandating policy changes was not. The policy changes at the Lauderdale County jail included no longer using chemical agents designed for crowd control on individual prisoners; updating jail policies and providing additional training regarding the use of pepper spray; allowing prisoners subjected to pepper spray “to decontaminate promptly”; and making grievance forms readily available to prisoners, who can use them to grieve use-of-force incidents.

“Mr. Danley insisted that the settlement of his case include changes at the jail to prevent others from suffering like he did,” said attorney Henry F. Sherrod III. “He firmly believed that no human being should be made to suffer like he suffered.” See: Danley v. Allyn, U.S.D.C. (ND Ala.), Case No. 3:06-cv-00680-IPJ.

Additional source: Press release from Law Office of Henry Sherrod

Hepatitis & Liver Disease
A Guide to Treating & Living with Hepatitis & Liver Disease. Revised Ed. By Dr. Melissa Palmer
See page 53 for order information
News in Brief:

**Alabama:** In April 2009, two unnamed Walker County jail guards were suspended with pay pending an investigation into a female prisoner’s claim that she was raped by a male prisoner who had been temporarily transferred from state prison to the jail to attend a funeral. Sheriff John Mark Tirey said his office was investigating whether malfunctioning equipment or employee negligence was responsible for the male prisoner gaining access to the female prisoner’s cell. Tirey said he expects the male prisoner will be charged with sexual abuse.

**California:** On May 1, 2009, former jail guards Daniel Lindini, Roxanne Fowler and Ralph Contreras were scheduled to appear in court for a pretrial hearing on murder charges. They are charged with murder and related crimes after beating prisoner James Moore to death in the Bakersfield jail on August 15, 2005 while Moore was handcuffed and shackled. Contreras failed to appear at the hearing and a bench warrant was issued for his arrest. Lawyers for the three defendants asked for yet another continuance, even though the case has been rescheduled numerous times. Trial was set to begin on May 11.

**Florida:** On April 22, 2009, Gainesville resident Victoria Thorp, 19, was arrested after sneaking into a minimum security prison to have sex with her boyfriend. Thorp climbed through a window to have sex with Aquilla Wilson, 18, according to Police Lt. Wayne Ash. Wilson jumped out a window when authorities discovered the couple. “It appeared that she climbed through the window for a little tryst, and when they got caught, he left and left her there,” Ash said. Thorp was being held at the Alachua County jail on charges of aiding a prisoner’s escape and introduction of contraband into a prison. Wilson remained at large while police continued to search for him.

**Reunion Island:** On April 27, 2009, Juliano Verbard, a religious cult leader and convicted child molester, escaped in a helicopter from the Domenjod prison on with two other prisoners. The other prisoners, Alexin Jismy and Fabrice Michel, are members of Verbard’s cult and his co-defendants. Unnamed accomplices boarded a tourist helicopter and hijacked it at gunpoint. The accomplices ordered the pilots to fly the chopper to the prison’s exercise yard, where Verbard and the other prisoners boarded. The helicopter then landed a few hundred yards from the prison and the men escaped in a waiting van. Authorities continue to search for them. This is the tenth helicopter escape from a French prison since 1996.

**Idaho:** In January 2009, a deputy at the Ada County jail mistakenly gave prisoners used disposable razors left in a storage area where new razors are usually kept. Jail officials are running blood tests on approximately 192 prisoners to determine whether any of them contracted diseases, such as hepatitis B. Jail spokeswoman Andrea Dearden said the tests were offered as a precaution; less than half of the unit’s prisoners took the test. The jail is investigating why the razors were not disposed of properly.

**Illinois:** In late April 2009, federal authorities apprehended a man wanted on an outstanding warrant for sexual assault following a conviction in Sweden. The man, Jerry Pomush, was arrested at the Sheridan Correctional Facility where he worked as a drug and alcohol counselor. Pomush’s conviction stemmed from his assaulting a female prisoner while working as a prison guard in Stockholm, Sweden in 1999. He passed a background check prior to beginning employment at the Sheridan facility. Illinois officials blamed Sweden for failing to notify the United States about the warrant. Pomush awaits extradition to begin serving an 18-month sentence at the Swedish prison where he was once a guard.

**Indiana:** In November 2008, three men and three women were charged with escape for sneaking between cell blocks in the Greene County Jail to have sex with each other. Authorities allege the prisoners removed metal ceiling panels and used a passageway to meet for sex more than a dozen times in September and October 2008. Judge Dena Martin dismissed the charges in one case because the prisoner did not actually leave the jail. Prosecutor Jarrod Holltsclaw said he expects the other charges will likewise be dismissed.

**Louisiana:** On April 23, 2009, Angelo Knighton Vickers, 47, a guard at the Terrebonne Juvenile Detention Center in Houma, was arrested and charged with two counts each of child molestation and sexual malfeasance in prison. Vickers allegedly gave teenage female prisoners various privileges, such as phone access and snacks, in exchange for sex. Floyd Wesley Howard and Darwin Jamal Brown, both guards at the facility, were arrested on identical charges. Another guard, Tiffani Denin Blakemore, was charged with obstruction of justice for allegedly threatening a teenage girl. All four have been fired. The allegations came to light when a former prisoner contacted officials to report she had sex with a guard while confined. Another girl made similar claims during the investigation, which is ongoing.

**New York:** On November 11, 2008, four guards at the GEO-owned Queens Private Correctional Facility were arrested and charged with use of excessive force and obstruction of justice. Marvin Wells, Stephen Rhodes and Kirby Grey allegedly beat a prisoner in April 2007 after he made derogatory comments about the appearance of female guard Krystal Mack. They then allegedly threatened the prisoner with death if he reported the beating. Other prisoners reported the victim’s severe injuries. Wells, Rhodes and Mack also allegedly tried to cover up the beating by preventing other guards from reporting it. The four guards were indicted on November 24, 2008.

**Oklahoma:** In April 2009, two female prison guards were strip searched by investigators looking for Indian Brotherhood tattoos, an American Indian prison gang. In the first incident, the guard acknowledged having tattoos but denied that any of them signified the Indian Brotherhood. A female investigator asked the guard to lift her dress above her head. In the second incident, the guard had to remove her jeans for an investigator. No Indian Brotherhood tattoos were found. Scott Barger, deputy director of the Oklahoma Public Employees Association, said the union believes the incidents violated Department of Corrections policy regarding strip searches of employees. “We don’t feel like the policy was followed,” he stated. Jerry Massie, a DOC spokesman, said the agency had performed a preliminary inquiry and found “no indication of a strip search “because the guards volunteered to expose themselves. “It was appropriate,” Massie said. No further investigation is planned. The irony of the guards’ complaint is that they most likely conduct far more invasive searches of prisoners on a regular basis, and would certainly turn a deaf ear to any complaints about their conduct.

**Peru:** On April 7, 2009, former Peru-
vian president Alberto Fujimori, 70, was convicted of crimes against humanity and sentenced to 25 years in prison by a three-judge court in Lima. The conviction stems from killings carried out by army death squads during Fujimori's presidency from 1990-2000. Fujimori was found guilty of giving political cover and leadership to the death squads during the height of Peru's fight against insurgents. The trial focused on two death squad incidents: one in November 1991 in which 15 people – including an eight-year-old boy – were shot dead at a barbecue in a Lima suburb, and another in July 1992 where nine university students and their professor were abducted and shot in the capital. Throughout the 16-month trial – which was the longest and costliest in Peru's history – Fujimori maintained his innocence. The trial represents a landmark case because it is the first time a Latin American head of state has faced trial in his own country for human rights violations.

Rhode Island: On April 27, 2009, Daniel Cooney, director of the controversial Donald W. Wyatt Detention Facility, was fired by Central Falls Mayor Charles Moreau. The jail has been under scrutiny since ICE prisoner Hiu Lui “Jason “ Ng died last year from late-stage cancer that went undiagnosed. ICE removed all 153 of its prisoners from the facility following Ng’s death. The jail relies heavily on government contracts, so the removal of ICE prisoners seriously affected its profitability. Cooney was fired for comments in a newspaper interview that stirred additional controversy and undermined the jail’s ability to secure a new contract with ICE. When questioned about conditions at the jail by a Providence Journal reporter, Cooney stated he was “looking at it like I’m running a Motel 6 ... I don’t care if it’s Guantanamo Bay. We want to fill the beds.” Despite Cooney’s firing and assurances from the mayor that jail conditions would improve, his comments prompted the Rhode Island ACLU to lobby the state’s congressional delegation to oppose placement of ICE prisoners at the facility. Other human rights groups held a protest outside the jail following Cooney’s termination.

Syria: In December 2009, riots broke out on two separate occasions at Sednaya prison, located in Northwest Damascus. The prison is run by military intelligence and holds hundreds of Islamist activists opposed to the current secular Syrian regime, many of whom have never stood trial. Human rights advocates claim that Syrian security forces killed approximately 25 rioters and buried their bodies several months later under cover of darkness at cemeteries throughout Damascus. According to civilians who witnessed the burials, Syrian officials used heavy machinery to dig the graves, which were then filled with bodies that had been stored in refrigerators since the riots. “The reports we have received suggest that yet more prisoners were killed during a second outbreak of rioting at Sednaya prison last December,” said an anonymous Syrian human rights activist. “The high number of deaths is indicative of the Syrian authorities’ heavy-handed treatment of detainees.” New York-based Human Rights Watch recently reported that many prisoners had not seen their families in more than a year even though they had not been officially charged with a crime. Syrian officials have refused to discuss the reports, and access to the prison is severely limited by security officials.

Texas: Former Montague County Sheriff Bill Keating died of a heart attack in his home in Forestburg on April 30, 2009. In February, a federal grand jury had returned a 106-count indictment against Keating and 16 other defendants. The indictment charged Keating with official oppression and sexual assaults against female prisoners during his tenure as sheriff from 2004 to 2008. In one instance, Keating coerced a woman into performing oral sex on him by promising not to arrest her after deputies found drug paraphernalia in her house. Also indicted were several jail guards, mostly women, who were charged with various offenses involving sex or drugs and other contraband. Several prisoners also were charged. Keating had pleaded guilty to a civil rights violation and was expected to be sentenced to 10 years in federal prison on June 22.

Washington: Former King County jail employee Lynita Regis was surprised when she went to an ATM on May 12, 2009. When she was previously employed at the jail she had access to the jail’s bank account. When she opened a new personal account, the bank mistakenly gave her access to more than $271,000 in jail funds. Although broke and facing eviction, Regis reported the error to the bank, which immediately corrected the mistake. Regis said she was tempted to spend the money but decided to “do the right thing.” Perhaps she didn’t relish the idea of being a prisoner at the jail where she had previously worked.\[1\]
On January 1, 2008, the defendants in a Michigan federal civil rights action involving the suicide of a jail prisoner settled the case for $1,800,000, the largest jail suicide settlement in Michigan history.

Tatisha Grant, 23, was arrested by River Rouge, Michigan police officers at about 2:00 a.m. in a bar parking lot on an outstanding warrant for loitering. She was uncooperative and fought the arresting police officers. She attempted escape, but was discovered hiding under a car in the police garage and sprayed with chemicals to drive her out into the open. She was hosed off and put in a cell. At shift change, arriving Lt. Camilla Worthy was informed of events and told to watch Grant closely.

Police policy called for hourly checks on all prisoners, more frequent in cases like Grant’s. Worthy waited well over an hour to check on Grant, then discovered her body hanging from the drawstring of her sweatpants.

A videotape of Grant’s cell shows her banging her head against the cell wall and covering the camera lens with bread from her breakfast tray. When the bread fell off ten minutes later, it shows her hanging body and eventually records the arrival of the emergency medical responders. An audio tape from the jail’s interview room revealed guards discussing Grant’s bizarre behavior, including self-mutilation by biting chunks out of her arm. However, they failed to summon medical or psychiatric help for Grant while she lived. An autopsy revealed the presence of cocaine in Grant’s body.

Worthy was charged with misdemeanor or willful neglect of duty. A jury acquitted her. The suit alleged that she and Sgt. Jefery Harris committed gross negligence, indifference and criminal negligence.

Grant’s estate was represented by Farmington Hills attorney Arnold E. Reed. He has asked the Wayne County Prosecutor’s Office to reopen its investigation into Grant’s death. See: Grant v. River Rouge Police Dept., USDC-MI, No. 2:06-CV-14267-PBD.

Additional Sources: Detroit Free Press, Michigan Trial Reporter

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**Other Resources**

**ACLU National Prison Project**
Handles state and federal conditions of confinement claims affecting large numbers of prisoners, as well as sexual assaults against prisoners. Publishes the bi-annual NPP Journal and the online Prisoners’ Assistance Directory. Contact: ACLU NPP, 915 15th St. NW, 7th Fl., Washington, DC 20005 (202) 393-4930. www.aclu.org/prisons

**Amnesty International**
Compiles information about prisoner torture, beatings, rape, etc. to include in reports about U.S. prison conditions; also works on death penalty issues. Contact: Amnesty International, 5 Penn Plaza, New York NY 10001 (212) 807-8400. www.amnestyyusa.org

**Center for Health Justice**
Formerly CorrectHELP. Provides information related to HIV – contact them if you are not receiving proper HIV medication or are denied access to programs due to HIV status. Contact: CHJ, 8235 Santa Monica Blvd. #214, West Hollywood, CA 90046. HIV Hotline: 323-822-3838 (collect calls from prisoners OK). www.healthjustice.net

**Children of Incarcerated Parents**
Works to stop intergenerational incarceration. Provides resources in three areas: education, family reunification, and services for incarcerated parents and their children. Contact: CCIP, P.O. Box 41-286, Eagle Rock, CA 90041 (626) 449-2470. www.e-ccip.org

**Family & Corrections Network**
Primarily provides online resources for families of prisoners related to parenting, children of prisoners, prison visitation, mothers and fathers in prison, etc. Contact: F&CN, 93 Old York

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$1,800,000 Settlement in Michigan Jail Prisoner Suicide Case

Road, Suite 1 #510, Jenkintown, PA 19046 (215) 576-1110. www.fcnetwork.org

**FAMM-gram**
Quarterly magazine of FAMM (Families Against Mandatory Minimums), which includes info about injustices resulting from mandatory minimum laws with an emphasis on federal laws. $10 yr for prisoners. Contact: FAMM, 1612 K Street NW #700, Washington, DC 20006 (202) 822-6700. www.famm.org

**Florida Prison Legal Perspectives**
A bimonthly newsletter that includes court rulings, administrative developments and news related to the Florida DOC. $10 yr prisoners, $15 yr individuals, $30 yr professionals. Contact: FPLP, P.O. Box 1069, Marion, NC 28752. www.floriaprisons.net

**The Fortune Society**
Provides post-release services and programs for prisoners in the New York City area and publishes Fortune News, a free publication for prisoners that deals with criminal justice issues. Contact: The Fortune Society, 29-76 Northern Blvd., Long Island City, NY 11101 (212) 691-7554. www.fortunesociety.org

**Innocence Project**
Provides advocacy for wrongly convicted prisoners whose cases involve DNA evidence and are at the post-conviction appeal stage. Maintains an online list of state-by-state innocence projects. Contact: Innocence Project, 100 Fifth Avenue, 3rd Fl., New York, NY 10011 (212) 364-5340. www.innocenceproject.org

**Justice Denied**
Only magazine dedicated to exposing wrongful convictions, and how and why they occur. Six issues: $10 for prisoners, $20 all others, $3 for sample issue or a first class stamp for more info. Contact: Justice Denied, P.O. Box 68911, Seattle, WA 98168 (202) 335-4254. www.justicedenied.org

**National CURE**
Citizens United for Rehabilitation of Errants (CURE) is a national organization with state and special interest chapters that advocates for rehabilitative opportunities for prisoners and less reliance on incarceration. Publishes the CURE Newsletter. Contact: CURE, P.O. Box 2310, National Capitol Station, Washington, DC 20013 (202) 789-2126. www.curenational.org

**November Coalition**
Publishes the Razor Wire newsletter four times a year, which reports on drug war-related issues, releasing prisoners of the drug war, and restoring civil rights. Yr sub: $6 for prisoners, $25 all others. Contact: November Coalition, 282 West Astor, Colville, WA 99114 (509) 684-1550. www.november.org

**Partnership for Safety and Justice**
Publishes Justice Matters, a quarterly newsletter that reports on criminal justice issues in OR, WA, ID, MT, UT, NV and WY. $7 yr prisoner, $15 all others. Contact: PSJ, P.O. Box 40085, Portland, OR 97240 (503) 335-8449. www.safetyandjustice.org

**Just Detention Int’l (formerly Stop Prisoner Rape)**
Seeks to end sexual violence against prisoners. Provides counseling resources for imprisoned and released rape survivors and activists for almost every state. Specify state with request. Contact: Stop Prisoner Rape, 3325 Wilshire Blvd. #340, Los Angeles, CA 90010 (213) 384-1400. www.justdetention.org

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Prison Legal News
Hepatitis and Liver Disease: What you Need to Know, 2004 Rev Ed, by Melissa Palmer, MD, 470 pages. $17.95. Describes symptoms & treatments of hepatitis B & C and other liver diseases. Includes medications to avoid, what diet to follow and exercises to perform. 1031

All Things Censored: Mumia Abu-Jamal, ed. by Noelle Hanrahan, 303 pgs. $14.95. Includes 75 articles by Abu-Jamal. Attacks capital punishment & critiques the dehumanizing prison system. 1040

Prison Writing in 20th Century America, by H. Bruce Franklin, Penguin, 1998, 368 pages. $16.00. From Jack London to George Jackson, this anthology provides a selection of some of the best writing describing life behind bars in America. 1022

Soledad Brother: The Prison Letters of George Jackson, by George Jackson; Lawrence Hill Books, 368 pages. $18.95. Lucid explanation of the politics of prison by a well-known prison activist. More relevant now than when it first appeared 30 years ago. 1016


No Equal Justice: Race and Class in the American Criminal Justice System, David Cole; The New Press, 218 pages. $19.95. Shows how the criminal justice system perpetuates race and class inequality, creating a two tiered system of justice. 1028

Ten Men Dead: the story of the 1981 Irish hunger strike, by David Beresford, 334 pages. $16.95. Relies on secret IRA documents and letters smuggled out from the IRA political prisoners during their 1981 hunger strike at Belfast’s infamous Long Kesh prison. 1006


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