Slave Labor Meets Hollywood

In a warehouse near the Baltimore airport in 1997, California businessman Trek Kelly observed a supplier peeling tags off crates of merchandise. Later he found a tag that had been overlooked. A tag with the words “Virginia State Prisons” printed on it.

At the time, Kelly, president of a company that supplies promotional goods to movie studios, was desperately trying to track down a long-overdue shipment of thousands of promotional vests for a 1996 movie, *The Island of Dr. Moreau*. New Line Home Video, which had ordered the vests from Kelly’s company, Kaiotu Gear, was hounding him daily and threatening a lawsuit over the delay. Meanwhile, Kelly’s supplier was demanding more money, making excuses about disgruntled workers in foreign factories, and showing Kelly a pile of shredded material instead of the finished vests.

“The workers were on strike and they had thrown all the materials out of the factory because we weren’t paying them enough money,” is the explanation Kelly remembers getting from the supplier, Edward R. Dovner, a Massachusetts businessman.

But there was no strike by foreign workers, no overseas sweatshop. Instead, there were five Virginia prisons where, for several months in 1996, prisoners earned 63 cents an hour making clothing for Dovner.

That work came to an abrupt halt on January 10, 1997, when Virginia State Police raided the prison work sites, confiscated materials, and shut the operation down. While Dovner was keeping Kelly at bay with tales of foreign worker rebellions, his attorney, Richmond lawyer Thomas B. Weidner IV, was begging the state to release the seized materials.

It wasn’t until Dovner’s attorney threatened a lawsuit that the state released the materials.

A year and a half later, the state police and FBI officials refuse to discuss the case because they say it is under investigation.

Virginia Prisons Opened to Privateers

In 1994, as U.S. trade negotiators threatened sanctions to protest China’s use of prison labor, Virginia’s then-Governor George Allen was pushing a “Factories Behind Fences” promotion, advertising prison labor as an economic boon for private companies.

“We complain about prison labor from China,” Allen said after a meeting of a government reform panel on July 24, 1994. “Well, let’s have our own prisoners doing something.”

To further Allen’s goals, Virginia’s General Assembly changed state law to allow for “joint ventures” between Virginia Correctional Enterprises (VCE) and private businesses.

“Virginia Prisons. They Are Wide Open To Business,” proclaimed a promotional brochure and trade magazine ads. Featuring a photo of a prison guard tower, the ads boasted of “willing, experienced workers,” and “no employee benefit packages to fund. No pensions, health insurance, vacations or sick leave.”

In 1996, VCE sought and received certification under the federal Prison Industry Enhancement (PIE) Program. Enacted in 1979, PIE exempts prison-made goods from interstate commerce restrictions if certain conditions are met. One such requirement: prisoners manufacturing such goods must be paid at least minimum wage.

But even with certification, obtaining approval for joint venture deals is a
complicated process. The rules require VCE officials to submit a proposal to the Board of Corrections, which sends it in turn to the VCE Advisory Committee.

If both approve, the proposed contracts are forwarded to the attorney general’s office for legal review. Finally, the deal must be authorized by the governor.

Apparently none of that happened with Dovner’s clothing deals. According to VCE’s former director and former assistant director, Dovner simply issued purchase orders for VCE to manufacture pants, flight suits and vests and VCE filled them.

“Virginia issues purchase orders to folks for them to provide goods,” explained former VCE Assistant Director David Addington when asked about the Dovner deal. “We just reversed the process. Folks issued us purchase orders to provide them with goods made by prison inmates. The director would then sign off on them.”

And in the case of Dovner’s purchase order, the price was right.

According to information provided by Virginia DOC spokesperson Larry Traylor, it cost VCE an average of $28.19 to make each pair of Island of Dr. Moreau pants. Documents supplied by Dovner’s lawyer show that VCE sold the pants to Dovner for $2.50 each.

It cost VCE $59.93 to make each Dr. Moreau flight suit, the same information shows, while the suits were sold to Dovner for $3 each. Finally, according to the state, it cost VCE $13 to make each Dr. Moreau promotional vest, which were sold to Dovner for $1.50 each.

According to Kelly, Dovner initially blamed the delays on Fine Incentives, the Texas company that Kelly originally hired to supply the vests, and which, in turn, had subcontracted the work to Dovner.

“Fine Incentives gave him $130,000 and we gave him about $110,000,” Kelly said.

Dovner paid VCE $15,751 for the vests, channeling the money through a bank in Anguilla, West Indies, VCE documents indicate.
did it without the knowledge of anybody but themselves.”

Former VCE Assistant Director, David Addington, a 20-year veteran of the DOC, abruptly quit his job in February, 1997, after he felt he was being unfairly targeted by the investigation. The deals with Dovner related to his contracts and dealings with VCE and the Virginia DOC. According to Weidner, authorities seemed interested in whether Dovner had bribed VCE officials to get the cut-rate prices he got on prison-made clothing, a charge he says Dovner has categorically denied.

As this issue of PLN goes to press, the investigation continues, and state officials remain tight-lipped.

Sources: Virginian-Pilot, Richmond Times-Dispatch

State Audit Exposes VCE Mismanagement

A week after the Island of Dr. Moreau scandal broke, the Virginia Auditor of Public Accounts released an audit of Virginia Correctional Enterprises (VCE) covering the period between July 1, 1996 and May 31, 1998. The report said that VCE posted an operating loss of $412,000 in FY 1997 and has liabilities of $5.1 million but only $3.5 million in liquid assets it could call on to pay its bills, including less than $150,000 in cash.

The audit report criticized VCE for lacking “adequate processes to review and evaluate joint venture contracts...lacks the ability to manage its cash flow...because the joint venture contracts lack sufficient monitoring controls and procedures.”

The audit team “found over twenty customers [in VCE’s Customer Master File] who did not appear to be government entities or non-profit organizations...VCE management was unable to provide justification, letters of understanding, or other support establishing the credibility and validity of these customers...VCE’s failure to validate its customers and subsequently conduct business with unallowable customers exposes the Commonwealth to unnecessary potential legal liabilities and contradicts public policies.”

VCE’s cash flow problems, say the report, began in the fall of 1996 when it first entered into joint venture contracts. The chief factor in VCE’s cash flow problems, according to the audit, “is its inability to collect receivables, specifically from one of the joint venture dealers, Morton Marks and Sons.”

Morton Marks, one of five furniture dealers involved in a joint venture with the agency, owed VCE about $1.2 million. And, says the report, “although VCE could not collect Morton Marks’ receivables, VCE continued to make sales to Morton Marks increasing the dealer’s receivables and worsening VCE’s cash problems.”

Unseemly Connections

According to state election records, Morton Marks was the second largest contributor to the successful gubernatorial campaign of then-Attorney General Jim Gilmore in 1997. Morton “Tracy” Marks III says his firm donated $44,625 worth of furniture to the governor’s campaign and that the furniture was returned after the election. Marks disputes that his ties to Gilmore led to anything improper. One connection that raises eyebrows, though, is David Jones, who was VCE’s director from March 1992 to November 1996. One month after leaving VCE he became a vice president for the furniture company whose joint venture partnership with VCE was approved in April 1996.

Jones, who is now also the chief financial officer of Morton Marks, says the company’s job offer came later and had nothing to do with his approving the joint venture.

VCE terminated its contract with Morton Marks on August 10, 1998. The attorney general’s office has filed a $1.7 million suit against Morton Marks to collect past due accounts. Marks filed suit against VCE to debate the amount owed. Marks said he was owed more by other state agencies than the amount he owes VCE.

Who’s Minding the Store?

VCE’s first two joint ventures were with Zig Zag Embroidery for textile products and Ariens, Inc. to manufacture camp stoves. Neither of these ventures proved successful.

VCE closed its Zig Zag operations due to Zig Zag’s inability to meet payment obligations.” VCE is currently in litigation with Zig Zag to collect unpaid invoices of $215,000.

The Ariens “letter of understanding” (in lieu of a contract) required VCE to manufacture 20,000 camp stoves at $43.97 each. VCE completed manufacture of the stoves in May, 1998. But according to the audit, VCE incurred extra labor and overhead costs [i.e. operating losses] of $88,000. The audit report dryly notes that “VCE management should ensure the prices of products are adequate to recover costs before starting production.”

The largest joint venture deals were between VCE and a consortium of furniture dealers. Five of the dealers were consolidated under one contract for an entity called the Boling Company. These five were: Morton Marks & Sons, B.T. Office Products, Anderson Business Furniture, Harris Office Furniture, Chasen’s Business Interiors.

Two other contracts covered Norix/York Industries and Network Business Furniture. Sales under these last two contracts were minimal, less than $150,000 combined between July 1, 1996 and April 6, 1998.

Under the Boling Company contract, sales for the five dealers for the period July 1, 1996 through December 31, 1997, totaled more than $13.2 million, with Morton Marks and Sons comprising almost $5.8 million.

The furniture sales contracts were sweet deals for the private furniture dealers. Under the terms of the contract, the dealers would take orders from customers who wanted furniture. They would submit those orders to VCE, whose prison factories would churn out the finished goods. VCE would then ship the furniture to the dealer, and in many cases directly to the end customer. Under the contracts, VCE invoices it’s contract dealers at negotiated amounts and the dealers in turn invoice the end customer at a substantial markup.
The dealers were thus able to milk the contracts for what appear to be easy profits, billing end customers for prisoner-made furniture that in many cases was both manufactured and shipped by VCE.

According to the audit report, the joint venture furniture racket was rife with what the state auditor characterized as "weaknesses" including (but not limited to) the following:

- "[VCE's] lack of a structured contract with sufficient monitoring controls and procedures forces it to rely on the dealers to send payments.
- "VCE does not have the ability to manage its customer base or develop a sufficient marketing strategy because the contracts do not require dealers to tell VCE who their customers are.
- "VCE cannot ensure the dealers invoice end users at negotiated contract prices because the contract language specifying how the dealers meet this requirement and VCE lacks the policies and procedures to monitor it.
- "VCE must rely on dealers to notify it of certain products sold; therefore, VCE cannot ensure that it has received 811 freight commissions due to it. The Department of Corrections Internal Auditors identified unreported sales... on which they estimated VCE had lost a minimum of $72,300 and a maximum of $117,400 in [unpaid freight] commissions.
- "VCE did not follow contract specifications and shipped directly to the end customer instead of the dealer in many instances. We also found instances where VCE shipped finished goods to a third party subcontracted by the dealer. The contracts do not provide for these subcontracting practices.
- "VCE did not verify the credit worthiness of its dealers, rather it authorized arbitrary $1 million blanket credit limits that can be overridden by Customer Service Representatives.
- "VCE continues to allow sales to dealers exceeding their credit limits. As of April 2, 1998, Morton Marks and Sons had exceeded its credit by $128,000 and had another $847,000 sales on order. We also found VCE invoicing the end user for a sale when the dealer reached its credit limit."

Also cited in the audit as a problem is VCE's outdated and poorly designed computer system and a computer security system (or lack thereof) that invites "fraud, abuse, and unauthorized disclosure of data."

The auditor found "at least 189 products [in VCE's catalog] priced below the standard cost," and observes that "failure to price products at or above standard cost can result in significant losses for VCE."

The report also criticizes VCE's entire cost accounting system, a system in such disarray that "it is difficult to identify products that are losing money, establish fair and adequate prices, or develop plans to increase, reduce, or discontinue products. This also distorts inventory and cost reporting throughout the year, making it difficult to evaluate industry and product profitability."

Sources: Virginian-Pilot, Richmond Times-Dispatch; Commonwealth of Virginia Independent Auditor's Report

Texas May Not Retroactively Stop Mandatory Release

The Texas Court of Criminal Appeals has held that Texas cannot reinterpret a law to retroactively deny a state prisoner mandatory release. Randy Sullivan Schroeter, a Texas state prisoner, was convicted of indecency with a child (IWC) in 1994 and sentenced to three years imprisonment. By July, 1997, the sum of his flat time and good time was almost five years, yet he had not been released.

At the time of the offense, Article 42.18, § 8(c), Texas Code of Criminal Procedure, made persons convicted of the specific offenses listed in the statute ineligible for mandatory release. It stated that persons convicted of all other offenses shall be released when the sum of their good time and flat time equaled their sentence. IWC was not included in the list. Two similar lists included IWC effectively making a person convicted of IWC potentially subject to mandatory release before becoming eligible for parole. A later legislature stated that the intent of the previous legislature was to include IWC in the ineligible-for-mandatory-release list. In 1997 the list was amended to include IWC.

The Texas Attorney General issued an opinion that persons, such as Schroeter, convicted of IWC which occurred in the four years prior to the amendment date. See: Ex Parte Schroeter, 958 S.W.2d 811 (Tex.Crim.App. 1997).
A recent issue of PLN called for articles and information from women prisoners. I hope women throughout the state and federal prison systems will respond to this request. If we are ever to change the hideous situations we face at the hands of the prosecutors, judges, and prison guards, we must speak up and we must speak for ourselves.

Who can understand and describe, as we can, the abusive ways we are kept in line? The issue of sexual abuse and harassment comes to light only when an incident occurs that is so outrageous that even the system can’t get away with ignoring it. And that is rare.

But women prisoners know that the foundation for that abuse is laid every day: when male guards patrol our housing units, where we have no privacy to change clothes, bathe, or use the bathroom. When male guards joke about doing strip searches in place of the women guards – or when they pat search us daily. When male guards yell at women prisoners (as they do all the time), raising the unspoken threat of violence, and often triggering memories of how a young girl was frightened and overpowered by an adult male who misused his authority to misuse her body. This is the daily reality of women in prison – but no one will know if we don’t tell them. If we don’t tell it, no one will understand that sexual harassment and abuse are not aberrations. They are integral to the methods by which we are controlled and repressed in the prison system.

Who can understand, as we do, how many women are serving ridiculously long sentences because they were in a relationship with a man (usually older, more experienced) who dealt drugs? We live in a community with young women whose lives have been torn apart because they did not turn in their boyfriend/husband/father of their children, because they can’t prove that they weren’t involved in the sale of drugs – or, if they can prove it, they were still found guilty of “aiding and abetting” because they paid the rent and the phone bill. This is an important part of the mandatory minimum tragedy that we women know intimately. Who will tell our stories if we don’t?

Who else can describe as we can the prospect of living for years in a cell built for one but now “home” – three, with no desk, no shelves, no room to turn around? Men prisoners have filed suit, protested, and written about the indignity of double-celling. We women are packed in like sardines, defying the safety inspectors’ mandates – and we are the one who must make it known.

Who better than us can tell what it is to see a child growing up only in photos, to hear that small voice only on the phone (if we can afford the call), asking why we’re gone so long? In the federal system, there are only three (soon to be four) prisons for women: Danbury, CT; Tallahassee, FL; Dublin, CA; and, soon, Carswell, TX. To be sent 3,000 miles from one’s children is not at all unusual. For the growing number of women in the system from Latin America, Africa and the Caribbean the visiting room is a foreign country twice over: They never see it. If we don’t publicize these cruelties, who will?

Who besides us can tell the story of the waste that is federal time? Once a woman has her GED, there are precious few educational opportunities for her. We support and encourage one another, but obstacle after obstacle must be overcome in order to study and learn. We know what it’s like to try to learn in our “library,” stocked with encyclopedias printed before most of the women here were born. We know that community resources from the outside are not welcomed here, and that sympathetic people who try to come into the prison to speak, teach, share, learn have to possess mountains of will and determination (and patience!) to breach the wall. We must tell this tale, or it will remain untold.

We feel powerless. We are told every day that we are powerless. But that’s a lie. As long as we have voices and one another, we hold our future in our control. We women prisoners have to speak, write, read, discuss – and begin the process of change. PLN is a tool all prisoners need. It’s the only place I know where reliable, current, useful information about all the laws affecting our lives as prisoners is available. Yet few women prisoners subscribe, and fewer still submit articles.

It’s not a story on TV, a long-running soap opera. It’s our story. Why are we waiting for someone else to write the script?

Postscript on another topic: In the aftermath of the NYPD attack on Harlem and black youth in the “million youth march,” Giuliani’s police have targeted black activists in NYC for harassment and arrest. At the same time, police in Decatur, Georgia attacked the Malcolm X Grassroots Movement. I don’t have sufficient details on this to make a more complete report. But I think we all need to be aware of this situation, and support the black comrades, communities and groups in any way we can. There have been important mobilizations and political activity by black groups all over the country in the last year. It’s not a surprise that the government would try to stop this increasing resistance. It’s imperative that all progressive forces act however we can to protest these police attacks.
Youngstown Break-Out Leads to Political, Financial Fall-Out

by Alex Friedmann

On July 25, 1998 a half-dozen prisoners, including four convicted murderers, cut through two fences and escaped from the CCA-operated Northeast Ohio Correctional Center in Youngstown, Ohio. According to Warden Jimmy Turner the successful break-out was due to errors by prison employees — including guards leaving their posts, not watching their designated areas and not promptly responding to motion sensor alarms.

The escape was the latest in a series of embarrassing incidents at the problem-plagued facility, which houses approximately 1,500 prisoners from Washington, D.C. [see PLN, Oct. 1997; June 1998]. CCA previously had been under a court order to remove maximum-security prisoners from the medium-security prison.

Michael Quinlan, the company’s director of planning, promised that CCA would learn from its mistakes and would improve staff training at the facility.

Ohio lawmakers, however, weren’t interested in apologies or excuses. State Senator Jeff Johnson observed that the escape highlighted a major distinction between privately-operated and public prisons. “I’ve been to Ohio prisons, and we have some problems,” he said. “The difference is if the manager screws up and lets six people escape in broad daylight, we have the authority to get him out of there.”

Also of concern was CCA’s response to the break-out. A Wall Street Journal article revealed that the first motion detector alarms went off at 1:06 p.m., though the escape was not reported to local law enforcement officials until two hours later.

According to Youngstown police captain Robert Kane, when officers arrived at the facility they initially were told there was no problem even though armed prison guards were searching the surrounding fields and woods. Said Kane, “In my opinion the escape was not reported promptly or properly.” Youngstown Mayor George McKelvey was more blunt, stating, “The facts lead one to believe there was an attempt to deceive the police or cover up the event.” CCA termed the suggestion of a cover-up “ridiculous.”

Following the escape Ohio Governor George Voinovich announced he was seeking a way to close the Youngstown facility, but a legal analysis by the Attorney General’s office concluded that the state had no authority to do so. Ironically the governor’s brother, Paul Voinovich, a prison architect, had lobbied the city of Youngstown for the facility and served as a consultant to CCA.

U.S. Rep. James Traficant (D-OH) quickly pushed through the House an amendment calling for a federal study on prison privatization that would examine security procedures. “The on-going problems at the Northeast Ohio Correctional Center in Youngstown should serve as a wake-up call to the nation,” Traficant said.

“We need to identify possible security and personnel shortfalls at private prisons and effectively address them.” Further, U.S. Sen. Mike DeWine (R-OH), a member of the U.S. Senate Judiciary Committee, stated that he would seek a hearing on classification problems at the Youngstown facility.

Wall Street reacted negatively to news of the escape: CCA’s stock slid 20% to a 52-week low within ten days of the incident. Brian Ruttenbur of Suntrust Equitable Securities, a finance firm that encourages investment in private prison companies, termed the Ohio situation a “public relations problem.” CCA spokesman Peggy Lawrence called criticism directed against the Company “very frustrating” and “very unfair.”

Meanwhile, agents with the U.S. Attorney’s Office and U.S. Marshals Service began an investigation into whether a CCA guard had assisted with the break-out. Company officials declined to comment publicly; however, Doctor R. Crants, CCA’s C.E.O., admitted in a letter to Governor Voinovich that they suspected “a single female employee collaborated with inmates to plan the escape.”

Five of the escapees were captured within two days and the sixth was caught more than a month later. Under an Ohio law enacted last March, CCA will have to reimburse city, state and federal authorities for the cost of the search.

On August 3, 1998, CCA announced it would transfer about 200 close-security prisoners from Youngstown to other facilities within thirty days; U.S. Attorney General Janet Reno said they would be moved to federal prison or a state facility in Virginia. Federal and D.C. authorities are also establishing a full-time monitor at Youngstown.

Fired SCI Greene Guards Regain Jobs

After months of negotiation with the union, the Pennsylvania DOC agreed to reinstate two guards who were fired from its Greene County prison. George Reposky and Mark Powell were fired and other guards were disciplined in May 1998 for using excessive force against SCI Greene prisoners. [See: “Whitewash in Greene County,” Sept. ’98 PLN].

The union might have quickly settled grievances that were filed by 11 other guards who were disciplined, “but we weren’t going to settle anything without those two,” said William Herbert, president of the AFSCME local that represents state prison guards.

Two senior guards, Lts. John Tustin and Scott Nickleson, were also fired, along with nine other senior guards who were demoted, suspended, or transferred. They held management positions and do not belong to the union. Herbert said they are negotiating their own deal with the state Civil Service Commission.

Reposky was transferred to SCI Waynesburg and Powell to SCI Pittsburgh. Neither received back pay for the three months they were out of work (and collecting unemployment compensation) but retain their seniority and pay rate.

DOC Spokesperson Michael Lukens said Reposky and Powell “realized what they’ve done [using excessive force against prisoners] is inconsistent with Department of Corrections’ policy.”

But the deal, negotiated between the AFSCME, the DOC and the Governor’s Office of Administration, neither exonerated the guards or required them to admit guilt.

“It’s the union position that the officers did nothing wrong and were just following the procedures established by those in charge of SCI Green at the time,” Herbert said. “They had only worked at SCI Greene, and that was the way things were done.”

Source: Pittsburgh Post-Gazette
May 17, 1998, prisoner Gerrol Barnes stabbed guard Doris Taylor (60) to death at the Thumb Correctional Facility. Barnes used a prison kitchen knife and committed the murder in an employee locker room in the prison kitchen. After killing Taylor Barnes slashed his own throat. Barnes has been charged with the killing. Prison officials claim Barnes killed Taylor because she had announced her retirement earlier that day.

MT: On May 17, 1998, prisoner Michael Benton was beaten to death at the California State Prison-Sacramento (AKA New Folsom). Prisoner Jiles Wallace has been placed in segregation as a suspect in the killing. Benton’s murder was the fourth at New Folsom since December, 1997.

CA: On August 11, 1998, prisoner Michael Benton was beaten to death at the California State Prison-Sacramento (AKA New Folsom). Prisoner Jiles Wallace has been placed in segregation as a suspect in the killing. Benton’s murder was the fourth at New Folsom since December, 1997.

CA: On August 18, 1998, The Judicial Council of the Ninth U.S. Circuit Court of Appeals reprimanded federal judge James Ware. For years Ware, who is black, had told audiences he was inspired to become a lawyer after his 13 year old brother was killed by white youths in his native Alabama in 1963. This was a lie as the victim’s brother was another James Ware. The fraud was exposed by Alabama federal judge U. W. Clemon who heard judge Ware describe the incident on television. Clemon knew the victim’s family. Ware, a Bush appointee in San Diego, had been nominated to the Ninth Circuit Court of Appeals but withdrew his nomination when his lie was exposed. The unanimous reprimand means Ware will face no other punishment, such as impeachment.

CA: On May 9, 1998, Calipatria State Prisoner Edward Citte1 (44) suffocated when he attempted to swallow a drug filled balloon during a cell search.

IN: On July 11, 1998, Anthony Harris was killed when the large moving tractor he was driving overturned on him. Harris was imprisoned at the Putnamville Correctional Facility when he died.

Iran: On August 23, 1998, Assadollah Lajevardi, the former chief prosecutor and head of the Iranian prison system, was shot and killed in his drapery shop. Two members of the communist Mujahedeen al-Khalq carried out the attack and one was killed in a shoot out with police afterwards. The shooting marked the tenth anniversary of the 1988 summary executions of thousands of communist prisoners in Tehran’s Evin prison. Lajevardi had overseen the executions as well as the systematic torture and mistreatment of political prisoners. Before the 1979 revolution Lajevardi had been imprisoned for bombing the Tehran offices of El AI, the Israeli airline, and for the attempted murder of a former Iranian prime minister.

MN: In February, 1998, Bemidji police raided a methamphetamine lab and arrested several drug makers. The meth chemists were local jail prisoners on work release. They had been hired by a local contractor who diverted them to his drug business.

MT: On May 17, 1998, prisoner Gerrol Barnes stabbed guard Doris Taylor (60) to death at the Thumb Correctional Facility. Barnes used a prison kitchen knife and committed the murder in an employee locker room in the prison kitchen. After killing Taylor Barnes slashed his own throat. Barnes has been charged with the killing. Prison officials claim Barnes killed Taylor because she had announced her retirement earlier that day.

NJ: On August 17, 1998, a jury awarded $350,000 in damages to former deputy attorney general Barbara Davis. Davis claimed she had been sexually harassed by her boss, deputy, director of the Criminal Justice Division, Richard Carley.

NY: On August 14, 1998, Gary Evans, a federal detainee facing the death penalty on charges of killing five people, kicked out the window of a U.S. Marshall’s van while being transported from a court hearing and escaped. Shackled hand and foot, Evans got out of the moving van as it passed over the Troy-Menand’s bridge and leaped to his death in the Hudson river. Evans fell 65 feet to land in one foot of water.

OK: On July 24, 1998, Tulsa jail nurses Troy Desonia and Charlene Crawford were indicted in charges of second degree manslaughter. The charges arise from the October 14, 1997, death of jail prisoner Charles Guffey, who died of a perforated ulcer.

OR: On August 28, 1998, Tracey Poirer escaped from the Oregon Women’s Correctional Center in Salem by crawling through a hole cut in the prison’s fence. Prison officials speculated that Poirer had a staff accomplice because electronic sensors in the fence did not work and she had been in a maximum security cell when she escaped. Poirer was serving a sentence or life without parole for killing a dwarf.

SC: In June, 1998, Alabama based Just Care Inc., a private prison company, announced it would spend $15 million to convert a former mental hospital into a 326 bed prison hospital. The company plans to open the nation’s first private geriatric prison to house elderly and disabled prisoners from Georgia and the Carolinas.

TX: In August, 1998, Cesario Alvarez Cubillos was shot and killed by prison guards while escaping from an INS detention center in Big Spring. Alvarez was serving a seven month sentence for illegally entering the U.S. The prison is operated on contract to the federal government by Cornell Corrections, a private prison company.

TX: On August 7, 1998, Bill Himstedt, a Texas state prison guard, was killed and 16 prisoners injured when the prison bus driven by Himstedt ran off the road in rainy weather. The crash occurred in Centerville. The bus was transporting prisoners from Gatesville to Huntsville.

TX: On August 7, 1998, Huntsville prisoner Mark Stallings attempted to escape by taking guard Thomas Dorman hostage. Stallings was armed with a loaded, two shot derringer pistol. After a forty minute standoff, Stallings surrendered. The prison, Holliday unit, was placed on lockdown for the weekend as prison officials investigated how Stallings got the gun.

VA: In August, 1998, the Virginia DOC signed a contract to house 1,267 Washington D.C. prisoners for 2 ½ years at a rate of $62 a day per prisoner. The contract comes as part of the District of Columbia’s plan to close its prison system and the Virginia DOC’s plan to rent 3,290 excess prison beds to MI, DE and VT.
PLRA Termination Provision Constitutional in Eleventh Circuit

The court of appeals for the Eleventh circuit held that the termination provision of the Prison Litigation Reform Act (PLRA), 18 U.S.C. § 3626(b)(2), does not violate the separation-of-powers doctrine, the due process clause, nor the equal protection clause of the fifth amendment.

For years Florida death row prisoners enjoyed virtually no outdoor exercise. Indeed, one prisoner’s leg bone snapped as a result of lack of exercise. In 1981 a lawsuit was commenced and a class certified. Two years later the court approved a consent decree requiring prison officials to provide two two-hour exercises sessions per week, weather permitting.

After several years of non compliance, this court found prison officials in contempt, and entered a highly detailed remedial order. While the appeal was pending, the PLRA became law. In response, the Eleventh circuit remanded the case to determine if the situation met the PLRA conditions that preclude termination. On remand the trial court concluded that § 3626(b)(2) is unconstitutional.

On the subsequent appeal the Eleventh circuit joined the Fourth, Plyler v. Moore, 100 F.3d 365 (1996), and the Eighth circuits, Gavin v. Branstad, 122 F.3d 1081 (1997), in holding § 3626(b)(2)’s termination provision constitutional. However, the court declined to follow the second circuit’s reasoning in the vacated ruling of Benjamin v. Jacobson, 124 F.3d 162 (1997).

In reaching this decision the court rejected the prisoners’ invitation to evaluate the holistic effect of the statute on court access because the issue was not properly before the court. The court also brushed aside the prisoners’ contention that the PLRA discriminated against prisoners and is not rationally related to a legitimate government purpose. The court found the Act advanced “the unquestionably legitimate end of minimizing prison operation by judges.”

In conclusion, the court vacated the remedial order and remanded the action “without limitation for further proceedings consistent with the [c]ourt and the PLRA.” See: Dongan v. Singletary, 129 F.3d 1424 (11th Cir. 1997)

No Refund of PLRA Fees

The court of appeals for the Seventh circuit held that the In Forma Pauperis (IFP) provisions of the Prison Litigation Reform Act (PLRA) are constitutional and prisoners do not get a refund of the partial filing fees they pay if they later refuse to pay the entire fee. Rudolph Lucien is an Illinois state prisoner and frequent filer of frivolous lawsuits. Lucien filed the instant suit challenging his classification as an escape risk. The district court conditionally granted Lucien’s motion to proceed IFP but required that he pay $18 towards the filing fee. Lucien refused to pay the $18 and the court refused to file the complaint. Lucien appealed and the court of appeals affirmed.

Lucien filed his suit in the district court before the PLRA was enacted, when district courts had discretion in imposing partial filing fees as a condition to granting IFP status. The appeals court noted that when the lower court assessed the $18 filing fee Lucien had $60 in his prison trust account and another $144 entered his account before he notified the court of his refusal to pay. “Lucien thought $18 excessive which implies he did not think much of his chances of success.” The court noted that Lucien purchased a wide range of items from his prison trust account, which he thought more valuable than his litigation. The court held the case was properly handled under pre PLRA law. However, because the complaint was never filed, Lucien did not owe the court any filing fee, not even the $18.

Lucien filed his notice of appeal after the PLRA was enacted and the district court assessed a partial fee, with the rest to be paid in installments. The appeals court held this was questionable since Lucien had more than three suits dismissed as frivolous, precluding IFP status in any other suits he files. See: Lucien v. Jockisch, 133 F.3d 464 (7th Cir. 1998). “Before authorizing periodic collection of the fee in future cases, district judges should determine whether § 1915(g) requires payment in advance.”

The court held Lucien was not entitled to recover what he had paid as a filing fee. Filing fees are a cost of litigation. The court also held the IFP provisions of the PLRA are constitutional, joining seven other circuits that have concluded the same.

The court expressed its dismay that the prison Lucien is at had not remitted the required 20% of “each preceding months income credited to the prisoner’s account” to the court as required by the PLRA. Instead, the prison only sent 2.5%. Lucien received more than $856 in his prison trust account yet only $19.08 was paid towards his $105 filing fee in this appeal. The court ordered the balance paid immediately, holding that 28 U.S.C. § 1915(b)(2) sets a 20% rate which is just that, 20%, no higher and no lower. “A prisoner who fails to ensure that the required sum is remitted in one month must make it up later; the statute does not allow deferral past the time when application of the formula would have produced full payment. If in a given month the prison fails to make the required distribution from the trust account, the prisoner should notice this and refrain from spending the funds on personal items until they can be applied properly.... An erroneously small payment in a given month postpones collection of that month’s installment, but it does not extend the time to complete payment.”

The court observed that an unanswered question is “whether the prison itself may be liable if it fails to comply with a judicial order under the PLRA.” The court left that issue for another day and said it would invite briefs from the states of the circuit as amicus before deciding it. See: Lucien v. Detella, 141 F.3d 773 (7th Cir. 1998).
Failure to Exhaust Administrative Remedies Not Jurisdictional

A federal district court in California held that 42 U.S.C. § 1997e(a) is not a jurisdictional prerequisite for federal courts to hear prisoner lawsuits; administrative exhaustion under that statute is not required when a prisoner seeks money damages as relief and the prison grievance system does not provide for money damages; and that section 1997e(a) does not require prisoners to file state tort claims seeking monetary relief before filing suit for inadequate medical care.

Bill Lacey, a California state prisoner, claimed that his knees were injured in the course of his prison employment and that he did not receive adequate medical care when he requested it. Lacey bypassed the first formal level of the prison's grievance system. He later filed suit under 42 U.S.C. § 1983, seeking only money damages for relief. The defendant prison officials moved to dismiss the suit, claiming the court lacked subject matter jurisdiction to hear the lawsuit because Lacey had failed to exhaust his administrative remedies under 42 U.S.C. § 1997e(a) before filing suit. The court denied the motion to dismiss.

The court held that under Weinberger v. Salfi, 422 U.S. 749 (1975) § 1997e(a) does not require exhaustion of administrative remedies in order to invoke the district court's subject matter jurisdiction. It noted other courts have reached the same conclusion. See: Wright v. Morris, 111 F.3d 414, 421 (6th Cir. 1997).

The court noted that under the California Department of Corrections (CDC) grievance system prisoners have four levels of grievances in which they can complain about incidents which have an adverse impact on their welfare. The grievance process does not provide for money damages, the sole relief sought by Lacey in his lawsuit. Because the relief sought, money damages, was not available through prison administrative remedies the court held that Lacey was not required to exhaust the administrative process.

The court rejected the state's argument that the California Tort Claim Act provides an administrative remedy prisoners seeking money damages must exhaust. After a well reasoned analysis the court held "It does not appear... that Congress intended to expand the scope of administrative remedies that must be exhausted prior to such a suit to include general state tort claims... in the face of long established precedent to the contrary." See: Lacey v. C.S.P. Solano Medical Staff, 990 F. Supp. 1199 (ED CA 1997).

No Exhaustion Required in Guard Attack

A federal district court in New York held that 42 U.S.C. § 1997e of the PLRA did not require a prisoner to exhaust administrative remedies before filing suit over being beaten by prison guards. Candido Rodriguez is a New York state prisoner who filed suit claiming prison guards beat, kicked and punched him without provocation. The district court issued a brief, vague ruling allowing the suit to proceed.

Without stating whether Rodriguez had exhausted his administrative remedies, the court notes several cases, most of them unpublished, which hold that § 1997e(a) does not require exhaustion. After a well reasoned analysis the court held it "does not appear... that Congress intended to expand the scope of administrative remedies that must be exhausted prior to such a suit to include general state tort claims... in the face of long established precedent to the contrary." See: Lacey v. C.S.P. Solano Medical Staff, 990 F. Supp. 1199 (ED CA 1997).

MT Prisoners Win Damages and Fees in Riot Suit

On April 2, 1998, a federal jury in Montana ruled that state prison officials had violated the Eighth Amendment rights of 13 prisoners. In September, 1991, a riot occurred at the Montana State Prison in Deer Lodge. Five prisoners in protective custody were killed by other prisoners during the uprising.

Eighteen days later prison officials took five prisoners they suspected of trying to start another riot and stripped them naked, hog tied them with handcuffs and chains and left them on bare concrete floors or steel bunks for up to 43 hours. A federal jury held this treatment violated the Eighth Amendment's ban on cruel and unusual punishment and awarded each prisoner $1,006 in damages.

In a separate suit, the jury held Montana prison officials had violated the Eighth Amendment rights of eight prisoners who were strip searched in an abusive manner after the riot. The jury awarded each of these prisoners $73 in damages. One of the plaintiffs' lawyers, Palmer Hoovestal, said the amount of damages was not important. "What was important for us was that this was a constitutional claim and a finding that the Eighth Amendment was violated," he said.

Montana prison officials later agreed to pay Hoovestal and co-counsel David Ness $122,750 in attorney fees and costs for their representation of the prevailing prisoner plaintiffs. These rulings follow earlier settlements the Montana DOC reached with the families of riot victims. [PLN, Sep. 1997, "Montana Paying for 1991 Rising."]

Prison Legal News 9 November 1998
State Auditor Blasts Texas Correctional Industries

by Matthew T. Clarke

The Texas State Auditor has issued a report on Management Controls at Texas Correctional Industries (TCI) concluding that its management controls are so poor TCI cannot fulfill its statutory mandates of training prisoners for post-incarceration jobs and reducing the costs of incarceration.

In Fiscal Year 1996-7, the Texas Department of Criminal Justice (TDCJ) incarcerated over 140,000 prisoners in approximately 150 prisons. Almost all medically fit TDCJ prisoners were required to work. TCI operated 44 factories and three warehouses, providing jobs for 8,000 prisoners, manufacturing uniforms, mattresses, shoes and other items for TDCJ and furniture, license plates, and jail steel for other governmental agencies. Total sales was nearly $96,000,000.

The current monthly financial information on TCI factories is inaccurate because they are produced using an accounting system that does not adequately allocate costs to products. Outdated costs of materials are used in reports. The calculation of overhead costs is severely flawed. Thus, TCI cannot tell if its calculated costs reflect actual costs. Furthermore, prices are often set at 10% below competitors’ prices, regardless of production costs. Therefore, TCI cannot tell if any of its factories make a profit.

TCI’s financial statements are inaccurate. In addition to the inaccurate cost calculations, the statements disguise TDCJ subsidies to other agencies. Thus, despite the fact that they are distributed to TDCJ, legislative entities, and external users for that specific purpose, TCI financial statements are not accurate indicators of divisional or factory success.

TCI’s funding is not tied to production. TCI receives lump-sum funding based on TCI’s estimates of the costs of producing goods for the prison system, revenue from external sales, and separate appropriations for goods sold to state jails. The separate funding sources are reflected in a piecemeal budgeting system that results in three separate budgets for each factory. The separate budgets are not consolidated, thus it is difficult to monitor factory budgets using TCI budget status reports.

TCI allocates appropriations to the factories based on historical budget amounts, not current operations, or even whether a factory over-or underspent its previous year’s budget. Expected expenditures are often grossly overstated in the budget. Thus appropriations often do not reflect budgetary needs of the individual factories.

TCI is unable to accurately price its goods and services because much of the information it prepares or collects is not accurate and TCI’s cost accounting system does not effectively track costs. TCI does not use standard reports or mechanisms containing free world benchmark ratios for tracking financial performance of manufacturing concerns. Thus, it is not possible to track the financial performance of TCI factories.

TCI is required by state statute, Tex. Gov. Code § 497.022, to provide vocational training for prisoners so they can get post-release civilian jobs and to recover some of the costs of incarceration. However, “TCI has not managed its operations in a way that ensures all of its statutory objectives are accomplished.” Part of the problem is TCI’s view of itself as a work program rather than a vocational training program, part lies with the nature of the contradictory goals of vocational training and cost recovery. A large part of the problem is TCI’s failure to develop long-term strategies to fulfill the full scope of its mandated purpose. Instead, TCI has concentrated on short term returns.

Several factors combine to make TCI’s operations difficult. Prisoners are assigned to TCI factories by prison sc-

H.R. Cox, M.S.
Corrections Consultant

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curity with no input from TCI. Skilled factory workers may be arbitrarily reassigned by prison security to non-factory jobs. When prisons are locked down for security reasons, production stops. Because it does not pay prisoners, TCI can thus offer little incentive. TCI must rely on the General Services Commission or the prison system's purchasing department for purchases of raw materials, making logistics difficult and leading to temporary production stoppages.

TCI operational reviews are inadequate to detect significant problems and no mechanism exists to ensure that problems detected are corrected. TCI's quality assurance program is not designed to review the actual quality of the products produced at the factories. TCI does not use customer input to improve business practices nor does it adequately track and effectively respond to customer complaints. Thus, poor business and production practices may continue unchecked for years.

TCI makes poorly informed decisions to build new factories without analyzing whether it would be less expensive to purchase a product instead of manufacturing it or whether the new factory will train prisoners in skills which are useful after release. When calculations are made to support the construction of new factories, flawed methods, arithmetic errors, and faulty figures yield unreliable conclusions. No system wide criteria for implementation of new businesses exist. Furthermore, the role of the Texas Board of Criminal Justice (TBCJ) in overseeing TCI's implementation of new businesses is unclear. This results in micromanagement by TBCJ on some relatively minor expansions of existing facilities while some large scale expenditures escape oversight.

Many of TCI's problems are caused by inadequate communication of production and financial information between the factories and TCI headquarters. To help alleviate this problem, TCI had begun implementation of a computerized system for financial and operational management. However, the $2,400,000 Industrial Operations Information System (IOIS) is far behind schedule and over budget. Because of delays, the scope of IOIS has been scaled back from the original proposal so that it no longer meets TCI's information needs.

Many of the problems with IOIS are due to the method of contracting for its implementation. The contract manager, who is not a TCI employee, was the author of the original feasibility study and was contracted at additional costs despite the availability of qualified salaried departmental data management personnel for the job. Because there is no internal contract manager, TCI employees lack detailed knowledge of the system. Furthermore, few factory employees were familiar with the system's capabilities, even in its currently-implemented diminished capacity.

Statistics relating to vocational training of prisoners or whether prisoners are assigned to TCI for any length of time are not kept. Post-release employment is not tracked. There is no accurate measure kept of the costs of incarceration. Therefore, TCI cannot determine its performance in the statutorily-mandated areas of vocational training of prisoners and recovery of costs.

Inventory controls in the TCI factories are inconsistent and determined locally. They are inadequate to protect and track inventory. Neither TCI nor the individual factories have accurate information on the inventory quantities that should be on hand. Furthermore, when a difference is found between actual and book inventories, the book inventory is adjusted to reflect the actual inventory without any investigation into the cause of the discrepancy. This makes it difficult to prevent or detect theft or waste of materials.

The inventory control problems are still present at the factories that have implemented the IOIS computerized inventory control. At one factory using IOIS, 22 of 24 items checked had inaccurate inventory quantities. Thus, full implementation of IOIS may not alleviate the problem.

Most factories have not or have only recently established raw materials stocking level controls such as reorder points and minimum and maximum order points. Some factories have staff "eye" inventory levels to determine when inventory is low and needs reordering. Thus, many factories have inadequate methods for determining when to order additional raw materials. This leads to production delays and additional costs due to obsolete overstocked inventories. Many factories had large quantities of obsolete inventory on their books which must eventually be written off or sold through auction or bid, potentially resulting in a large financial loss.

TCI fails to properly track whether the customers it grants credit to have outstanding overdue balances. Thus, some customers with large outstanding balances for long periods were still being shipped goods on credit. This continued despite a previous internal audit which identified and addressed the collection problem.

TCI allows employees to purchase goods for personal use for the costs of raw materials plus overhead. However, the prices charged employees were often not justified, proper authorization for the sale was missing, unauthorized persons (non-employees) were making the purchases, and the goods purchased appeared to be for business, rather than personal use.

Generally, the State Auditor's Report blasted the poor, unprofessional operation of the factories. It also noted that TCI seemed unconcerned with the fulfillment of its legislatively-mandated objectives—prisoner vocational training for civilian jobs and partial reimbursement of incarceration costs. TCI lacked vision and long-term planning to implement those goals. Indeed, TCI seems a monument to bureaucratic failure.

The report contained an appendix summarizing similar state auditors' reports in CA, DE, FL, MD, MO, NJ, NY, OR, PA, RI, and VA. Of those states, only MO and PA had self-sufficient programs; no state used effective strategic planning; only DE assisted released prisoners to find jobs; only FL trained prisoners with skills marketable in the free-world; and only MO and NJ reduced the costs of incarceration.

Allan B. Polunsky, chairman of TBCJ, attributed the problems at TCI to the prison system's "plantation mentality" and threatened to "find other people who were willing to do the job" if the
present TCI staff did not make changes quickly. Polunsky questioned the training of prisoners in jobs such as soap production and textiles, jobs for which there is no market in Texas. TBCJ tentatively agreed to put a new $2,600,000 sheet and pillow case factory on hold as a result of the State Auditor’s Report.

“Are there many textile mills do you think there are in the state of Texas?” Polunsky asked John Benestante, the head of TCI. “How many are in the Fifth Ward of Houston? How many facilities in South Oak Cliff in Dallas manufacture shoes or soap?” Lambasting the “plantation mentality” of the prison system, Polunsky stated that TCI needed to be aggressive in identifying job opportunities that are “relevant in the 1990s and beyond” so prisoners will be able to find civilian jobs that pay enough to reduce the temptation to commit crime.

Benestante replied that private companies complain of unfair competition when TCI attempts to establish factories requiring highly skilled workers. However, Polunsky countered that Benestante overstated the problem and noted that, although there were economic issues to consider, he did not believe TCI to be in competition with the private sector.

Testifying before a commission which determines whether state agencies should be continued, Wayne Scott, executive director of the prison system, noted that he had changed leadership of TCI and was implementing the recommendations of the audit report.

“We have the capability to make things better,” said Scott.

“You know, several other directors have sat here, just like you, and promised the same thing,” replied State Senator J. E. “Buster” Brown.

Sources: An Audit Report on Management Controls at Texas Correctional Industries-Office of the State Auditor of Texas (free download copies available at http://www.sao.state.tx.us), Houston Chronicle, Tyler Morning Telegraph.

DC Circuit Resurrects Hewitt v. Helms

The court of appeals for the DC Circuit held that prisoners challenging placement in administrative segregation (ad seg) are not required to petition for habeas corpus relief. The case was remanded for further record development regarding what occurred at the prisoner’s ad seg hearing, so a determination could be made as to whether he received all the process he was due.

In October 1992, a prisoner in the medium-security unit of the District of Columbia’s Lorton prison became embroiled in a confrontation with a guard. The prisoner allegedly hit the guard with a urine/feces mixture, and threatened to “get” him. A search of the prisoner’s cell turned up a sharpened toothbrush.

The prisoner was subsequently charged with three disciplinary infractions. However, no hearings were ever held, nor was any punishment expressly imposed. Instead, the day after the incident, the prisoner was transferred to ad seg at Lorton’s maximum-security facility.

Two days later, the prisoner was brought before Lorton’s “Housing Board” to determine the propriety of his assignment to ad seg. However, the prisoner received no notice of the hearing. While the record appeared to indicate that the prisoner was arguing against involuntary protective confinement, the Board concluded that he was “a threat to self and others due to the alleged incident involving the guard. After ten months in solitary confinement, the prisoner was returned to his previous custody status.

In April 1993, the prisoner filed a civil rights complaint alleging due process, free exercise, and Eighth Amendment violations. The latter two involved denials of religious service attendance and dental care, but were settled. However, the district court dismissed the due process claim on the theory that, under Sandin v. Conner, 515 U.S. 472 (1995), the prisoner did not have a liberty interest in remaining free from ad seg because such confinement did not amount to an “atypical and significant hardship.”

On appeal, the District attempted to apply the rationale of Edwards v. Balisok, 117 S.Ct. 1584 (1997), when it argued that success of the due process claim would “necessarily imply” the invalidity of the ad seg decision. The District suggested that Edwards required the prisoner to bring his claim by habeas corpus. The appeals court rejected this reasoning when it held that Preiser v. Rodriguez, 411 U.S. 475 (1973), and its progeny, apply only to situations where “the fact or duration” of confinement to prison are at issue, not conditions of confinement.

The court resurrected Hewitt v. Helms, 459 U.S. 460 (1983), when it held that, although “greatly relaxed,” prisoners are entitled to procedural due process before placement in ad seg. Quoting Hewitt, the court acknowledged that prisoners must be accorded “some notice of the charges against him and an opportunity to present his views.” However, the court qualified this requirement by noting that the decision can be “made fairly informally on the basis of ‘subjective’ and ‘intuitive’ considerations.”

By applying Hewitt, the court sidestepped the “difficult and unsettled questions of constitutional law” presented by the analytical framework developed in Sandin. The court also rejected the prisoner’s contention that the procedural requirements of Wolff v. McDonnell, 418 U.S. 539 (1974), should apply. The court noted that “Hewitt’s requirements are not elaborate, but they are real, and must be strictly complied with.” Because the record regarding what occurred at the ad seg hearing was lacking, the case was remanded for further factual development. See: Brown v. Plaut, 131 F.3d 163 (DC Cir. 1997).

In a companion case, the same panel held that a Lorton prisoner’s involuntary confinement in “voluntary” protective confinement for six months did not constitute an “atypical and significant hardship.” Therefore, the prisoner had no liberty interest in remaining free from the special conditions of confinement imposed on him. See: Neal v. District of Columbia, 131 F.3d 172 (DC Cir. 1997).
Abuses Continue at Private INS Facility  
by Alex Friedmann

The Immigration and Naturalization Service (INS) continues to experience problems at a privately-operated detention center in Elizabeth, New Jersey. In June 1995 detainees rioted at the facility, which was then run by Esmore Correctional Services. The detainees — mostly asylum-seekers who had not been charged with any crime — complained of severe abuse and human rights violations by the poorly-paid and under-trained Esmore staff. [PLN, Sept. 1995]. The company lost its contract to operate the center, changed its name to Correctional Services Corporation and relocated to Florida.

The INS facility reopened in 1997 under the management of Corrections Corporation of America (CCA), and was soon lauded as a national model for privately-operated detention services. But now the former assistant warden at the center, Steve Townsend, has filed suit claiming he was fired by CCA after informing the INS that detainees were forcibly sedated and improperly restrained. Townsend said that both his supervisor and CCA corporate office ordered him to “illegally cover up and conceal such actions.”

Initially the INS denied that detainees had been involuntarily sedated, but later admitted the allegations were true after reviewing medical records from the facility. The agency then decided the failure to report the sedation’s and improper restraints was part of a larger pattern of mismanagement and non-compliance. Both the INS and CCA blamed the warden, who was transferred to Tennessee. CCA declined to comment on the charges.

The INS operates nine detention centers and contracts with seven private facilities, including four managed by CCA. In addition, the agency rents bed space in hundreds of state and local jails nationwide. CCA has announced plans to build a $60 million, 1,000-bed detention center in California to cash in on the expanding market for incarcerating illegal immigrants.

According to Penny Venetis, administrative director of the Constitutional Litigation Clinic at Rutgers Law School, corporations that operate private detention facilities are mainly concerned with maximizing profits by cutting corners. “Privatization gives government agencies excuses,” she said. “They hide behind the private contractor.” Venetis is representing 19 detainees in a lawsuit against the INS and former Esmore Correctional Services.

NY Seg Case Dismissed on Remand

In the March, 1998, issue of PLN we reported Sealey v. Giltner, 116 F.3d 47 (2nd Cir. 1997) in which the second circuit reversed and remanded Sealey v. Coughlin, 857 F. Supp. 214 (ND NY 1994). The case involves Emmeth Sealey, a New York state prisoner who spent 152 days in administrative segregation while undergoing various “investigations.” He filed suit claiming the ad seg violated his due process rights. The district court dismissed the case. The appeals court reversed and remanded, instructing the lower court to develop a factual record to determine if Sealey had a liberty interest in remaining free from segregation.

On remand the case went to trial before a jury which found that Sealey’s segregation placement was administrative, not punitive, and that a hearing officer violated Sealey’s procedural due process rights. Sealey was awarded $1 in nominal damages. The district court then granted the defendants judgement as a matter of law under Fed.R.Civ.P. 50(a) and (b), holding that Sealey had no liberty interest under Sandin v.Connor, 515 U.S. 427, 115 S.Ct. 2293 (1995) in avoiding ad seg placement. The court held that Sealey had failed to show that his 152 days in ad seg was an “atypical and significant hardship” as required by Sandin to establish a right to due process.

In essence, because Sealey had no due process right in not being placed in ad seg, any irregularities that occurred in the hearing (which was not required under Sandin) were immaterial.

The court held that the denial of privileges afforded to prisoners in the general population and noise in the segregation unit did not create a liberty interest in remaining out of segregation because the situation was not atypical. “Therefore, plaintiff’s administrative segregation in SHU was not an atypical and significant hardship. As a consequence, the plaintiff failed to establish a liberty interest entitling him to due process protections.” The case was dismissed. The trend is clear that under Sandin prisoners are finding it virtually impossible to establish a due process liberty interest in remaining free from segregation or challenging segregation placements on procedural grounds when the segregation does not involve the loss of good time credits or the imposition of fines. See: Sealey v. Coughlin, 997 F. Supp. 316 (ND NY 1998).
With Advocates Like These: Capitulation, Collaboration and CURE-Ohio

by Paul Wright.

In the May, 1998, issue of PLN we reported on the November 1, 1997, statewide work strike in Ohio. The purpose of this article isn’t to rehash last year’s events but to examine basic questions of advocacy versus activism, opportunism and collaboration. While this article focuses on today’s prison reform movement the issues are neither new nor restricted to prison groups.

On October 16, 1997, the Call and Post, a black community newspaper in Cleveland, ran a letter announcing a work strike on November 1, 1997, to protest the abusive practices of the Ohio parole board which is massively extending prisoners’ sentences. The timing of the strike, a Saturday, was questionable. A communiqué by the Ohio Prisoner Rights Union called on all Ohio prisoners to remain in their cells and refuse all prison activities “until the government of the state of Ohio guarantees the 39,000 prisoners being discriminated against through the new sentencing laws (HB 2, 1996) and at the hands of the Ohio parole authorities, that we too will receive equal justice....”

The Ohio Department of Rehabilitation and Correction (DORC) responded by issuing a memo from DORC chief Reginald Wilkinson threatening even further collective repression against prisoner privileges and programming should a strike take place. Wilkinson’s memo stated “Inmates who attempt to lead, encourage or coerce other inmates to participate in any form of boycott will be dealt with severely, including a potential loss of parole release.” Which is ironic since thousands of Ohio prisoners have already lost their parole releases. But, this was to be expected.

What wasn’t expected was a letter sent to all Ohio prison wardens by Paula Eyre, chairperson of CURE-Ohio. (Citizens United for the Rehabilitation of Errants (CURE) is a national prison reform organization with state chapters.) The memo was posted on many prison bulletin boards prior to the strike. Eyre’s memo, on CURE-Ohio’s letterhead, states in relevant part: “It was irresponsible of the Cleveland Call and Post to publish such a letter, and it was also irresponsible of the mailrooms in state prisons to allow that issue of the Call and Post, which contained this inflammatory information as defined by the administrative regulations, in to prisoners.

“Regardless of these errors, CURE-Ohio is opposed to such a strike. We do not support it nor do we condone it. CURE-Ohio has worked hard over the last two years to bring a legislative solution to the unfair actions of the Ohio parole board. We now have such legislation in the form of Senate Bill 182. Such a strike, should it turn violent, would quickly undo all that work. In addition, CURE-Ohio is concerned for the lives of prison staff and prisoners. Such a strike has too much potential to turn violent. We want to urge every prisoner not to participate in this work stoppage.”

CURE-Ohio board member Cindy Mollick also sent a similar letter, on the group’s stationary, to Ohio prison wardens for dissemination to prisoners. Mollick’s letter urged prisoners not to participate in the strike and stated “those of us working on prison reform do not support such an action.”

Since the strike Eyre and CURE-Ohio’s remaining board members (some resigned) have doggedly defended their actions in sending the warden letters. A May 15, 1998, letter from Eyre to PLN regarding the May, 1998, PLN article on the strike attempts to muddle the issue by deflecting attention from their actions prior to November 1. Eyre states that the strike was poorly organized, the original letter published in the Call and Post was poorly written and had bad grammar (alas, not all of us have degrees in English), which made its authenticity suspect in her eyes and that only some of the wardens had posted her letter. Interestingly, if the original letter’s authenticity was doubted by the board of CURE-Ohio, did they call the editors of the Call and Post to determine why they chose to run it? I’m not familiar with that publication but it is reasonable to assume the editor would not have run the letter unless he/she had been assured of the letter’s authenticity. But, as discussed below, the letter’s authenticity was immaterial for CURE-Ohio.

Ironically, Eyre claims she and CURE-Ohio hold Martin Luther King, Jr., Henry David Thoreau and Mahatma Gandhi in the highest esteem because of their advocacy of passive resistance to protest unjust laws. (It should be noted that all three men were imprisoned because of their civil disobedience.) Eyre claims that Ohio prisoners lack the self discipline to participate in peaceful, non violent protest. “You can bet that in a prison scenario, prisoners participating in a non violent action which broke prison rules (like a work strike) would be beaten and threatened by guards and eventually dragged to the hole. Only a very self controlled, self disciplined person would not fight under such circumstances.”

Eyre’s outlook comes through when she calls DORC prison officials “irresponsible” for not censoring prisoners’ mail more. So, why can’t a peaceful protest remain non violent? Because according to Eyre prison guards will perhaps beat and physically threaten the passive protesters. At best Eyre’s letter to PLN is disingenuous. It also did not address an open letter sent by PLN co-editor Dan Pens which accurately recounts the failed efforts of prisoners in Washington state, and elsewhere, who have faced nearly identical circumstances of changed sentencing practices which severely disadvantage prisoners convicted before the change.

Key issues for activists of all stripes is from where do we seek our legitimacy. Some of us believe that strength and legitimacy comes from the masses themselves by struggling to empower the disempowered and give voice to the voiceless. For others, legitimacy comes only from the ruling class and the powers that be. The sense of self importance that comes from empty talk with legislators, government officials and corporate flunkies. Labor unions and political parties are among those that also have to confront these issues. Sometimes doing the right thing to advance a disempowered constituencies interests will be frowned
upon by the ruling class. An example is the struggle for the eight hour work day.

After the strike Eyre claimed CURE-Ohio's support was growing and that CURE-Ohio had opposed the strike at the request of its members. In a December 4, 1997, letter to prisoner Dan Cahill, Eyre states: "...I don't think you have a clear understanding of CURE and its purpose as an organization. We are not part of the movement nor do we seek to be. We are not activists; we are advocates." Eyre states that as a national group CURE is mostly comprised of prisoners' families and friends. Prisoners' families are not, she notes, left wing radicals "and they are not very active either."

So what is the difference between a prisoner rights advocate and an activist? In a December 22, 1997, letter to prisoner John Perotti, Eyre spells it out.

"I know a few prisoners are calling for CURE-Ohio's support was growing and that CURE-Ohio had opposed the strike at the request of its members. In a December 4, 1997, letter to prisoner Dan Cahill, Eyre states: "...I don't think you have a clear understanding of CURE and its purpose as an organization. We are not part of the movement nor do we seek to be. We are not activists; we are advocates." Eyre states that as a national group CURE is mostly comprised of prisoners' families and friends. Prisoners' families are not, she notes, left wing radicals "and they are not very active either."

So what is the difference between a prisoner rights advocate and an activist? In a December 22, 1997, letter to prisoner John Perotti, Eyre spells it out.

"I know a few prisoners are calling for Cindy and my resignation, but the prisoner members of CURE-Ohio have no voting rights (that will change however when the Prison Advisory Board is elected in January, but the PAB will be the only prisoner members with voting rights.)

"Ok, it may make some of our prisoner members mad, but this organization is supposed to be comprised of FAMILIES and FRIENDS of prisoners, not prisoners themselves. That is why in our bylaws prisoners do not have a voice in our decisions. The board of CURE-Ohio represents the concerns of families of prisoners, not the concerns of prisoners. That is the way the organization is structured (and has been from the time Charlie Sullivan began it in Texas in 1972)." So while hundreds of Ohio prisoners are, or were, dues paying members of CURE-Ohio they are as voiceless and disenfranchised in that organization as they are in the rest of the American political system.

One historical lesson that is clear is that political gains for the oppressed have usually come from struggle by the oppressed themselves. By totally denouncing any activism or struggle by the prisoners themselves who, or what, is being "advocated" for? This is a paternalistic and elitist approach, as well as a political or economic gains until and unless those in power were forced to make such concessions to defuse growing social movements. Recent examples in this country include the New Deal, labor legislation, civil rights for blacks and women, abortion rights and yes, prisoner rights. Absent organized pressure from the oppressed, progressive change does not happen.

Unions face a declining membership outside of the public sector as a result of similar "advocacy" with management. Had the black civil rights movement listened to its contemporaneous "advocates" who spoke out against the bus boycotts, marches, food counter sit ins and other direct participation by black citizens, in all likelihood blacks would still be eating in segregated restaurants, riding in the back of the bus and using "blacks only" restrooms and drinking fountains. So it goes for prisoners.

To date CURE-Ohio has issued no self criticism regarding the letters it sent to prison wardens around the strike. It continues to defend its actions. Whether or not CURE-Ohio supported or endorsed the strike was, and is, immaterial. Likewise, it is immaterial whether the strike was poorly organized, had any chance of meeting its goals, etc. It is clear that CURE-Ohio’s objection is to any type of prisoner organization and self empowerment, not whether it is well done. The equivalent to this flawed defense is the stool pigeon who defends his testimony against a colleague by saying "they would have been convicted anyway." The issue is collaboration and having principles. CURE-Ohio could have maintained a discreet silence and taken no position on the strike.

When DORC officials called on CURE-Ohio to take a public stand against prisoner self determination, they did so. Rather than use the opportunity to articulate the concerns of prisoners to media and those outside the prisons and temper any violence or brutality by prison guards, CURE-Ohio chose to collaborate with the DORC.

Prior to writing this article I received a letter from Ohio prisoner Terrence Lattie asking me not to write it. Hattie believes that this article will weaken CURE-Ohio in its role as an advocate for Ohio prisoners. CURE-Ohio’s actions speak for themselves. Readers can draw their own opinions about the matter. There are larger political issues at stake than just whitewashing the recent past. Likewise, it is no sin to make political misjudgments or errors. The problem is not recognizing the errors and correcting the underlying policy so it does not happen again.

In 1971 prisoners at Attica seized the prison to protest the injustice of the day. The prison seizure came only after passive protests, strikes, etc., had failed. Prisoner advocates came to the prison to speak on behalf of the prisoners. These included many famous and prominent people: journalist Tom Wicker, lawyer Bill Kunstler, even a young, liberal Geraldo Rivera. However, when governor Nelson Rockefeller told the advocates to leave, they did so. Within hours almost fifty people had been gunned down by state police and prison guards storming the prison. Many prisoners were wounded by gunfire and many more were later beaten and tortured by guards and...
Texas Prisoners Bake to Death

by Alex Friedmann

More than one hundred people have died during a searing heat wave in Texas this past summer, including at least three prisoners. Dozens of convicts have been treated for heat-related health problems. "I've been with the system 13 years and this has been the most extreme heat we've ever experienced," said Bob Koenig, risk manager for the Texas Dept. of Criminal Justice.

The only air-conditioned areas in state prisons are classrooms and work sites that require lower temperatures to operate computers. All other areas, including the sweltering cell blocks, have to be cooled by fans. Prisoners must purchase their own fans, which sell on the commissary for $7.95. Those who can't afford them go without -- in indoor temperatures that have reached an estimated 130 degrees.

Two convicts died on un-air-conditioned buses while being transferred to different units, one in May and one in June. And on July 9, 1998, Emile Duhamel, a mentally ill prisoner on death row, died due to heat-related causes. He was taking medication that made him especially sensitive to high temperatures; guards had taken away his fan. According to prison officials Duhamel died of natural causes. His body was cremated before his family was notified.

Harvey Earvin, a leader of the prison-based group Panthers United for Revolutionary Education (PURE), was placed in solitary confinement after being contacted by the ACLU about heat-related problems in the prison system. "The heat is so oppressive that the guards don't even want to be in the solitary run," he said. "This is like the old sweat boxes they used to have on this unit that were outlawed by the Supreme Court in 1975."

Sources: Workers World

In the April, 1998, issue of PLN we reported Dowling v. Hannigan, 968 F. Supp. 610 (D KS 1997). The case involved Kansas state prisoner and informant Mark Dowling, who claimed prison officials were deliberately indifferent to his safety when one of his victims slashed him with a razor knife. The court denied the defendants' motion for summary judgment and set the case for trial.

In a last ditch effort to avoid a trial the defendants filed another motion for summary judgment, rearguing the Eighth amendment claim and this time claiming they were entitled to qualified immunity from money damages. This motion was denied.

The court noted the record on the Eighth amendment claim had not changed since its last ruling. Whether the defendants' actions rose to the level of deliberate indifference required a trial to resolve because material facts were in dispute.

The court denied the defendants' qualified immunity from damages, holding that since at least n 1990 -- prisoners have a constitutional right to reasonable protection from attacks by other in-mates. "The disputed record made a ruling on the immunity issue inappropriate. The case was again set for trial. See: Dowling v. Hannigan, 995 F. Supp. 1188 (D KS 1998).

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In Fact

Florida's DOC anticipates 26 percent fewer prisoners than earlier growth projections estimated. The state expected nearly 19 percent of people convicted under 1995 get-tough sentencing guidelines to be given prison terms. Instead, just 14 percent are being imprisoned.
Hawaii Prisoners Challenge ‘Sex Offender’ Label

Hawaii prisoners labeled as “sex offenders” and ordered to participate in a sex offender treatment program as a pre-condition of parole eligibility have a protected liberty interest in receiving minimal due process before being thus labeled.

In 1992, Hawaii enacted a law authorizing the creation of a prison sex offender treatment program (SOTP) and requiring prisoners identified as sex offenders to complete the program before they could be considered for parole. The Hawaii statute defines a sex offender as someone “having been convicted, at any time, of any sex offense or who engaged in sexual misconduct during the course of an offense.”

Even though parole eligibility for sex offenders hinges on completion of the SOTP, the statute characterizes the program as “voluntary” and participants are required to complete and sign a “SOTP contract and consent to treat” form prior to admission into the program.

Hawaii prisoners B.A.J. Neal and Marshall Martinez were labeled as sex offenders, refused to attend the SOTP, and denied parole eligibility. Neal was indicted in 1990 on robbery, kidnapping, and sexual assault charges. As part of a later plea agreement, the sexual assault charges were dismissed. Martinez was convicted of attempted rape in 1984 and had prior convictions for rape and attempted sexual assault.

The two brought separate §1983 actions seeking injunctive relief and monetary damages on grounds that labeling them as sex offenders based upon a statute enacted after their criminal convictions is a violation their rights under the Due Process and Ex Post Facto clauses of the U.S. Constitution. They further argued that by forcing them to admit their guilt to sexual offenses as a condition of entry into the SOTP, the statute violates their Fifth Amendment protection against self-incrimination and constitutes cruel and unusual punishment under the Eighth Amendment. The district court granted summary judgment for Neal on his due process claim and issue an injunction ordering the Hawaii Parole Authority to remove the label.

In the instant case, however, the only benefit that a victory would provide is a ticket to get in the door of the parole board, thus making them eligible for parole consideration. Because the inmates’ challenge in this case does not necessarily imply the invalidity of their convictions or continuing confinement, it is properly brought under §1983.

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The court then addressed the constitutional claims.

Citing Kansas v. Hendricks, 117 S.Ct. 2072 [PLN Aug 1997], the court ruled that “it is certainly not punishment to deny an inmate eligibility for parole following classification as a sex offender so that he can participate in a treatment program... the officials responsible for classifying inmates as sex offenders... take past behavior into account, but only for evidentiary purposes related to the classification.” Since the classification process “does not criminalize conduct legal before its enactment”, the court concluded that “classification as a sex offender based on conduct which occurred prior to the program’s beginning does not violate the Ex Post Facto Clause.”

The court upheld summary judgment on the Ex Post Facto claim, as well as the Fifth and Eighth Amendment claims. However, some Fifth Amendment implications were not addressed by the court. What of those sex offenders who maintain their innocence — and the few who truly are — and who are required to sign an “admission of guilt” as a prerequisite to SOTP? And what of the possibility that the fruits of such an admission may later be wielded by the state in so-called civil commitment proceedings?

Due Process Implicated — But How Much?

After a lengthy analysis, the court concludes that “the classification of an inmate as a sex offender is precisely the type of atypical and significant hardship in relation to the ordinary incidents of prison life” [citing Sandin v. Conner, 115 S.Ct. at 2300] that the Supreme Court held created a protected liberty interest. Inmates like Neal and Martinez are entitled to the benefits of [due process] before being labeled as sex offenders and subjected to the requirements of the SOTP.

The court then discusses what type of process is due, and concludes that “it is clear that Martinez received all of the process to which he was due. Martinez was convicted after formal criminal proceedings of attempted rape, obviously a sex offense. Prison officials need do no more than notify such an inmate that he has been classified as a sex offender because of his prior conviction for a sex crime.”

Citing Wolf v. McDonnell, 94 S.Ct. 2693, (1974) the court said: “It is equally clear, however, that Neal did not receive the minimum due process protections required... Neal has never been convicted of a sex offense and has never had the opportunity to formally challenge the imposition of the ‘sex offender’ label in an adversarial setting. He must be afforded that opportunity.”

The court granted defendants qualified immunity and dismissed Neal’s claim for monetary damages. “Neal is, however, entitled to injunctive relief. On remand, the district court should enter summary judgement for Neal on his due process claim and issue an injunction ordering the Hawaii Parole Authority to remove the sex offender’ label from Neal’s classification (and, consequently, the requirement that he complete SOTP) unless and until he is provided all of the procedural protections due him under Wolf.”

Not mentioned by the court is the fact that this ruling creates a split within the 9th Circuit, contradicting Hernandez v. Johnston, 833 F2d 1316 (9th Cir. 1987) which held there is no due process in being labeled as a sex offender. See: Neal v. Shimada, 131 F3d 818 (9th Cir. 1997).
Washington Good Time Loss Implicates Due Process

A Washington state appeals court held that prisoners have a due process right to challenge the validity of prior minor infractions at disciplinary hearings that involve the loss of good time for allegedly incurring more than four minor infractions in a six month period. Washington prisoners can receive "minor infractions" which involve the loss of privileges for petty rule violations. The sanctions are limited and do not allow for the loss of good time credits nor the imposition of segregation punishment. Washington Administrative Code (WAC) disciplinary rule 137-28-260(657) allows for the loss of good time credits and segregation punishment if a prisoner is found guilty of having received more than four minor infractions in a six month period. Significantly, minor infractions do not require any type of hearing nor do they provide for prisoner defendants to call witnesses on their behalf.

Derek Gronquist, a Washington state prisoner, challenged the loss of good time credits after a 657 disciplinary hearing where he was found guilty of committing four minor infractions during a six month period. In a Personal Restraint Petition (PRP) Gronquist raised three challenges to the hearing: 1) that one infraction did not qualify as a countable offense; 2) that another was unconstitutionally obtained and 3) that the 657 hearing violated his right to due process because he was not allowed to present evidence on his behalf. The court ruled in his favor on the third claim. Gronquist claimed he was deprived of due process because three prison guards refused to provide him with written statements in his defense and the hearing officer denied his request to present their testimony. The court observed that due process requires prison officials to allow a prisoner to present evidence and witnesses on his behalf, or provide justification for denying the request.

The court rejected the state's argument that prisoners cannot challenge the validity of the underlying minor infractions at a 657 hearing because the prisoner has no right to a hearing for minor infractions. The court held that the hearing officer violated Gronquist's right to due process by not allowing him to present witnesses at the hearing. The court noted that under Sandin v. Conner, 515 U.S. 472 (1995), a prisoner has a due process liberty interest only if the punishment or sanction "imposes atypical and significant hardship in relation to the ordinary incidents of prison life." The court held that the range of punishment for minor infractions in Washington does not meet this standard.

However, the court held that a 657 infraction, which results from four minor infractions in a six month period and can result in the loss of good time credits, does meet the Sandin standard. Thus, Gronquist was entitled to due process at his disciplinary hearing and should have been able to call witnesses on his behalf. Because the hearing officer did not allow Gronquist to call witnesses at his 657 hearing, nor provided any reason for the denial, the court held he was denied due process. The court found Gronquist was prejudiced by the denial of witnesses and granted the PRP, remanding the case to the DOC for a new hearing. The Washington state supreme court has granted review in this case. We will report the ruling when it is issued. See: In Re Gronquist, 89 Wn.App. 596, 950 P.2d 497 (WA Ct.App. Div. I, 1997).
Medical Restraint Requires Doctor’s Supervision

The Eighth Circuit has held that the law was clearly established in 1988 requiring specific approval from a doctor when a prisoner is placed in segregation and restraints for psychiatric treatment purposes.

Eddie Buckley, an Iowa state prisoner, sued alleging that he was routinely subjected to segregation and restraints without medical approval during his confinement at the Iowa Medical and Classification Center psychiatric hospital in violation of his Eighth and Fourteenth Amendment due process rights. Buckley sued the medical director for the Iowa Department of Corrections alleging that the director was responsible for the policies and operating procedures of the hospital under which hospital guards developed treatment plans for patients. Buckley’s six treatment plans included treatment for 1) schizophrenia-like psychosis, 2) refusal to comply, 3) poor sleeping habits, 4) poor money management, 5) failure to follow smoking policies, and 6) failure to meet expectations. Buckley alleged the director’s policies and practices allowed guards, rather than trained medical personnel, to develop and implement treatment plans. Buckley also alleged the treatment plans lacked sufficient specificity to guide the staff administering treatment.

Successive Texas Habeas Corpus Defined

The Texas Court of Criminal Appeals has held that a state post-conviction petition for a writ of habeas corpus (petition) which does not challenge the prosecution or judgment does not count as a first petition for purposes of the state law restricting successive petitions, Article 11.07, Section 4, Texas Code of Criminal Procedure (TCCP).

Larue Evans, a Texas state prisoner, filed a petition pursuant to Article 11.07, T.C.C.P., seeking credit for time spent in jail pursuant to parole revocation warrants prior to the actual revocation. He had filed a previous Article 11.07 petition challenging various aspects of a previous parole revocation hearing. The previous petition had been denied without a written order.

The trial court recommended that relief be denied on the second petition, citing the general prohibition against successive petitions contained in Article 11.07, Section 4(a), T.C.C.P. and Evans’s failure to show he qualified within one of the narrow exceptions to the general prohibition. The Texas Court of Criminal Appeals held that the first petition “is not a challenge to the conviction under Article 11.07, § 4, because it does not call into question the validity of the prosecution of the judgment of guilt,” thus, the second petition was not a successive petition. The court noted that the same holding applies to the second petition. Thus, Evans could still file a petition challenging his conviction despite having filed two previous petitions which did not directly challenge the prosecution or conviction.

NOTE: This same reasoning would apply to other situations in which a state postconviction petition for a writ of habeas corpus is used in a manner which does not challenge the conviction. Such situations include the seeking of an out-of-time appeal or petition for discretionary review due to ineffective assistance of appellate counsel. See: Ex Parte Evans 964 S.W.2d 643 (Tex. Cr. App. 1998).
No Qualified Immunity for Private Health Care Provider

A federal district court in Florida denied qualified immunity to a private provider of health care services to a county jail. Health care personnel failed to give a prisoner with a history of heart attacks her heart medication and ignored her complaints of chest pains until she suffered a fatal heart attack.

Diane Nelson was arrested around 11:00 p.m. on March 6, 1994. Having suffered a heart attack the previous October, she was prescribed twice daily Procardia XL and given nitroglycerine. However, when arrested, she was unable to locate her medications which she had last taken at 6 p.m.

When booked into the jail, Nelson informed medical personnel of her heart condition and the medications needed. The nurse noted this and that the medications needed to be continued if verified; however, it was too late at night to verify them. Over the next thirty hours, Nelson repeatedly attempted to get medication from multiple nurses. Her condition deteriorated. Her skin became pasty and she began sweating profusely. She complained of difficulty breathing, chest pains and shooting pain in the arm. The nurse refused to interrupt her breakfast at a nearby diner to check Nelson. An hour later, she collapsed while being brought to the infirmary. Her face turned blue and she had no measurable blood pressure.

Treatment for Nelson vacillated. At best she was given nitroglycerin and told to self-medicate; at worst she was accused of faking and ignored. After she collapsed, a nurse told her “to stop the theatrics and get up on the chair” then waived ammonia under her nose “in case Nelson was faking an injury or something.”

The jail had been under court supervision since 1975. Court-appointed monitors had noted the deficiencies in medical treatment, especially for female prisoners, which extended past the point in 1992 when the sheriff contracted with Prison Health Services (PHS) to provide health care services at the jail. The monitor noted that the most prevalent problem was “the jail medical staff’s failure to respond to requests for treatment in a timely manner.” Internal memoranda of PHS indicated that, although PHS staff were aware of the problem, they had not corrected it.

The personal representative of the estate of Nelson sued in state court under several theories, including §1983 actions for civil rights violations and state law violations for negligence and medical malpractice pursuant to Fla. Stat. Ch. 766.102(1). The action was removed to federal court, retaining the pendent state law claims. The federal court ruled that, despite Eleventh Circuit precedent which is arguably to the contrary, the Supreme Court’s ruling in Richardson v. Murphy, 117 S.Ct. 2100 (1997), as applied to this case, precluded granting the private provider of health care services qualified immunity. However, pursuant to West v. Atkins, 487 U.S. 42 (1988), a private medical provider is still a state actor for purposes of §1983. Thus, PHS and its health care employees could be sued under 1983 and could not claim qualified immunity. The court also held that the county and sheriff were not entitled to summary judgment because a widespread and longstanding failure to provide adequate medical treatment had been shown. This was sufficient to show it had been "authorized by the policymaking officials because they must have known about but failed to stop it."

In Nelson’s case, the nurses failed to follow PHS’s treatment protocol which would have required an EKG and that a doctor be notified when chest pains were reported. This, coupled with their knowledge of Nelson’s previous heart attack and need for prescription medication, was sufficient to show "a breach of the prevailing standards of care" and thus survive summary judgment motions on both federal and state claims. See: Nelson v. Prison Health Services, Inc., 991 F.Supp. 1452 (M.D.Fla. 1997).

ADA/RA Apply to Jails and Give Deaf Right to TDD

The Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 et seq. (ADA) and Rehabilitation Act of 1973, 29 U.S.C. § 794, (RA) apply to jails and require that deaf prisoners be given access to alternate assistance in using a telephone, such as a Telephone Text Device (TDD) and TDD directory or a sign-language interpreter according to a federal court in Illinois.

Steve Hanson, profoundly deaf with only a limited ability to read lips or understand written communication, was arrested along with about ten other people for possession of cannabis. Hanson informed the arresting officers that he was deaf. They responded by placing him in a police van with other arrestees without informing him of the charges against him.

Hanson was booked into jail and verbally informed of the charges but not how much bail was needed to secure his release. He informed guards that he was unable to use a conventional telephone and requested alternate assistance. None was given. The jail had a TDD, but the sheriff’s policy strictly forbid prisoners using it.

Within four hours of the arrest, all of the prisoners transported and processed into the jail with Hanson were released on bail. Later a guard assisted Hanson in making a phone call to his roommate and neighbor so they could bring money to bail him out. Thirteen hours after his arrest, Hanson was bailed out. He was later convicted.

Hanson brought suit under §1983 claiming that the denial of access to alternate means of communication violated the ADA and RA. The sheriff’s department and sheriff moved for dismissal under F.R.C.P. 12(b)(6), alleging that the ADA and RA did not apply to jails. The sheriff also claimed qualified immunity.

The court ruled as follows: The ADA and RA apply to jails. The denial of hearing impaired equipment to a deaf prisoner, needed for the purpose of posting bond, states a claim under the ADA and RA which is actionable under §1983. The sheriff is not entitled to qualified immunity just because there were no cases directly on point prior to this one. The ADA and RA themselves, coupled with 9th and 11th Circuit opinions that they applied to prisoners and prisons, and the federal regulations implementing them, 28 C. F. R. §§ 35.160(a), 35.160(b), and 35.104, clearly established the requirement that deaf prisoners be provided alternate means of communication to post bond. See: Hanson v. Sagamon County Sheriff’s Department, 991 F.Supp. 1059 (C.D.Ill. 1998). [Editor’s Note: This case was decided before Pennsylvania DOC v. Yeskey, 118 S.Ct. 1952 (1998) which held the ADA applies to state prisons.]

Prison Legal News 21 November 1998
Liberty Interest Created By Fine

A federal district court in Nevada held that a Nevada prisoner had no liberty interest in remaining free of one year of disciplinary segregation. The court also ruled that the prisoner had a property interest in money taken from his account for restitution and therefore could challenge the adequacy of due process in a prison disciplinary hearing.

Anthony Barone, a Nevada state prisoner, was accused of stealing $100 from another prisoner’s account. He was given a hearing, then sentenced to a year of disciplinary segregation and ordered to pay restitution. No good time credits were taken. Barone filed a § 1983 action challenging the adequacy of due process in the disciplinary hearing.

Barone specifically alleged that prison officials failed to give notice of the hearing, refused to permit him to call witnesses, and failed to provide a statement of the evidence relied on for their judgment. Barone also raised claims of conspiracy to violate due process and denial of law library access.

The court held that Barone proved only that defendants were sloppy about keeping evidence and records, not conspiracy. The court also held that Barone failed to show actual injury as a result of any denial of law library access. The court granted the prison officials’ motion on both issues.

The court conducted an analysis pursuant to Edwards v. Balisok, 117 S.Ct. 1584 (1997) to determine whether Barone could challenge due process in a prison disciplinary hearing when a loss of good time is not at issue. After a lengthy discussion on whether Balisok should be narrowly or broadly construed, the court decided that Gotcher v. Wood, 122 F.3d 39 (9th Cir. 1997) (on remand from 117 S.Ct. 1840) controlled. Gotcher required a broad interpretation which foreclosed any § 1983 claims based on procedures resulting in disciplinary segregation, even if the duration of incarceration was unaffected.

The court also examined whether Barone had a liberty interest in remaining free of a year of disciplinary segregation, using the four factors set forth in Keenan v. Hill, 83 F.3d 1083, 1089 (9th Cir. 1996). The court concluded that, under Sandin v. Conner, 515 U.S. 472 (1995), Barone had no liberty interest, despite the length of time involved. Chief among its considerations was Barone’s failure to adequately prove how the conditions in disciplinary segregation were worse than those in general population.

Finally, the court determined that depriving Barone of his funds constituted an atypical and significant hardship under Sandin and, therefore, Barone had a property interest in the $33.48 he was ordered to repay without due process. The process was inadequate because Barone was entitled to a statement of the evidence and reasons relied upon by the disciplinary panel that ordered the restitution. The court ordered judgment for Barone for $1 in nominal damages. As more states impose fines on prisoners found guilty of disciplinary infractions, litigants can raise due process challenges as a result of the fine, even if no good time credits are involved. See: Barone v. Hatcher, 984 F.Supp. 1304 (D. Nev. 1997).

Holding Pretrial Detainee in Prison May Violate Due Process

A federal district court in New York ruled that holding a prisoner in a prison ten months after his conviction was reversed may violate the due process clause and entitle him to damages. In 1991 Vincent Robbins was convicted of assault and attempted robbery in New York state court and sent to a state prison. In 1993 Robbins’ conviction was reversed. Robbins was transferred between state prisons and Rikers Island jail several times, during which he spent ten months in state prisons.

Robbins filed suit under 42 U.S.C. § 1983 claiming that being held in prison, rather than jail, after his conviction was reversed, violated the due process clause. He sought damages, claiming he suffered stress and mental anguish from being far away from his family; missed court appearances related to his trial; was tested for TB each time he was transferred between state and city facilities; faced an increased risk of violence and physical harm during the transfers and he was required to work in prison.

The court denied the defendants motions to dismiss and for summary judgment, holding Robbins was entitled to a trial to prove his claims and collect damages if he was successful.

The due process clause protects citizens from punishment before an adjudication of guilt in accordance with due process of law. See: Bell v. Wolfish, 441 U.S. 520, 99 S.Ct. 1861 (1979). The government may detain defendants prior to trial, consistent with the due process clause, only as long as the confinement doesn’t amount to punishment. See: United States v. Milan, 4 F.3d 1038, 1043 (2nd Cir. 1994). Prolonged pretrial confinement can assume a punitive character.

“Accordingly, the prolonged confinement of a pretrial detainee in a facility statutorily designated for convicted prisoners raises the spectre of a constitutional violation.” Because the defendants offered no reason for holding Robbins in prison ten months after his conviction was reversed, Robbins complaint was sufficient to withstand the defense motions for dismissal.

The court held that Robbins had presented sufficient evidence to hold both the New York state Department of Correctional Services and Rikers Island jail officials liable for his detention. He could also hold New York City liable as a municipality. See: Robbins v. Doe, 994 F. Supp. 214 (SD NY 1998).

PLN On the Air

Every week PLN editor Paul Wright delivers prison news and commentary on radio station KPFA, 94.1 FM in San Francisco, CA. Titled This Week Behind Bars the show airs every Wednesday at 5:20 PM as part of the Flashpoints program. If your local radio stations aren’t carrying any prison news or commentary ask them to carry Flashpoints. Straight out of the gulag. Radio stations interested in carrying the show should contact Flashpoints producer and host Dennis Bernstein at: (510) 848-6767.
Colorado Supreme Court Holds Utility Commission Lacks Jurisdiction Over Prison Phone Gouging

The Colorado state supreme court held that the state Public Utilities Commission (PUC) had no jurisdiction over the Colorado Department of Corrections (DOC) with regards to inflated phone costs charged to prisoners. Several Colorado state prisoners filed complaints with the PUC claiming that the Inmate Telephone System (ITS) implemented by the Colorado DOC and Sprint Communications Company violated state public utilities law by overcharging for prisoner calls. The PUC dismissed the petition, holding it had no jurisdiction over the prisoners’ complaint because the DOC was not a public utility nor a provider of non-optional operator services as a reseller of toll services. The PUC held that Sprint did not require a separate tariff to charge prisoners as it was properly operating under its long distance tariff.

The prisoners then went to state district court which also dismissed their petition, holding that the PUC lacked jurisdiction over the DOC and Sprint to review the fairness of charges for prisoner phone usage. The supreme court affirmed.

The court relied on Colorado statutes that define public utilities, as well as the functions and authority of the DOC, in determining the DOC was not operating as a public utility or a phone service provider in its involvement with the ITS.

With regard to Sprint, the court held that the company was providing an unregulated service. Colorado statutes that arguably did regulate the service were invalid because those services had been deregulated at the federal level and federal law now preempts regulation of telephone equipment, such as the SafeBlock system, by the states. “The PUC found that the SafeBlock system, which included the PBX’s and the software used to run them, consisted of ‘customer premises equipment’ and as such was not subject to state regulation. We agree.”

The court held that because Sprint was providing an unregulated utility it had no duty to obtain a certificate or file its tariff rates with the PUC regarding the provision of the ITS. By holding the PUC lacked jurisdiction to hear the matter the Colorado supreme court left Colorado prisoners with little in the way of a state regulatory remedy. See: Powell v. Colorado Public Utilities Commission, 956 P.2d 608 (Colo. 1998).

Readers should note that public utilities remedies can, and do, vary from state to state. State utilities commissions in Florida, Nevada and Louisiana have, as reported in past issues of PLN, taken extensive action to curb the abuses of prison phone systems. This includes capping phone rates, ordering refunds, etc.

BOP Sentence Reduction Granted to Non-Violent Offender

A federal district court in Oregon granted a federal prisoner’s petition for habeas corpus because the Bureau of Prisons (BOP) had wrongly denied him a one year sentence reduction. Kenneth Johnson is a federal prisoner who was convicted of possessing stolen explosives. He successfully completed a 500 hour drug and alcohol treatment program offered by the BOP and requested a one year sentence reduction under 18 U.S.C. § 3621(e)(2)(B). The BOP denied his request, claiming Johnson had been convicted of a “violent” offense. Section 3621 sentence reductions are available only to prisoners actually convicted of a non-violent offense.

The court granted the petition, ruling that possession of stolen explosives is not a violent offense under 18 U.S.C. § 924(c)(3) or the federal sentencing guidelines. BOP Program statement 5162.02 defines numerous non violent offenses as “violent” in order to deny prisoners the one year sentence reductions under § 3621.

The Ninth circuit has previously held that the BOP cannot redefine as a “violent” offense those crimes which are deemed non violent by the circuit courts, statutes and the sentencing guidelines commission. See: Davis v. Crabtree, 109 F.3d 566 (9th Cir. 1997) and Downey v. Crabtree, 100 F.3d 662 (9th Cir. 1996).

Like this case, those also originated at FCI Sheridan in Oregon. Apparently the BOP is requiring its captives to litigate each sentence reduction individually rather than simply comply with the court orders that have helped BOP Program Statement 5162.02 is void. PLN has reported numerous cases on this issue from all circuits See: Johnson v. Crabtree, 996 F. Supp. 999 (D OR 1997).
D.C. Smoking Injunction Reversed

In the December, 1997, issue of PLN we reported Crowder v. District of Columbia, 959 F. Supp. 6 (D DC 1997), where a district court in the District of Columbia (D.C.) issued an injunction requiring that three prisoners in the D.C. prison system not be exposed to second hand smoke, AKA Environmental Tobacco Smoke (ETS). The court of appeals for the District of Columbia circuit reversed, holding there was insufficient evidence the plaintiffs were exposed to dangerous levels of ETS or that prison officials were deliberately indifferent to the danger posed by ETS exposure.

Three D.C. prisoners filed suit claiming they were being exposed to dangerous levels of ETS which exacerbated existing medical problems. The district court agreed and issued a permanent injunction ordering the District of Columbia to provide these three prisoners with a smoke free environment. Damages were not awarded and this was not a class action suit. One of the plaintiffs was later released, which the appeals court ruled mooted the case as to his claim. The other two plaintiffs were transferred to a private prison in Ohio, which did not moot their claims.

The appeals court held that the district court had incorrectly applied Helling v. McKinney, 509 U.S. 25, 113 S.Ct. 2475 (1993)[PLN, Sep. 1993], the leading ETS case, by holding the plaintiffs should not be exposed to tobacco smoke. "Helling did not read the Eighth Amendment as mandating smoke free prisons. It is impossible to read any such per se rule into Helling's objective element. It is also impossible to find that these plaintiffs presented enough evidence to satisfy Helling's standard, correctly understood." The court faulted the plaintiffs for failing to present any objective evidence at trial (as opposed to "anecdotal accounts") about the actual level of ETS at the prison. "In short, Dawson and Smith failed to prove that even while they were at Lorton, they were exposed to such an unreasonable level of tobacco smoke that it posed a serious risk to their future health."

The court also held the plaintiffs had failed to show a causal nexus between their physical ailments and ETS exposure. The plaintiffs' expert testimony did not show a connection between their health conditions and an increased risk of harm due to ETS. Thus, the court held the plaintiffs had failed to prove an objective risk of harm, required under Helling.

The appeals court also held the plaintiffs had not proven the subjective element of their claim, namely deliberate indifference by prison officials. The district court had ruled the defendants were unable or unwilling to enforce rules banning smoking in certain areas of the prison. The appeals court faulted this. "This cannot be right. The court heard no evidence demonstrating the existence of any substantial risk of harm. Yet there must be an 'objectively intolerable risk' in order for there to be a 'knowing and unreasonable' disregard of it. It makes no sense to charge someone with improperly ignoring a danger that never existed."

A federal district court in Kansas held that a trial was required to resolve disputed issues of material fact in a Jewish prisoner's lawsuit over the denial of a Kosher diet. Jimmy Searles is a Kansas state prisoner. While housed at the Hutchinson Correctional Facility Searles requested a Kosher diet. Prison officials denied the request and demanded that Searles complete a form called "Request for Accommodation of Religious Practices" and attend Jewish services for three months before they would grant his diet request. Searles filed grievances, which were resolved in his favor because he had received a Kosher diet at two other state prisons and had attended Jewish services for several years at other prisons. Searles then filed suit seeking money damages for the four month denial of a Kosher diet which he claimed violated his right to the free exercise of religion.

The defendants moved for summary judgment claiming Searles was not sincere in his religious beliefs and that they were entitled to qualified immunity from money damages. The court denied the motion and scheduled a trial.

The court noted that prisons "may not substantially burden a prisoner's right of free exercise in the absence of a compelling state interest and must employ the least restrictive means necessary to further that interest. Werner v. McCotter, 49 F.3d 1476, 1479 (10th Cir. 1995). In Lefevers v. Saffle, 936 F.2d 1117 (10th Cir. 1991) the tenth circuit held that dietary restrictions based on religious beliefs are constitutionally.

To prevail in a free exercise claim a prisoner plaintiff must show that government action burdens a religious belief, the religious belief is sincerely held and the restriction does not further legitimate penological goals. The court held Searles had presented sufficient evidence indicating he was sincere in his beliefs, thus a trial was required to resolve the claim.

The court held that the defendants were not entitled to qualified immunity from money damages because Lefevers clearly established the right of prisoners to religious diets. The court held the defendants' actions were not objectively reasonable. See: Searles v. Van Bebber, 993 F. Supp. 1350 (D KS 1998).
Segregation Requires Less Due Process

The court of appeals for the Seventh circuit held that prisoners facing only the prospect of disciplinary segregation are entitled to less due process than when the sanction imposed involves the loss of good time credits. The court also questioned, but did not decide, whether such disciplinary cases can be brought as habeas cases.

Armen Sylvester, an Indiana state prisoner, was incarcerated for inciting a riot, found guilty and sentenced to three years in segregation. No good time credits were lost. Sylvester filed a habeas corpus petition under 28 U.S.C. § 2254 claiming that the hearing officer’s verdict was not supported by “some evidence” and he was denied due process when he was not allowed to present witnesses on his own behalf. The district court denied relief and the appeals court affirmed.

At the outset, the appeals court expressed doubt that habeas corpus was the proper means for Sylvester to challenge the disciplinary hearing outcome because he did not seek earlier release from custody. “Section 2254 is the appropriate remedy only when the prisoner attacks the fact or duration of ‘custody.’ Although dramatically more restrictive confinement may be contested in a collateral attack under § 2254, see Graham v. Broglino, 922 F.2d 379 (7th Cir. 1991), recent cases such as Sandin v. Connor, 515 U.S. 472, 115 S.Ct. 2293 (1995), imply that the difference between a prisoner’s general population and segregation and segregation does not involve a ‘liberty’ interest and therefore could not be ‘custody’ for purposes of § 2254. See also Wagner v. Hanks, 128 F.3d 1173 (7th Cir. 1997). The difference between § 1983 and § 2254 is potentially important for procedural issues, such as the need for a certificate of appealability and the application of the Prison Litigation Reform Act. Perhaps Stone-Bey v. Barnes, 120 F.3d 718 (7th Cir. 1997), which extends Edwards v. Balisok, 117 S.Ct. 1584 (1997) and Heck v. Humphrey, 512 U.S. 477, 114 S.Ct. 2364 (1994), to foreclose the use of § 1983 actions to review placement in segregation means that prisoners are effectively compelled to use § 2254 through Stone-Bey did not attempt to reconcile its holding with Sandin and the fact that few states afford collateral review of prison disciplinary cases.” The court did not pursue the matter further.

Turning to the merits of the sole question raised in the certificate of appealability, the court held that “some evidence” supported the hearing officer’s finding of guilt in the disciplinary hearing.

Sylvester claimed on appeal that his due process rights were violated when two prisoners whose testimony he’d requested were not compelled to attend the hearing. Wolff v. McDonnell, 418 U.S. 539, 94 S.Ct. 2963 (1974) sets forth the due process requirements in disciplinary hearings that result in the loss of good time credits. Forbes v. Triggs, 976 F.2d 308 (7th Cir. 1992) requires that prison officials assist prisoners in obtaining witness testimony even from unwilling witnesses, unless the prison has a good reason not to present the testimony.

“Whatever else may be said about the process required in the wake of Sandin before a prisoner may be moved to segregation, we do not think that the Supreme Court would today require prisoners to compel unwilling witnesses to give testimony (oral or written) at hearings that concern only a prisoner’s custody status, and not the length of his confinement. A prisoner is entitled to some kind of hearing, but an opportunity to present his own testimony, documentary evidence, and the testimony of willing witnesses is constitutionally sufficient for interests of this kind (if, to repeat, any process at all is due).” See: Sylvester v. Hanks, 140 F.3d 713 (7th Cir. 1998).

This case highlights some of the inconsistencies within the seventh circuit on the issue of due process in prison disciplinary hearings that result only in segregation. Beyond the problem of basing due process on the sanction that is supposedly imposed only after the hearing has been conducted, is the larger question of whether a hearing of any type whatsoever is required. Other panels in the seventh circuit have held that no due process is required where prisoners are placed in segregation based on false claims of misconduct. See: Leslie v. Doyle, 59 F.3d 1202 (7th Cir. 1995) [PLN, May, 1998]. In Wagner, supra, the court held that it was extremely unlikely prisoners would ever be able to show a due process liberty interest in segregation placement alone. Until the seventh circuit en banc decides the question definitively, we won’t know if, as Sylvester implies, some due process is required when segregation sanctions are imposed or if hearings can be dispensed with in their entirety. The trend however seems to be towards the latter.