“Corrections-Industrial Complex” Expands in U.S.

BY JAN ELVIN

Ted Goins, a securities analyst at Branch, Cabell & Co. in Richmond, Va. spent a weekend last spring reading through every detail of the federal Crime Bill and watching the debate on C-Span. He then came up with a list of “theme stocks of the 90s.”

Goins’ highest recommendation went to the Nashville-based Corrections Corporation of America (CCA)—the nation’s most successful operator of private prisons—whose stock had recently hit an all-time high.

CCA’s chief financial officer was quoted as saying that the Crime Bill was “very favorable to us.”

CCA’s success is but one example of the profits to be made by a rapidly growing constituency of architects, private prison operators, vendors, labor unions, developers, financiers, and other entrepreneurs.

Most recently, defense contractors, who have been hurt by cuts in military spending, have been searching for opportunities in the corrections industry.

The combination of these lucrative business opportunities, political posturing, the war on drugs, and deep social divisions within the United States have created a rapid expansion of the “crime control industry.”

The buyers and sellers of prison goods and space are lining up to cash in.

Critics warn, however, that the economic interests of industry will always be on the side of oversupply of prison space rather than undersupply, establishing an extraordinarily strong force for expansion.

Renowned Norwegian criminologist Nils Christie, one of the most outspoken critics of the emerging “corrections industrial complex,” cautions against the spread of a system of crime control in which ethical questions are suppressed and efficient management supplants justice.

Will the economic motives of business conflict with the objectives of providing decent conditions of confinement? Will prison businesses maintain high occupancy rates even in the absence of demonstrated need? And, as Malcolm Feeley asks, to what extent does privatization expand and transform the state’s capacity to punish?

That the United States is moving full steam ahead to expand this system is unquestionable. In 1980 the total state and federal sentenced inmate population was 329,821. At midyear 1994 that total had risen to 1,012,851.6 The 1994 federal Crime Bill provides nearly $9 billion for state prison construction. During FY 1993-94 state pris-
have become involved: Goldman Sachs & Co., Prudential Insurance Co. of America, Smith Barney Shearson Inc. and Merrill Lynch & Co. Many of the companies work to underwrite prison construction with private, tax-exempt bonds which require no voter approval.

A Shoppers' Guide

Private companies are now available to provide consulting, personnel management, architecture and building design, vocational assessment, medical services, drug detection, transportation, food service and management to state prison systems. Other businesses have been formed to sell specialized products such as body armor, closed circuit television systems, mechanical and electronic locks, perimeter security and motion detection systems, tamper-proof furniture, fencing, flame-retardant bedding, heavy duty furniture, shatter proof plastic panels, plastic bunks, tamper-proof fasteners, and clog proof waste-disposal systems. One company sells high-security fire sprinklers designed so that inmates cannot hang themselves.

A quick look through the advertisements in any issue of Corrections Today, the ACA’s glossy magazine, reveals a certain talent for word play.


• Santana (plastic toilet compartments): “I got 10 years, but Santana is in here for life!”

• AT&T: Strike Three! 3-way call detects system stops your inmates from getting out. And it’s proven 93% effective.

• Point Blank Body Armor: “Some inmates would love to stab, slash, pound, punch and burn you. But they won't get past your S.T.A.R. (Special Tactical Anti-Riot Vest).”

The lobbying power of these companies, especially defense contractors with lobbyists in Washington and long-term relationships on Capitol Hill, distorts the dialogue that should be taking place about the effectiveness of incarceration as a policy and drowns more reasonable voices.

“We’re not going to be able to lock up everyone,” said Bobbie L. Huskey, president of the ACA. “The absence of a noticeable reduction in adult crime rates as incarceration rates have climbed raises serious questions about the efficacy of America’s sentencing policies.”

Yes, In My Back Yard

For many years prison officials faced the “NIMBY” problem: when communities heard about plans for a new prison, the outcry was “Not In My Back Yard!” Times have changed.

“Communities started looking for any kind of economic growth,” says Bill Patrick of the Federal Bureau of Prisons. “They started realizing we were a recession-proof, environmentally clean, attractive, safe industry.”

Financially strapped communities are now begging for prisons to be built in their back yards. Town leaders in Coleman, Florida, the former “Cabbage Capital of the world,” population 854, lobbied aggressively for a new Bureau of Prisons site. The new prison is now partially completed.

In Texas, some communities have offered free memberships in local country clubs to top officials of any prison that comes to town. Dick Lewis, spokesman for the state jail division of the Department of Corrections, said, “Fifteen years ago, if you wanted to place a prison in a locale, you would have major opposition. Now the turn around is 180 degrees. They are seeking these prison units. The local media calls it the prison derby.”

Braham, Minnesota is trying to purchase about 300 acres to donate the land to the state for an $80 million, 800-bed, close custody prison. (The BOP requires that land for a prison be donated by the state.)

James Bruton, the state’s deputy commissioner for institutions, said he could understand why small towns like Braham seek the prison for economic salvation. But he worries about the long run. “We can’t

“Remember, we’re not just making money. We’re building prisons.”
not build ourselves out of the crime problem," says Bruton. "Every state that's tried it has failed miserably. You'll never see a reduction in the crime rate by building more prisons. What you're going to find out is that you can't afford to operate what you've built."

Privatization
Cornell Cox, a private firm in Houston, entered the California market by buying the state's largest private prison firm, Eclectic Communications, Inc. Cornell Cox is backed by Wall Street investments houses Dillon, Reed & Co. and Charterhouse. Since 1988, Eclectic has received contracts worth more than $50 million. The former owner, Arthur McDonald, sold the company for more than $10 million, according to the Los Angeles Times. "Crime pays. I hate saying that, but it really does," said McDonald from retirement in South Dakota.

The two largest companies in the field are Corrections Corporation of America (CCA) and Wackenhut Corrections Corporation. CCA recently entered the inmate transportation business by purchasing TransCor America. "One of TransCor's biggest expenses is overnight housing of prisoners on transcontinental routes," said Doctor Crants, CCA chairman and chief executive officer. "CCA's network of facilities will give TransCor ready access to quality, secure beds, while CCA will gain incremental occupancy."

Tennessee's $60 million contract with CCA is currently under review by the state legislature. CCA has come under fire from government audits in Texas of two of their privately run prisons. The 1990 report disclosed that "inexperienced" prison employees had used excessive force on inmates. Additionally, inmates were not getting the services which were required under the state contracts and intended to help inmates return to society.

Another unfavorable report was issued by the Prison Officers' Association in the United Kingdom in 1987, alleging cruelty to inmates at the CCA facility at Silverdale and abhorrent conditions.

As of now, fewer than 2% of the nation's prisoners are incarcerated in private facilities, but the new Republican crime bill presently before Congress will add $10 billion for prison construction, some of which will go to private prisons.

State spending
According to a survey of 47 states for Fiscal Year 1994-95, the average DOC budget is around $507 million per system, up from an average of $447 million per system in FY 93-94.

Six states have a corrections operating budget of over one billion dollars. California's tops the list with a budget of over $3.6 billion. Here are some examples of what that has meant for Californians:

- In the last ten years the DOC's share of the State's General Fund rose from 3.9% to 8.2% while higher education's share declined from 14.4% to 9.3%.
- The multi-billion dollar prison and so-called crime control expansion will force cuts in education, job training, youth counseling and other social services, the very programs that address the root causes of crime;
- The Los Angeles District Attorney's Office says that three out of four offenders who get life sentences under Proposition 184 ("Three Strikes You're Out") will be non-violent offenders, at a cost of $48 billion over 20 years for Los Angeles' prisoners alone.
- Based on information provided by the DOC, increases in California's prison population will result in additional state operating costs of about $200 million in 1995-96, and will grow by several hundred million each year until the full impact is realized in about 32 years. By the year 2003, the additional costs will reach about $3 billion, and will grow to about $6 billion annually by the year 2026. The DOC predicts that it will incur one-time costs of about $20 billion over the next 32 years to construct new facilities.

Connections
Corrections has traditionally operated without political advantage, but can now benefit from the lobbying skills of many private providers.

"An urge for expansion is built into industrial thinking," says Dr. Christie. But the prison industry is one with particular advantage because it provides "weapons for what is often seen as a permanent war against crime. The crime control industry is like rabbits in Australia or wild mink in Norway—there are so few natural enemies around."

With the boom have come lobbyists who have an economic interest in keeping sentences harsh and long, so that prison populations continue to soar. Thus, we see a system developing where the deprivation of liberty is powered in large part by the profit motive. Christie warns, "You get private lobbying for prisons and you get private capital interested in building more prisons, in expanding that system... The industry has no interest in its own abolition."

Jan Elvin is the editor of the NPP Journal.

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PRI Members Confer on UN Prison Standards

BY JENNIFER MONAHAH

This is not, in fact, a very popular theme.” With classic Dutch understatement Winnie Sorgdrager, the Netherlands Minister of Justice, introduced the major conference on prison standards held in The Hague last November by Penal Reform International (PRI), and funded by her government.

PRI members from five continents described a world where standards for prisoners, and penal reform in general, are indeed very low on the public agenda. We heard a dispiriting picture of rising crime, outstripped only by rising fear of crime, of public and political pressure towards more imprisonment, set against tight budget constraints. Above all, of the proven ineffectiveness of treating prisoners badly as a way of reducing crime. “Today’s convict is tomorrow’s ex-convict,” Professor Monika Platek of Warsaw University summed up. “The better we treat prisoners, the safer is society.”

Hence the main task of the conference: to prepare a manual that would update the 1955 United Nations Standard Minimum Rules (SMRs) for the Treatment of Prisoners. The rules are in many respects badly out of date—drawn up before equal opportunities, or drugs or AIDS.

Nevertheless, international penal reformers (including senior UN officials) are convinced that a new set of rules would get nowhere today. Indeed, UN member states would not agree to new SMRs laying down even the 1955 standards. (As one participant pointed out, about half the member countries of the UN today use torture.)

During three days’ hard committee work, three points in particular became clear. First, despite vast differences in wealth and culture, basic prison standards should be universal. Participants from the developing world did not want adjustments downwards, they wanted firm principles as a lever in the struggle to raise standards.

Second, prisons are a reflection of how much the world is shrinking. Participants from western countries stress the growing proportion of their prison population who are foreign nationals. Immigration detainees—asylum seekers in particular—are a reflection of how much the world is shrinking. Participants from western countries stress the growing proportion of their prison population who are foreign nationals. Immigration detainees—asylum seekers in particular—

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SUMMARY

Thirty-nine states plus the District of Columbia, Puerto Rico, and the Virgin Islands are under court order or consent decree to limit population and/or improve conditions in either the entire state system or its major facilities. Thirty-three jurisdictions are under court order for overcrowding or conditions in at least one of their major prison facilities, while nine jurisdictions are under court order covering their entire system. Only three states have never been involved in major litigation challenging overcrowding or conditions in their prisons.

The following list gives the current status of each state.

Note: There is some overlap between the second and fourth categories because, in some states, one or more facilities are under court order while other facilities in that state are presently being challenged (e.g., Illinois). Also, Oklahoma is listed in both the second and third categories because the McAlester facility is still under the court order entered in *Battle v. Anderson* but is no longer under active court supervision.

Entire Prison System Under Court Order or Consent Decree
9 jurisdictions: Alaska, Delaware, Mississippi, New Mexico, Rhode Island, South Carolina, Texas, Puerto Rico, Virgin Islands.

Major Institution(s) in the State/Jurisdiction Currently Under Court Order or Consent Decree

Formerly Under Court Order or Consent Decree or Currently Released from Active Supervision of the Court
7 jurisdictions: Alabama, Arkansas, Georgia, Oklahoma, Oregon, Tennessee, Wyoming.

Pending Litigation
11 jurisdictions: California, Colorado, Connecticut, Georgia, Montana, Nebraska, New York, North Carolina, Ohio, Utah, Vermont.

Special Masters/Monitors/Mediators Appointed (present and past)

Prison Systems or Major Facilities Under Court Order and Cited for Contempt (present and past)
8 jurisdictions: Alabama, Michigan, Mississippi, Rhode Island, Texas, Virginia, District of Columbia, Puerto Rico.

Not Involved (to date) in Overcrowding or Conditions Litigation
3 jurisdictions: Minnesota, New Jersey, North Dakota.

*The full Status Report, with details on the litigation in each state, will be sent to Journal subscribers under separate cover. For non-subscribers the full Status Report is available for $5 prepaid from the NPP, 1875 Connecticut Avenue, Suite 410, Washington, DC 20009.*
Case Law Report

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BY JOHN BOSTON

Highlights of Most Important Cases

Habeas Corpus/Exhaustion of Remedies

During the 1993-94 term, the Supreme Court finally addressed a long-standing ambiguity in the relationship between 42 U.S.C. §1983 and the federal habeas corpus statutes in cases where prisoners seek relief related to the fact or duration of their imprisonment. In Heck v. Humphrey, 114 S.Ct. 2364 (1994), the Court definitively clarified the matter for prisoners who allege that their criminal convictions or sentences are defective. However, the waters remain murky for prisoners challenging disciplinary, parole, or other administrative decisions affecting the time they must serve.

Heck addressed what one commentator has called “the Preiser puzzle.” Schwartz, “The Preiser Puzzle: Continued Frustrating Conflict Between the Civil Rights and Habeas Corpus Remedies for State Prisoners,” 37 DePaul L.Rev. 85 (1988). In Preiser v. Rodriguez, 411 U.S. 475 (1973), the plaintiffs brought suit under §1983 to get back “good time” (time off for good behavior) that had been taken from them in prison disciplinary proceedings. The Court ruled that when a state prisoner challenges “the very fact or duration of his physical imprisonment,” and the relief he seeks is a determination that he is entitled to immediate release or a speedier release from that imprisonment, his sole remedy is a writ of habeas corpus. 411 U.S. at 487. The Court reasoned that challenges to custody represent the “core of habeas corpus,” and that allowing such challenges under §1983 would let prisoners evade the statutory mandate of exhaustion of state judicial remedies. See 28 U.S.C. §2254(b).

The scope of the Preiser holding has been a source of persistent controversy. Preiser explicitly stated that a prisoner seeking damages “is attacking something other than the fact or length of his confinement, and he is seeking something other than immediate or more speedy release;” accordingly, damage actions do not require prior exhaustion of state remedies. 411 U.S. at 494. The following year, in Wolff v. McDonnell, 418 U.S. 539 (1974), a §1983 suit alleging that prison disciplinary proceedings denied due process, the Court held, “Preiser expressly contemplated that claims properly brought under §1983 could go forward while actual restoration of good time credits is sought in state proceedings,” and that the plaintiffs could also obtain a federal court declaratory judgment addressing the adequacy of the procedures used and an injunction prospectively enjoining invalid regulations. 418 U.S. at 554-55. The Court added, “One would anticipate that normal principles of res judicata would apply in such circumstances.” Id. at n. 12.

It is this distinction among remedies that sets up the “Preiser puzzle.” If Wolff and Preiser mean what they say, then a litigant can get a ruling on the merits of an action that affects his or her release date, along with damages, a prospective injunction, or a declaratory judgment. The judgment can then go back into state court armed with the federal court judgment and demand the restoration of lost good time, rescinded parole date, etc., claiming res judicata or collateral estoppel or both. Insofar as Preiser was about federalism, this procedure—which would reduce the state courts to a “me too” role—does not seem to serve its concerns. Even if the federal judgment is not preclusive in state court, the potential result is highly unsatisfactory: contradictory judgments in different courts concerning the same subject matter.

In cases involving criminal convictions or sentences, federal courts have consistently refused to hear such claims, regardless of the relief sought, unless the litigant has previously exhausted state judicial remedies. See, e.g., Johnson v. State of Texas, 878 F.2d 904, 906 (5th Cir. 1989) (damage claim for speedy trial violation and the use of perjured testimony in a criminal proceeding may not be pursued without exhaustion of state remedies); Hadley v. Werner, 753 F.2d 514, 516 (6th Cir. 1985) (a federal court should not make a ruling on a §1983 damage claim which might imply that a state conviction was illegal). In cases involving administrative decisions—discipline, parole, release date calculation—there has been a spectrum of approaches, discussed below.

Heck arose from a criminal conviction. The plaintiff sought damages, but not release, based on allegations that the defendants (county prosecutors and a state police investigator) had engaged in an "unreasonable" and "arbitrary" investigation, destroyed exculpatory evidence, and used an unlawful voice identification procedure at trial. The court of appeals had held that the claim was barred by Preiser. It had gone on to hold that the case should be dismissed, rather than stayed, pending the exhaustion of state judicial remedies. The appeals courts were in conflict on this point, which is important because a dismissed claim can become time-barred during the state exhaustion process. See, e.g., Young v. Kenny, 907 F.2d at 878 (9th Cir. 1990); Prather v. Norman, 901 F.2d 915, 919 (11th Cir. 1990).

The Court did not directly resolve this procedural issue. Rather, it held that Mr. Heck had no claim cognizable under §1983. Because §1983 creates a "species of tort liability," the Court looked to the law of malicious prosecution. The Court deemed this the common-law tort most nearly analogous to the plaintiff's claims because it "permits damages for confinement imposed pursuant to legal process." The Court noted that an element of that tort is termination of the prior criminal proceeding in favor of the accused. 114 S.Ct. at 2371. Adopting this tort rule, it held that the plaintiff would not have a cognizable claim unless and until he got his conviction reversed, which can only be done through exhaustion of state judicial remedies with subsequent resort to federal habeas corpus if necessary.

This holding does away with the "Preiser puzzle" for claims involving convictions and sentences. It also makes the stay versus dismissal question a non-issue: if the claim does not accrue until the conviction is reversed, the statute of limitations cannot run during the exhaustion process. 114 S.Ct. at 2371. Heck also resolved any doubt—not that any existed—about prisoners' inability to get around the exhaustion requirement by seeking other forms of relief against their criminal convictions or sentences.

The Preiser rule, however, is not limited to criminal judgments; it also applies to administrative actions such as prison disciplinary proceedings, parole decisions, and the calculation of release dates. For prison litigators, the important question is what application the malicious prose-
The answer should be "none." The tort of malicious prosecution was traditionally limited to judicial proceedings, which prison disciplinary hearings are not. Some states maintain this "courts-only" rule. See Greer v. DeRobertis, 568 F.Sup. 1370, 1376 (N.D.Ill. 1983) (holding that prison disciplinary proceedings cannot support a malicious prosecution suit under Illinois law); Kepelman v. Bricker, 329 A.2d 423, 427-28 (Md.Ct. Special Appeals 1974). Other states permit some malicious prosecution claims based on administrative proceedings. Even these states have generally done so in instances, such as professional licensing and discipline proceedings, that were much more like judicial proceedings than prison disciplinary hearing. See, e.g., Toft v. Ketchum, 113 A.2d 671, 673-74 (N.J. 1955) (ethics and grievance committee proceeding against attorney); Kaufman v. A.H. Robbins Co., 448 S.W.2d 400, 403 (Tenn. 1969) (license revocation proceeding before state board of pharmacy with subpoenae witnesses and administer oaths).

Research reveals only one decision addressing directly and in any detail whether a malicious prosecution claim can arise from a prison disciplinary hearing. In Trecy v. State, 134 Misc.2d 849, 501 N.Y.S.2d 1005 (N.Y.Cr. Cl. 1986), aff'd on other grounds sub nom. Arteaga v. State, 72 N.Y.2d 212, 532 N.Y.S.2d 57, 527 N.E.2d 1194 (N.Y. 1988), the court held that New York's rule allowing claims for malicious prosecution in administrative proceedings applied only to proceedings "which provide for a 'hearing and trial of the issues on evidence and testimony under oath, with the right of cross examination'..." A prison disciplinary hearing "is not a full-scale adversarial hearing" because it is governed only by the minimal requirements of Wolff v. McDonnell, without a right to confrontation or the assistance of counsel and with only a qualified right to call witnesses. 501 N.Y.S.2d at 1006. Therefore Trecy held no malicious prosecution claim could lie.

More fundamentally, a malicious prosecution claim is completely different in concept and structure from a disciplinary due process claim. Malicious prosecution claims are brought against the complainant in the case, not the court or other tribunal that hears it. They are based on the lack of probable cause for making the charges, not on violations of procedural rights. W. Page Keeton et al., Prosser and Keeton on The Law of Torts §119 (5th ed. 1984). By contrast, a claim that the complainant falsly or baselessly filed disciplinary charges is exactly what federal courts will not hear in connection with prison discipline. See, e.g., Sprouse v. Babcock, 870 F.2d 450, 452 (8th Cir. 1989); Freeman v. Rideout, 808 F.2d 949, 951-53 (2d Cir. 1986), cert. denied, 485 U.S. 982 (1988). Viable disciplinary due process claims are brought against the disciplinary hearing officer or committee members, and they allege that these officials failed to follow the procedures required by due process in deciding the case against the prisoner.

Nothing in Heck is to the contrary. Heck's discussion of malicious prosecution focuses explicitly on criminal convictions and sentences, with no suggestion that it is intended to govern disciplinary proceedings or other administrative matters— which were, after all, not before the Court. Although Heck makes Preiser and Wolff irrelevant to cases challenging criminal judgments, the Court did revisit these decisions in passing. Unfortunately, its comments, which are almost certainly dicta, do little to clarify Preiser's application to administrative actions.

Before Heck, some courts held, or simply assumed, that Wolff permitted them to grant any relief not directly affecting a prisoner's release or parole.1 Others held that no relief could be granted under §1983 if it would require a ruling on whether good time was properly taken, parole was properly revoked or denied, etc.2 One variation of the latter approach permits prisoners to obtain rulings under §1983 requiring officials to follow proper procedures in connection with future proceedings concerning their good time, parole, etc., because such rulings do not directly entitle the prisoner to earlier release.3 A more restrictive view of this substance/procedural distinction holds that no relief can be granted under §1983 if the prisoner's hearing does not resolve issues that would automatically entitle the prisoner to release.4 Another appeals court similarly held that §1983 may not be used to decide an "underlying issue," even one of a general nature, that would indirectly entitle the prisoner to immediate or earlier release.5

Heck does little to narrow this diversity of views. The Court wrote:

...Petitioner contends that [the plaintiffs in Wolff were authorized] to recover damages measured by the actual loss of good time. We think not. In light of the earlier language characterizing the claim as one of "damages for the deprivation of civil rights," rather than damages for the deprivation of good-time credits, we think that this passage recognizes a §1983 claim for using the wrong procedures, not for reaching the wrong result (i.e., denying good-time credits). Nor is there any indication in the opinion, or any reason to believe, that using the wrong procedures necessarily vitiated the denial of good-time credits. Thus, the claim at issue in Wolff did not call into question the lawfulness of the plaintiff's continuing confinement....

Thus, the question posed by §1983 damage claims that do call into question the lawfulness of conviction or confinement remains open....
Suicide Prevention/Deliberate Indifference

In Farmer v. Brennan, 114 S.O. 1970 (1994), a case about protection from inmate-inmate assault, the Supreme Court significantly clarified its prior rulings concerning the Eighth Amendment deliberate indifference standard. Randall C. Berg of the Florida Justice Institute in Miami has pointed out that Farmer appears to overrule a major prop of existing law concerning jail and prison suicides.

Most federal courts have adopted some version of the rule that "a finding of deliberate indifference requires that officials have notice of the suicidal tendency of the individual whose rights are at issue in order to be held liable for the suicide of that individual." Tittle v. Jefferson County Commission, 10 F.3d 1535, 1539 (11th Cir. 1994) (en banc) (emphasis in original). In Tittle, the panel opinion held that a history of suicides from horizontal bars in jail cells, with no corrective action by jail officials, created a triable factual issue of deliberate indifference regardless of their knowledge of individuals' suicidal tendencies. 966 F.2d 606, 612 (11th Cir. 1992) ("It is true that prison officials are not required to build a suicide-proof jail. By the same token, however, they cannot equip each cell with a noose.") The en banc court rejected this theory of liability.

In Farmer, the Court explicitly rejected the notion that prison officials must have notice of the danger to a particular individual to be held liable.

The question under the Eighth Amendment is whether prison officials, acting with deliberate indifference, exposed a prisoner to a sufficiently substantial "risk of serious damage to his future health..." and it does not matter whether the risk comes from a single source or multiple sources, any more than it matters whether a prisoner faces an excessive risk of attack for reasons personal to him or because all prisoners in his situation face such a risk.

Dear Prison Project...

Dear Prison Project:
I am currently out on parole, and the parole board has recently informed me that I have violated the conditions of my parole and that the board will take "appropriate action." Do I have any protection against the board revoking my parole?

Parole Pending

Dear Parole Pending:
Revocation of parole requires two hearings: (1) a preliminary hearing to determine whether there is probable cause or reasonable grounds to believe that the parolee has violated the terms of parole; and (2) a final hearing to decide any contested facts and to determine whether revocation is warranted. Morrissey v. Brewer, 408 U.S. 471, 480-82, 92 S.Ct. 2593 (1971)

The preliminary hearing is held before a detached and neutral body at or near the place of the alleged violation. At the preliminary hearing, you are minimally entitled to (1) a written notice of the alleged violation; (2) disclosure of the evidence against you; (3) an opportunity to be heard by the board in person; and, (4) a written decision containing the facts and reasoning for a finding of probable cause. You have the right to confront and question those who have presented information against you unless the hearing officer decides that the witness would be subject to a risk of harm if his identity is revealed.

At the final hearing, you are also guaranteed (1) the right to present witnesses and documentary evidence that support your claim that parole should not be revoked; and, (2) a written decision setting forth the reasons for revocation. You have the right to confront and cross-examine adverse witnesses unless the board finds good cause why this should be denied, such as cost and difficulty of producing these witnesses. See Kell v. U.S. Parole Com'n, 26 F.3d 1016, 1019 (10th Cir. 1994); White v. White, 925 F.2d 287, 290-91 (9th Cir. 1991); Downto v. Klinkar, 759 F. Supp. 425, 426-27 (N.D. Ill. 1991). A parolee is generally entitled to a prompt hearing, but a delay does not deny due process unless the parolee can show that the delay prejudiced his ability to present evidence. Cortinas v. U.S. Parole Com'n, 936 F.2d 43 (5th Cir. 1991) (per curiam).

If prejudicial delay is established, due process requires the quashing of the parole violation warrant. United State ex rel Sims v. Stauffer, 563 F.2d 821, 828 (7th Cir. 1977).

Finally, counsel may be provided to a parolee who requests assistance and does not have the capacity adequately to represent himself. Gagnon v. Scarpelli, 411 U.S. 778, 93 S.Ct. 1756, 1764 (1973). You should request counsel if you believe that the issues involved in the hearing are too complex for you to handle without professional assistance. See U.S. v. Dodson, 25 F.3d 385, 389 (6th Cir. 1994).

NPP fellow Eric Bakahan is a graduate of the University of Virginia School of Law.

1 See, e.g., Sisk v. CSO Branch, 974 F.2d 116, 118 (9th Cir. 1992); Clark v. State of Georgia Parole and Paroles Board, 915 F.2d 656, 650-39 (11th Cir. 1990) (claim for damages for parole denial based on unconstitutional grounds and for an injunction barring future consideration of those grounds could be heard under § 1983 since the plaintiff did not seek release); Smith v. Maschner, 899 F.2d 940, 951 (10th Cir. 1990) (claim...
for good time was subject to habeas exhaustion requirement, but damage claim about same disciplinary proceeding could go forward under § 1983; Venable v. Daniels, 871 F.2d 1526, 1333-34 (7th Cir. 1989) (if “significant sanctions” other than loss of good time are imposed, the prisoner may resort to § 1983 without exhaustion).

See, e.g., Sheppard v. State of La. Board of Parole, 873 F.2d 761, 762 (5th Cir. 1989) (Pretrial rule barred prisoner whose parole was revoked from challenging the constitutionality of a parole revocation statute even though he sought only damages and a declaratory judgment).

Offutt v. Solem, 825 F.2d 1256, 1258-60 (8th Cir. 1987) (barring § 1983 challenge to good time statute); accord, Bressman v. Farrar, 900 F.2d 1305, 1306-07 (8th Cir. 1990) (holding that Offutt rule bars all federal court challenges to disciplinary proceedings in which good time was taken, regardless of the relief sought), cert. denied, 111 S. Ct. 1090 (1991).

Serio v. Members of Louisiana State Board of Pardons, 821 F.2d 1112, 1118-19 (5th Cir. 1987).

Offutt v. Solem, 823 F.2d 1256, 1258-60 (8th Cir. 1987) (barring § 1983 challenge to good time statute); accord, Bressman v. Farrar, 900 F.2d 1305, 1306-07 (8th Cir. 1990) (holding that Offutt rule bars all federal court challenges to disciplinary proceedings in which good time was taken, regardless of the relief sought), cert. denied, 111 S. Ct. 1090 (1991).

Other Cases Worth Noting

U.S. COURT OF APPEALS

Suicide Prevention

Hare v. City of Corinth, Miss., 22 F.3d 612 (5th Cir. 1994). The defendants were not entitled to summary judgment on qualified immunity grounds in a jail suicide case in which the record was “replete with evidence that the custodial officers knew or should have known of Tina Hare’s vulnerability to suicide” (615) yet they placed her in a cell in which she could not be seen or reached by the trustee or dispatcher on duty and then left her hanging for an indeterminate time.

Classification—Race/Procedural Due Process—Disciplinary Proceedings

Black v. Lane, 22 F.3d 1395 (7th Cir. 1994). The plaintiff filed a complaint of racial discrimination. He had previously filed an administrative complaint with the Office of Civil Rights Compliance of the Department of Justice, which sustained his complaint and led to a resolution agreement concerning job discrimination. After six years of proceedings, including a trip to the appeals court, the defendants defaulted in answering the amended complaint, and the court denied their motion to vacate the default four months later. The magistrate judge held a hearing on damages and awarded $50 after dismissing substantial parts of the complaint for failing to state a claim.

The plaintiff’s claim of denial of due process in disciplinary proceedings should not have been dismissed. His claim that he was repeatedly subjected to false and unjustified disciplinary charges amounts to the claim that they were unsupported by “some evidence.”

The plaintiff’s allegations of false disciplinary charges stated a substantive due process claim. At 1402: “Issuing false and unjustified disciplinary charges can amount to a violation of substantive due process if the charges were in retaliation for the exercise of a constitutional right.” At 1402 n. 11: The court explicitly rejects the view that such allegations do not state a constitutional claim if Wolff is complied with and there is some evidence. “The fact that Black alleges retaliation for the exercise of a constitutional right is a decisive distinction” from prior authority.

Procedural Due Process—Disciplinary Proceedings

Walker v. Bates, 23 F.3d 652 (2d Cir. 1994). A prisoner whose disciplinary conviction was administratively reversed after he had served two months of punitive segregation was not barred from pursuing a claim for denial of due process. At 658-59:

The rule is that once prison officials deprive an inmate of his constitutional procedural rights at a disciplinary hearing and the prisoner commences to serve a punitive sentence imposed at the conclusion of the hearing, the prison responsible for the due process deprivation must respond in damages, absent the successful interposition of a qualified immunity defense.

Access to Courts

Holloway v. Hornsby, 23 F.3d 944 (5th Cir. 1994). At 946:

It is very important to our considered system of justice that our courts be open to anyone with a case or controversy presenting a justiciable claim. Ready access to our court system, including access by those who are incarcerated, is recognized as a valuable constitutional right, one to be carefully guarded. Complaints about the validity of incarceration or the treatment accorded inmates are entitled to timely and meaningful consideration.

Dental Care

Kinney v. Kalfus, 25 F.3d 633 (8th Cir. 1994). The plaintiff alleged that he complained of various dental problems, and the dentist first extracted the wrong tooth and then refused to deal with his subsequent complaints of pain, difficulty eating, and bleeding gums.

These allegations raised a disputed issue of material fact. The plaintiff conceded that removing the wrong tooth did not violate the Constitution, but the allegation that the dentist refused repeated requests for treatment for two and a half weeks and then refused to see the plaintiff again after learning he had filed a malpractice action.

Law Libraries and Law Books

Clayton v. Tansy, 26 F.3d 980 (10th Cir. 1993). The plaintiff, convicted in Oklahoma and transferred to New Mexico pursuant to the Interstate Corrections Compact, sued New Mexico officials for denying him Oklahoma legal materials. At 982: “In the context of denial of access claims, the general rule imposes upon the sending state authorities the responsibility for ensuring their prisoners incarcerated in sister state facilities are afforded access to state courts.” The court rejects dicta from another circuit indicating that the receiving jurisdiction shares the responsibility, since in that case the prisoner was transferred to a federal prison. The district court properly denied permission to amend, since the only defendant who could have saved his case is an Oklahoma official not subject to service of process in New Mexico. The plaintiff must pursue his case against the proper defendant in the proper venue.

Pre-Trial Detainees/AIDS/Privacy

A.L.A. v. West Valley City, 26 F.3d 989 (10th Cir. 1994). The plaintiff was arrested for passing a bad check; the arresting officer found a piece of paper in his wallet indicating (erroneously) that he was HIV positive, and told his sister, his housemates, and at least one other witness about it. The officer had no basis to believe that the plaintiff engaged in sexual activity or IV drug use with these people. He also told the jailer, though there was no basis to believe the plaintiff had done anything to put anyone else at risk. As a result, his friends and family shunned him and refused to visit him; he suffered harassment and discriminatory treatment in jail; he was treated for depression as a result of these events. At 990:

There is no dispute that confidential medical information is entitled to constitutional privacy protection.... We believe...that the actual validity of the HIV test results discovered in Plaintiff’s wallet is entirely irrelevant to whether he has a reasonable expectation of privacy in the results, or whether he suffered an “injury in fact” as a result of the unlawful disclosures. [Citations omitted]

Pre-Trial Detainees/Use of Force

Brothers v. Klevenhagen, 28 F.3d 452 (5th Cir. 1994). The due process clause, rather than the Fourth Amendment, governs a claim based on a police shooting of a person escaping from custody during transportation from one holding cell to
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A state prisoner released to federal marshals pur­

eral censorship practices, and there were no par­
ticularized findings in these cases.

Here, where the defendants' policies "have appar­

ably ebbed and flowed throughout the course of
the litigation," the g.overnment failed to meet its
officials, "we place greater stock in their acts of
screen the material until the plaintiff sued; then
they found an employee in another prison who
was proficient in Japanese.

The defendants were entitled to qualified immu­

nity. There is only one case in point (Ramos v.
Lamm), it is from another circuit, and the
Supreme Court has relaxed the relevant legal stan­
dard anyway.

In general, voluntary cessation of allegedly
illegal conduct does not moot a case. The burden
of proving mootness, which is on the defendant,
is a heavy one. When the defendants are public
officials, "we place greater stock in their acts of
self-correction, as long as they appear genuine." (97, internal quotes and citation omitted).

Here, where the defendants' policies "have appar­
ently ebbed and flowed throughout the course of
the litigation," the government failed to meet its
burden of proof.

The court frames the question "whether the
prison's alleged de facto policy of summarily
rejecting foreign language publications without
making any effort to translate or screen such
material is constitutionally permissible." (97, footnote omitted) The court notes that
Thornburgh v. Abbott emphasized the individual­ized nature of the determination in upholding fed­eral censorship practices, and there were no par­
ticularized findings in these cases.

Federal Officials and Prisons/Use

of Force

Muniz v. Michael, 28 F.3d 795 (8th Cir. 1994).
A state prisoner released to federal marshals pur­
suant to a writ of habeas corpus ad testifican-
dam was a convict subject to the Eighth
Amendment and not a pre-trial detainee.

Allegations that the plaintiff was beaten while
restrained and then beaten again while in a
padded cell raised a triable factual issue despite
the fact that he had been convicted in a jury trial of
destroying government property based on his
destruction of the inside of the patrol car, and
injuries limited to rib contusions. The defendants
were not entitled to qualified immunity based
on these allegations.

Psychotropic Medications/Administrative Segregation

Walker v. Shansky, 28 F.3d 666 (7th Cir.
1994). The defendants were entitled to qualified
immunity from the plaintiff's due process claims of
involuntary administration of Haldol because these
claims were not sufficiently well defined before
Washington v. Harper. They were not entitled to
qualified immunity from the Eighth Amendment
claim, since the deliberate indifference standard
applicable to medical care cases was well estab­
lished. However, the use of Haldol did not violate
the Eighth Amendment in light of the plaintiff's vio­
lent and uncooperative behavior and the defendant
doctor's behavior. If he had presented evidence
from a medical professional disputing the diagno­
sis, or if he had disputed the facts on which the
defendant doctor based his medical opinion, there
might have been a factual issue sufficient to with­
stand summary judgment.

Prolonged administrative segregation may vio­
late the Eighth Amendment. "Whether such con­
finement does in fact violate the Eighth
Amendment depends on the duration and nature
of the segregation and the existence of feasible
alternatives." The plaintiff's claim of ten plus "sev­
eral" months, combined with allegations that he
was denied exercise, that sometimes he had no
water for a week, and he was physically abused
raised a triable issue of fact.

Procedural Due Process—

Classification/Administrative Segregation

Mackey v. Dyke, 29 F.3d 1086 (6th Cir. 1994).
The plaintiff remained in administrative segrega­
tion for 117 days after a recommendation that he
be released to general population, in part because
of lack of bed space.

Michigan regulations create a liberty interest in
being released from segregation when the justifi­
cation has expired, either because the inmate is
"cleared" of the original reason, or because the
prisoner's behavior and attitude has changed.
Lack of bed space would constitute a defense;
if there was sufficient bed space, the court must
determine whether the failure to release the pla­
tiff was the result of "willful and wanton behavior." (1092) The defendants are not entitled to quali­fied immunity because Hewitt v. Helms and Skot
Circuit precedent clearly established the "particu­larized" right "not to be arbitrarily kept in admin­
It may not be necessary to offer as many classes in a small women's prison as in the larger men's prisons. But the number of classes offered should at least be proportionate to the number of inmates, to the number of inmates desiring to take educational programs. And the inmates must be made aware of the opportunity for participation in various programs before their interests can be assessed. In order to give women "equal opportunity," there may need to be a higher number of courses offered so that women have comparable variety in course selection.

"Petological necessity" is not a defense to Title IX; it is "just one concern to be considered in how the equality principles of Title IX are to be applied in prison." (1230) Efficiency and cost effectiveness are not valid security concerns; they are cost and management concerns.

The court then proceeds to address the second issue: whether the plaintiff's complaint is timely. The plaintiff was charged with possession of an excessive amount of money and canteen items and asked to call witnesses including his cellmate, who allegedly had testified that some of these items were his. He said he asked his assigned assistant (an inmate) to procure the witnesses, but he failed to do so, and when he asked at the hearing, the hearing officer said such requests must be in writing—requiring both he and the assistant said they had not been informed about.

At 458:

"[T]his court finds that it is clear that once a prisoner is placed in administrative segregation, he is then incapable of interviewing or obtaining statements from potential witnesses. Thus, this court concludes that at the time of plaintiff's hearing there was a clearly established constitutional right to sufficiently competent representation when a prisoner in administrative segregation is facing a disciplinary hearing.

Use of Force/Searches—Person—Arrestees/Pre-Trial Detainees/Ignyz

Huffman v. Viola, 850 F.Supp. 833 (N.D.Cal. 1994). The plaintiff’s complaint of sexual assault in a boozing cell in the guise of a search stated a constitutional claim under the Fourth Amendment. Jail personnel who watched and refused to stop the alleged assault could be held liable under the deliberate indifference standard.

At 857: "Under ordinary circumstances denial of a shower for three days would not be actionable. However, due to the nature of the Plaintiff’s allegations and Defendants alleged knowledge of the sexual assault, the denial reaches the level of a cognizable claim in this case."

Allegations that the plaintiff was hog-tied, her head was bashed against a wall, and an officer stomped on her bare feet stated use of force claims. The court previously stated that this case was being decided under the Due Process Clause.

At 858: "Where one has no entitlement to a benefit, one cannot be deprived of it in retaliation for the exercise of constitutional rights."

Allegations that the plaintiff was denied a shower because she reported the assault and had her bare feet stomped on because she said she was going to file suit stated constitutional claims.

Women/Legal Assistance Programs

Glover v. Johnson, 850 F.Supp. 592 (E.D.Mich. 1994). Prison officials unilaterally reduced funding to Prison Legal Services of Michigan, which provides legal assistance to women inmates pursuant to a prior court order, and excluded parental rights matters from PLS' services contrary to that order, after the Sixth Circuit's Knop decision holding that the right of court access did not extend to parental rights matters in a case involving male inmates. This court had previously determined that women inmates, because of their backgrounds, were entitled to the assistance of attorneys (though not necessarily representation in court), and not just law libraries, because they do not have male inmates' "history of self-help in the law."

The court holds the defendants in contempt and grants a preliminary injunction requiring the continuation of services consistently with prior orders.

The court holds that women inmates are constitutionally entitled to continuation of the relevant legal services; the Knop decision did not address the equal protection violation previously found for women inmates. At 596: "Equal protection is not the same as identical treatment, for identical treatment may indeed result in unequal protection."

The court then proceeds to find that Beards requires assistance of attorneys for women inmates because of the structure of the probation, juvenile and circuit courts and the informal procedures required to get a hearing in them as well as the prisoners' lack of access to the telephone. The court also concludes under the Batson v. Blue test that due process requires legal assistance in parental rights matters. At 600: "The structure of the various courts as well as the regulations of the Department constitute a barrier to the plaintiff class' exercise of a fundamental right."

Religion

Rust v. Clarke, 851 F.Supp. 377 (D.Neb. 1994). The plaintiffs are devotees of "Astrau," which they say is an "Icelandic word/term for the ancient religion of the Teutonic people of Northern Europe ... also known as 'Odinism' or 'Troth.'" They claimed unequal treatment with respect to other religious groups.

The Religious Freedom Restoration Act "was specifically intended to apply to state prisons (and other institutions of state and federal government) and in the prison context was designed to overrule the Supreme Court's decision in O'Lone v. Estate of Shabazz...." (380) Since the defendants' summary judgment motion is addressed primarily to the O'Lone standard rather than the RFRA, the court denies the motion without actually addressing the merits.

The RFRA "does not appear to have waived the [Eleventh Amendment] immunity of the states, either.... While Congress could abrogate the immunity of the states, it must express itself without equivocation, and it has not done so here."

This is completely wrong. The statute says that plaintiffs can sue "Governments" including "a State, or a subdivision of a State." How unequivocal can you get?

The individual defendants are entitled to qualified immunity.

At 378 n. 1: "Defendants do question whether certain practices are necessarily a part of the Astrau religion. In the future, Plaintiffs would be well advised to document why Plaintiffs believe a particular practice is part of the Astrau religion, such as by referring to published theology texts or similar objective sources." This is blatantly wrong.

See Thomas v. Review Board, 450 U.S. 707, 715-
Attorneys’ Fees

Kerr v. Board of County Commissioners of Natrona County, 851 F.Supp. 1541 (D.Wyo. 1994). Plaintiffs’ counsel’s efforts in connection with a successful contempt motion “constituted reasonable post-judgment work that was necessary to secure the improvements anticipated by the 1990 Consent Decree.” (1543) In addition, they were prevailing parties in the contempt motion. Plaintiffs’ attorney is awarded fees at the rate in his community (Denver) rather than the site of the litigation (Casper, Wyoming), since there is no indication that any Wyoming attorney has ever filed a “totality of conditions” case or would consider doing so. In addition, expertise in the field of litigation was necessary, and it was reasonable for this attorney to handle the contempt motion given that he had obtained the underlying consent decree.

Access to Courts/Legal Assistance Programs

Carpenter v. Deland, 851 F.Supp. 1506 (D. Utah 1994). Utah provides legal assistance to prisoners by contract with local attorneys; there are no law libraries and inmates are not allowed assistance from “writ writers.” The contract was changed to eliminate general legal assistance in civil matters and to restrict the services to writs of habeas corpus and challenges to conditions of confinement. The court previously granted a preliminary injunction to the named plaintiffs and to several additional prisoners. A class was certified of “all current and future inmates in the Utah prison system who seek to exercise certain legal rights.” (1510-11) The court here grants summary judgment to the plaintiffs and issues an injunction.

At 1517-18:

... if defendants are correct that increased legal services will result in a decrease in educational and other programs, that is unfortunate. However, the court is unpersuaded by defendants’ argument that budgetary considerations justify limiting the scope of their duty to the level provided under the current contract.

While it is true that economic factors may be considered in determining the method used to provide meaningful access to the courts, the cost of protecting the right of access cannot be used to justify its denial... [citations omitted]

... Although providing such programs is a legitimate penological objective, defendants may not choose to provide them at the expense of a constitutional right. Furthermore, the decision whether to fund such programs is a question for the legislature, not for the court.

The right of court access extends to the pursuit or defense of actions to adjust family relationships, including initial papers opposing the termination of parental rights, including a request for the appointment of counsel, and preparing petitions for divorce or the initial response to divorce petition. It does not extend to enforcement or contempt or modification proceedings in divorce cases. Assistance in adopting a prisoner’s spouse’s children is not required.

Workers’ compensation claims are included in the right of court access. Although the tribunal is administrative, “such proceedings are judicial in nature and provide the only means by which an eligible inmate may obtain worker’s compensation benefits.” (1523)

Religion/Standing

Scarpino v. Grossheim, 852 F.Supp. 798 (S.D. Iowa 1994). The Iowa Civil Liberties Union has taxpayer standing to challenge the prison system’s “The Other Way” program, a twelve-step rehabilitation program alleged to violate the Establishment Clause.

The claim of a prisoner who had been released from the institution and then reincarcerated is not moot because given the twelve to sixteen-week duration of the program, it is “capable of repetition yet evading review.” The claim of a prisoner on parole is moot.

The court distinguishes earlier authority holding that an AA-type program was not religious on the ground that this program not only refers to God and a higher power, but also because it involves group prayer, individual pressure to accept religion as the solution to addiction, and the use of religious video tapes.

Establishment Clause claims are not governed by the Turner reasonableness standard because they involve the insistence that public money can’t be spent to support religion rather than an assertion of inmates’ rights to do something. Under Lemon v. Kurtzman, prison officials could have believed that this program did not violate the Establishment Clause, and they are entitled to qualified immunity from damages.

Hygiene/Negligence, Deliberate Indifference and Intent

Masonoff v. Dubois, 853 F.Supp. 26 (D.Mass. 1994). The plaintiffs complained that they did not have access to toilets in their cells; when they did not have access to a bathroom area, they had to use portable chemical toilets and a pitcher of water. Official policy was that the bathroom area was supposed to be opened at any time on request, but there was evidence that these orders were not followed by all officers with respect to all inmates.

At 29:

Having a sanitary place to dispose of one’s bodily waste is one such “minimal civilized measure of life’s necessities.”... The plaintiffs have presented evidence that some inmates have been barred from the shower—the one place at the entire prison which has flush toilets available to inmates. These inmates, when they are out of their cells, are left with no place to deposit their bodily waste. The Constitution does not permit prison officials to force inmates to undergo such indignities.

The plaintiffs have thus shown a likelihood of success on the question of whether they have met the objective requirement of an Eighth Amendment claim. However, there is not presently enough evidence to support a finding of deliberate indifference, in the absence of a showing that the defendants had actual knowledge of the violations. At 29:

The representations made in affidavits and otherwise in connection with the present motion are sufficient, however, to put the defendants on notice that Superintendent Bissonnette’s order to provide full access to the shower is not being diligently carried out. The court will take into consideration, in any future motion for injunctive relief regarding access to the shower, that the defendants have had such notice.

Grievances and Complaints

About Prison


Searches—Person—Convicts

Castillo v. Gardner, 854 F.Supp. 724 (E.D. Wash. 1994). Conducting digital rectal probes without “cause predicate” is not reasonably related to legitimate penological goals and is unconstitutional under Turner. However, the defendants are entitled to qualified immunity on this claim.

Religion—Practices/Injunctive Relief—Preliminary

Campus v. Coughlin, 854 F.Supp. 194 (S.D.N.Y. 1994). State prison officials are preliminarily enjoined from prohibiting plaintiffs from wearing their Santeria beads under their clothing or placing beads on their non-publicly displayed shrines. A preliminary injunction is appropriate. At 204: “Ordinarily, violations of First Amendment rights are recognized as constituting an irreparable injury;” The balance of hardships favors plaintiffs, since they have no other way of practicing their religious beliefs, but the defendants have other ways of protecting security besides burdening the plaintiffs’ religious practice.

The Religious Freedom Restoration Act applies to prisoners and displaces the O’Lone/Turner reasonable relationship standard for prisoners’ reli-
gious claims in favor of a compelling interest/least restrictive means standard. Security is a compelling interest. At 207: "However, defendants cannot merely brandish the words 'security' and 'safety' and expect that their actions will automatically be deemed constitutionally permissible conduct." The court defers to defendants' assessment of the prison gang situation and the role of beads as gang identifiers, but notes that this argument fails to address why the beads cannot be worn under clothing. At 208: "I am troubled by defendants' complete rejection of plaintiffs' proposal based on what defendants speculatively describe as an 'enforcement problem'." These enforcement problems are the same for Santeria beads as for crosses and crucifixes, which are allowed. The defendants also failed to show that gangs have actually used Santeria beads or that gang beads resemble Santeria beads. The fact that Santeria beads might be used in this fashion sometime in the future is "pure speculation," which cannot justify burdening the plaintiffs' constitutional rights. "I am not required, on a motion for preliminary injunction, to indulge DOCS' whims and anxieties about prospective hypothetical situations." (209)

The court reaches the same conclusions under the O'ZonelTurner test. There is no rational relationship between prohibiting wearing beads underneath clothing and the purpose of minimizing gang affiliation and violence. The plaintiffs have no alternative to exercise this particular tenet of their religion. The impact of permitting wearing beads under clothing will be "constitutionally insignificant," and this practice is an "obvious, easy alternative."

Use of Force
Mesina v. Mazzeo, 854 F.Supp. 116 (E.D.N.Y. 1994). An allegation that all of the named police officers participated in excessive force was sufficient to state a claim. Discovery should determine the exact role of each officer, and a motion for summary judgment can be made based on lack of personal involvement.

An allegation that the plaintiff was slapped by police officers without any justification while handcuffed in a police car stated a claim for excessive force under the Fourth Amendment. Summary judgment could not be granted based on the lack of injury where the plaintiff had not had the opportunity to take discovery. The question is for the jury if the plaintiff can establish "that force was used and some injury was sustained."

Pre-Trial Detainees/Federal Officials and Prisons/Procedural Due Process—Disciplinary Proceedings
Collazo-Leon v. U.S. Bureau of Prisons, 855 F.Supp. 530 (D.P.R. 1994). The petitioner was convicted at a disciplinary hearing of attempted escape and offering a bribe to an officer; he was sentenced to a total of 90 days and loss of visiting and telephone privileges for six months.

Wolfish forbids the punishment of detainees. The Bureau of Prisons disciplinary regulations by their terms are intended to punish. In addition, "the severity of the sanction itself upon a pretrial detainee charged with misconduct, as to whom no attempt is made to deal with his disciplinary problem by means of less drastic actions, compel the conclusion that the purpose in segregating is to punish." (553) The court rejects the view that the petitioner's punishment is necessary to provide for an orderly environment, since upon his release he will present the same security hazard as when he was placed in segregation.

The court grants the writ of habeas corpus and orders his discharge from segregation and restoration of his visiting and telephone privileges.

Women/Privacy
Gallow v. Carothers, 855 F.Supp. 285 (D.Alaska 1994). The female plaintiff alleged that she was placed in an all-male wing and that she was subjected to sexual harassment. The court previously granted her a preliminary injunction requiring officials to find her alternative housing.

The plaintiff's claim meets the objective prong of Eighth Amendment analysis. At 291:

- Defendants contend there is no ev-

dence regarding minimal standards of privacy and decency for a woman inmate. The court finds this statement to be fantastic. The court finds that minimal standards of privacy and decency include the right not to be subject to sexual advances, to use the toilet without being observed by members of the opposite sex, and to shower without being viewed by members of the opposite sex.

There is sufficient evidence that the defendants knew or should have known of the potential risks inherent in placing a female inmate in a male maximum security prison wing". (392).

(This opinion antedates Farmer v. Brennan, which held that "should have known" doesn't cut it under the Eighth Amendment.)

Federal Officials and Prisons
Lloyd v. Corrections Corporation of America, 855 F.Supp. 221 (W.D.Tenn. 1994). A private prison housing federal prisoners acted under color of federal law and not state law, and the plaintiff's complaint therefore must be construed as a Bivens action and not a § 1983 claim.

Communication with Media/Injunctive Relief—Preliminary
Pratt v. Rowland, 856 F.Supp. 565 (N.D.Ga. 1994). The plaintiff, a former Black Panther leader, was transferred after agreeing to be interviewed by a television station and double celled immediately after the interview was aired. Medical evidence showed that various physical and psychological afflictions he had were aggravated when he was double celled, and prison officials had generally acknowledged these.

The court concludes that the plaintiff was subjected to retaliation for being interviewed, based on evidence that suggests an extremely incompe-tent cover-up, and grants a preliminary injunction requiring him to be single-celled.

Continued on page 17

Court Decides Landmark Class Action Case in Favor of Pelican Bay Prisoners

BY JENNI GAINSBOROUGH

On January 11, Chief Judge Thelton Henderson of the U.S. District Court, Northern District of California ruled substantially in favor of prisoners at Pelican Bay State Prison in their class action lawsuit against state prison officials (Madrid v. Gomez). The suit claimed that conditions at the facility, the state's first "supermax" prison, violate prisoners' constitutional rights. The judge, in his 345 page decision, wrote that "dry words on paper cannot adequately capture the senseless suffering and sometimes wretched misery" caused by the defendants. "In this landmark decision, Judge Henderson found that the California Department of Corrections is operating in flagrant disregard of the U.S. Constitution," said David Steurer, a partner in Wilson Sonsini Goodrich & Rosati who tried the case together with fellow partner Susan Creighton and attorneys Donald Specter and Steve Fama of the Prison Law Office in San Quentin.

The suit originated in 1991 after the U.S. District Court received more than 300 petitions from Pelican Bay prisoners alleging civil rights violations during the first two years of the facility's existence. A panel of federal judges referred the matter to the Pro Bono Committee of the San Francisco Bar Association which asked Wilson Sonsini Goodrich & Rosati to investigate the case. A lawsuit originally filed on behalf of one inmate eventually became a class action and trial took place from September 17 through December 15, 1993.

Among the constitutional violations found by Judge Henderson were a pattern of excessive guard brutality, a failure to provide Continued on next page
Bill Seeks to Strip Courts of Power in Prison Cases

BY AYESHA KHAN

Among the package of new federal crime bills passed by the House of Representatives is the Stop Turning Out Prisoners Act ("STOP"), Title III of HR 667. STOP is not part of the "Contract With America," yet it was pushed through the Judiciary Committee and onto the floor of the House without hearing or testimony and virtually without notice to the public. A similar bill has been introduced into the Senate as S. 400. The proponents of STOP are trying to rush the bill through Congress without debate because the "facts" upon which it is based are bogus and the "solutions" it offers are fraudulent.

The STOP bill violates the guiding principle of this country that all people, even the least deserving, are protected by the Constitution. The bill sets a dangerous precedent for stripping civil rights from those in public disfavor. If this bill is successful in placing adult and juvenile prisoners beyond the full protection of the law, the path will be clear to target other groups, such as ethnic minorities, the mentally ill, and gay people, for similar treatment.

The bill is a dangerous assault on federal court power to remedy civil rights violations, and thereby runs afoul of the separation of powers doctrine, which the "Founders of our...
Section (b)(1), Termination of Prospective Relief After 2-Year Period: This section calls for judgments to terminate two years after issuance or two years after passage of STOP, whichever is later, even when constitutional violations remain. For example, a court could not continue to enforce a judgment even in the face of a continuing threat to staff and prisoners. In institutional reform cases, it typically takes years of effort by state officials and supervision by the court to fix the major problems that are the subject of such litigation. Since the law already requires termination when constitutional requirements are met, Board of Educ. v. Dowell, 111 S. Ct. 630, 657 (1991), the perverse effect of this section would be to require termination when constitutional violations persist.

This provision also violates the separation of powers doctrine. The Framers criticized legislative efforts to vacate judicial proceedings, suspend judicial actions, and annul or modify judgments, see M.J.C. Vile, Constitutionalism and the Separation of Powers 153 (1967), and the Constitutional Convention rejected several proposals to allow legislative revision of judgments. 1 M. Jensen, The Documentary History of the Ratification of the Constitution 246-47 (1976). In light of this historical background, the Supreme Court has struck down statutes that revise or suspend judgments. Hayburn's Case, 2 U.S. (2 Dall.) 409 (1792); Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp., 333 U.S. 103, 113 (1948).

Section (b)(2). Immediate Termination of Prospective Relief: This section requires the termination of all settlement agreements ("Consent Decrees") that were approved without a finding of a constitutional or statutory violation. This would render almost all existing Decrees void because, by their nature, they are approved without such findings. Prison officials usually seek to operate their prisons in a safe and professional manner because they do not want to put their staff at risk of the riots that can result from intolerable conditions. A court order is often necessary to get the resources that they need to do this.

By legislative fiat, this bill would indiscriminately undo decrees that play a vital role in protecting the health and safety of prisoners and staff. Moreover, by preventing settlements, this provision forces parties to costly trials in all cases. Forbidding a state from entering into a settlement agreement encroaches on state autonomy and raises serious federalism concerns. Furthermore, by requiring a lengthy trial in every case, this section increases the burden on the federal judiciary.

Section (a)(1), Limitations on Prospective Relief: This section limits the power of the federal courts to grant relief in prison conditions cases. To the extent that this provision prevents a court from issuing emergency interim relief, such as a temporary restraining order, it violates due process. Cf. Phillips v. Commissioner, 283 U.S. 589, 596-97 (1931). If, for example, a prison is in imminent danger due to a tuberculosis outbreak, a court must retain the discretion to issue an emergency order prior to a hearing.

Section (c)(2), Automatic Stay When Motion Pending: This section calls for an automatic stay of decrees and judgments after a defendant files a motion to modify or terminate, regardless of whether a constitutional violation is ongoing. In effect, this provision gives a defendant the temporary power to overrule a federal court. An automatic stay also deprives a court of its traditional power to balance the equities involved in a stay application.

Section (e), Special Masters: This provision requires courts to use Magistrates in place of special masters. This usurps the power of the judiciary in two ways. First, it abrogates Fed. R. Civ. Proc. 53, which authorizes courts to appoint special masters. The Supreme Court, rather than Congress, is empowered to modify the Federal Rules. 28 U.S.C. § 2072. Second, over and above the authority granted by Rule 53, "there has always existed in the federal courts an inherent authority to appoint masters." Kaufman, Masters in the Federal Courts: Rule 53, 58 Colum. L.R. 452, 462 (1958).

Section (f), Attorney's Fees: This provision modifies 42 U.S.C. § 1988 by changing the standard for an attorney fee award in prison conditions cases. The passage of sections 1983 and 1988 was motivated by a commitment to the civil rights of all citizens. Singling out one group for lesser protection sets a dangerous precedent for other groups that fall into disfavor. The bill also prevents a state from entering into a settlement that includes a fee award, forcing states to risk a far greater fee award after trial. In the name of states' rights, the bill actually limits the freedom of a state to determine its own best interests.

Text of H.R. 667, Title III, "Stop Turning Out Prisoners Act"
Sec. 301. APPROPRIATE REMEDIES FOR PRISON CONDITIONS
(a) In General.—Section 3626 of title 18, United States Code, is amended to read as follows: Sec. 3626. Appropriate remedies with respect to prison conditions
"(a) Requirements for Relief.—
"(1) Limitations on prospective relief.—Prospective relief in a civil action with respect to prison conditions shall extend no further than necessary to remove the conditions that are causing the deprivation of the Federal rights of individual plaintiffs in that civil action. The court shall not grant or approve any prospective relief unless the court finds that such relief is narrowly drawn and the least intrusive means to remedy the violation of the Federal right.

"(2) Limitations of relief.—In any civil action with respect to prison conditions, the court shall not grant or approve any relief whose purpose or effect is to reduce or limit the prison population, unless the plaintiff proves that crowding is the primary cause of the deprivation of the Federal right and no other relief will remedy that deprivation.

"(b) Termination of Relief.—
"(1) Automatic termination of prospective relief after 2-year period.—
In any civil action with respect to prison conditions, any prospective relief shall automatically terminate 2 years after the later of—
"(A) the date the court found the violation of a Federal right that was the basis for the relief; or
"(B) the date of the enactment of the Stop Turning Out Prisoners Act.

"(2) Immediate termination of prospective relief.—In any civil action with respect to prison conditions, a defendant or intervenor shall be entitled to the immediate termination of any prospective relief, if that relief was approved or granted in the absence of a finding by the court that prison
Continued on next page
conditions violated a Federal right.

(c) Procedure for Motions Affecting Prospective Relief—

(1) Generally.—The court shall promptly rule on any motion to modify or terminate prospective relief in a civil action with respect to prison conditions.

(2) Automatic stay.—Any prospective relief subject to a pending motion shall be automatically stayed during the period—

(A) beginning on the 30th day after such motion is filed, in the case of a motion made under subsection (b); and

(B) beginning on the 180th day after such motion is filed, in the case of a motion made under any other law;

and ending on the date the court enters a final order ruling on that motion.

The advantages of settling cases through Settlement Agreements and Consent Decrees have been recognized by judges and state officials involved in prison conditions cases:

In his Memorandum approving the Settlement Agreement in the statewide Pennsylvania case (Austin v. Lehman), U.S. District Court Judge DuBois noted that:

"the entire case was settled...without the need for judicial findings on the issues of liability and remedy...which would have involved the Court in the micromanagement of the state correctional system...Such a settlement, particularly in a case as complex as this one, represents an outstanding accomplishment by counsel and is of manifest importance to all citizens of the Commonwealth of Pennsylvania."

In the long-running New Mexico case (Duran v. Johnson), then-attorney general (now Senator from New Mexico) Jeff Bingaman, wrote in his "Report of the Attorney General on the February 2 and 3, 1980 Riot at the Penitentiary of New Mexico:

"The consent decree agreed to by New Mexico since the riot will, if monitored effectively...insure that New Mexico will never again derivate so greatly from accepted standards of prison management."

Ayesha Khan is a staff attorney with The National Prison Project.

were singled out as a group lacking any appropriate protection. Third, the overwhelming threat to decent prison standards is overcrowding.

The revised rules now go back to the UN for consideration. What was particularly fascinating at the meeting was the opportunity (in the gaps between the committee work) to learn how two traditional leaders in the world incarceration competition—Russia and South Africa—are reacting to the universal penal dilemma. Their divergent paths demonstrate vividly how prisons are both the product and the barometer of a country’s civic health.

At the last PRI general meeting three years ago, a former dissident, Valery Abramkin, described a situation of appalling hardship. But he felt the underlying trend was towards improvement. At The Hague last November, however, he and other gave details that show this trend in reversal.

Public anger and fear of crime in Russia have contributed to delaying both the new penal code and the new code of criminal procedure. Long and undifferentiated sentences remain in force for many everyday offenses, and prisoners have no effective protection or redress against abuses.

Human rights guarantees in the new Russian constitution (1993) are not, in reality, implemented. The PRI members from Moscow said they repeatedly received letters from prisoners describing beatings to extract confessions during the pretrial investigation period. Contact with the outside world, including with lawyers, is highly restricted.

Overcrowding is again rocketing. Official figures put the prison population at 886,000—proportionately 530 per 100,000 population. (Unofficial estimates are far higher.) No one who has visited the main urban prisons for pretrial detainees leaves
any doubt that ghastly conditions have got even more ghastly (See the NPP Journal, Vol. 8, No. 2, Spring 1993). Abramkin said that dormitories which had been overcrowded in Stalin's days with 80 occupants now held 140. He had seen prisoners with skin ulcers "like an apple." In the distant colonies for convicts, food was in short supply. TB was increasing again.

But the Russian prison authorities—who allow westerners access to their prisons—readily admit they have problems. One official was an active participant at the conference.

The status of the participants who came from South Africa is an indicator of the political priority given by this country to penal reform. The Minister of Correctional Services, Mr. Sipo Mzimela, was there; also the Commissioner, the chief administrator of correctional services, General J.J. Bruyn, who as a young prison guard had worked on Robbin Island. He told me, "President Mandela is a man who always commanded respect."

South Africa is facing the worldwide penal crisis in acute form. The public—as well as white—demands a stop to a plague from page 13.

From the United States, there were neither politicians nor prison administrators. As Alvin Bronstein, Executive Director of the National Prison Project, pointed out: "U.S. officials don't come to this sort of meeting." Bronstein's description of "hot-racking" to be introduced in Mississippi to accommodate more prisoners, and the state's ban on all possessions that might make prison tolerable, confirmed fellow PRI members' feeling that the U.S. is not the model to follow. As Bronstein summed up: "The U.S. is marching firmly into the 19th century."

Pleading

Tompkins v. Vickers, 26 F.3d 603 (5th Cir. 1994). The court declines to adopt the D.C. Circuit's variation of the heightened pleading that requires a plaintiff whose claim depends on the state of mind of a defendant to plead direct, rather than circumstantial, evidence of that state of mind.

Municipalities

Owens v. Gates, 27 F.3d 1432 (9th Cir. 1994). A claim against the municipality based on an allegedly unconstitutional policy does not turn on the lawfulness of the conduct of the municipal employee involved. At 1445:

"A city cannot escape liability for the consequences of established and ongoing departmental policy regarding the use of force simply by permitting such basic policy decisions to be made by lower level officials who are not ordinarily considered policymakers. . . . If the city in fact permitted departmental policy regarding the use of canine force to be designed and implemented at lower levels of the department, a jury could, and should, nevertheless find that the policy constituted an established municipal "custom or usage" regarding the use of police dogs for which the city is responsible. . . . Municipal liability could [also] be found under the "deliberate indifference" formulation of Monell liability. . . . Where the city equips its police officers with potentially dangerous animals, and evidence is adduced that those animals inflict injury in a significant percentage of the cases in which they are used, a failure to adopt a departmental policy governing their use, or to implement rules or regulations regarding the constitutional limits of that use, evidences a "deliberate indifference" to constitutional rights."

John Boston is the director of the Prisoners' Rights Project, Legal Aid Society of New York.
Segregation in Alabama

BY JACKIE WALKER

Alabama Revisited: Separate But Equal?

In 1988 the National Prison Project, along with the Southern Center for Human Rights and local private lawyers, brought a class action suit, Harris v. Thigpen, (now Onishea v. Herring) which challenged the Alabama Department of Corrections' policy of mandatory testing and segregation of HIV-positive prisoners. Since then the Eleventh Circuit Court of Appeals affirmed the District Court's ruling to uphold both policies, but remanded issues of programming and legal access. While awaiting the latest decision we explore the experiences of three women housed in the Medical Isolation Unit (MIU) at Julia Tutwiler Prison for Women and one resident of Limestone Correctional Facility's MIU.

Small Changes

In 1986 M.W. became the first HIV-positive prisoner isolated at Julia Tutwiler Prison for Women. HIV-positive prisoners during this period were housed on death row with a quarantine sticker, required to disinfect telephone receivers after use and given meals served on paper plates. M.W. recalls waking up covered with maggots because correctional staff refused to empty her garbage. After 13 months M.W. was transferred to administrative segregation with a small group of newly diagnosed women. During the next two years M.W. received access to segregated Adult Basic Education (ABE)/General Equivalency Diploma (GED) preparation and college courses. When she returned in 1993 she found limited programming. GED preparation classes were sporadic, while college courses were nonexistent. In commenting on the policy's impact, M.W. says, "We do more time just because we're positive and can't receive the same programs as general population."

E.C. entered MIU in 1987 and has observed changes through three periods of incarceration. She recalls the medical staff greeted her wearing masks and gloves and being instructed she would have to wear the same whenever she left MIU. Her daily life included few activities beyond watching television, crocheting or knitting. Reflecting on these days E.C. remembers, "I felt like an animal placed in a cage and just left there."

Her second incarceration in 1992 brought some changes, though. E.C. took college courses from an inmate tutor and attended some programs separate from general population. Since returning in 1994 E.C. has participated in the Substance Abuse Program taught by an inmate tutor. By comparison, general population prisoners have access to a residential substance abuse program coordinated by a certified counselor. In commenting on the need for drug treatment programs E.C. explains, "Drugs is the reason I came back to the Unit. Instead of talking about my problems I turned to drugs. Being in a substance abuse program helps me to talk about it."

Carrie White has experienced two very different periods at Julia Tutwiler Prison for Women. During her first incarceration in the mid-Seventies Ms. White participated in a variety of programs from completing her GED and numerous college courses, to commercial sewing and bookkeeping. In addition to these accomplishments she participated in furlough programs and was employed in a "downtown job" with the Department of Corrections. She remembers that the current site of the Medical Isolation Unit once housed prisoners who worked in the healthcare unit.

Upon returning to prison in 1993 Ms. White was placed in MIU after testing HIV-positive, a status she now shares with two sons incarcerated at Limestone Correctional Facility's MIU. Today Ms. White's daily routine primarily consists of crocheting and cleaning up the MIU area. Her inquiries regarding college courses all return to an exclusion based on her HIV-positive status. For future MIU prisoners Ms. White has only one desire, "I hope other women won't have to go through what I'm going through. Sitting back here and deteriorating."

Transforming the Anger

Alester Moore is serving his second prison stint, one he hoped would provide rehabilitation. A former bridge builder once employed by a large construction firm, Mr. Moore hoped to continue learning building trades at Limestone Correctional Facility. He soon learned that being HIV-positive was enough to be excluded from vocational and other programming including the Interstate Commerce Compact, which he inquired about in order to be transferred closer to his family. Although a segregated drafting class has recently been offered, other vocational programs continue to be denied.

Moore has channeled his dissatisfaction into being a lay minister and serving as coordinator of education for Citizens On Prevention and Education (COPE), a prisoner run HIV/AIDS program. Founded by Unit prisoner Matthew Coleman, COPE members provide a 12 week training program in HIV/AIDS education, conduct monthly seminars on HIV/AIDS issues, correspond with the families of prisoners and visit sick prisoners in the infirmary. Mr. Moore says, "Being segregated and denied equal programming takes the sentencing judge's decision to another level. We're just asking the DOC to open up the door. If they don't open the door to programs it will just cause more problems."
The National Prison Project JOURNAL, $30/yr. $2/yr. to prisoners.

The Prisoners' Assistance Directory, the result of a national survey, identifies and describes various organizations and agencies that provide assistance to prisoners. Lists national, state, and local organizations and sources of assistance including legal, AIDS, family support, and ex-offender aid. 10th Edition, published January 1993. Paperback, $30 prepaid from NPP.

The National Prison Project Status Report lists by state those presently under court order, or those which have pending litigation either involving the entire state prison system or major institutions within the state. Lists cases which deal with overcrowding and/or the total conditions of confinement. (No jails except District of Columbia.) Updated January 1994. $5 prepaid from NPP.

Bibliography of Material on Women in Prison lists information on this subject available from the National Prison Project and other sources concerning health care, drug treatment, incarcerated mothers, juveniles, legislation, parole, the death penalty, sex discrimination, race and more. 35 pages. $5 prepaid from NPP.

A Primer for Jail Litigators is a detailed manual with practical suggestions for jail litigation. It includes chapters on legal analysis, the use of expert witnesses, class actions, attorneys' fees, enforcement, discovery, defenses' proof, remedies, and many practical suggestions. Relevant case citations and correctional standards. 1st Edition, February 1984. 180 pages, paperback. (Note: This is not a "jailhouse lawyers" manual.) $20 prepaid from NPP.

TB: The Facts for Inmates and Officers answers commonly-asked questions about tuberculosis (TB) in a simple question-and-answer format. Discusses what tuberculosis is, how it is contracted, its symptoms, treatment and how HIV infection affects TB. Single copies free. Bulk orders: 100 copies/$25. 500 copies/$100. 1,000 copies/$150 prepaid.

1990 AIDS in Prison Bibliography lists resources on AIDS in prison that are available from the National Prison Project and other sources, including corrections policies on AIDS, educational materials, medical and legal articles, and recent AIDS studies. $5 prepaid from NPP.

AIDS in Prisons: The Facts for Inmates and Officers is a simply written educational tool for prisoners, corrections staff, and AIDS service providers. The booklet answers in an easy-to-read format commonly asked questions concerning the meaning of AIDS, the medical treatment available, legal rights and responsibilities. Also available in Spanish. Sample copies free. Bulk orders: 100 copies/$25. 500 copies/$100. 1,000 copies/$150 prepaid.

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The following are major developments in the National Prison Project's litigation program since September 30, 1994. Further details of any of the listed cases may be obtained by writing the Project.

**Carty v. Farrelly**—Agreement has been reached in this lawsuit contesting conditions of confinement at the Criminal Justice Complex in St. Thomas, U.S. Virgin Islands. The complaint filed in June 1994 alleged severe overcrowding, unconstitutional environmental and fire safety conditions and grossly deficient medical and mental health care. The agreement, which has the same force as a court order, provides for improvements in all these areas, including limits on population, improved and expanded medical services, with testing and treatment for tuberculosis, and separate housing for mentally ill prisoners. Prisoners will have recreation for three hours daily with a maximum cell lock-in time of twelve hours daily. The agreement also contains several important provisions for monitoring. The BOC is also prevented from instituting another facility-wide lockdown without the court’s permission.

**Casey v. Lewis**—This statewide class action suit, filed on behalf of Arizona state prisoners in January 1990, challenges legal access, health care and assignments to segregation. In November 1992, the court held unconstitutional the state’s policies restricting prisoners’ access to the courts. The Ninth Circuit Court of Appeals heard oral argument in November and on December 27, in a unanimous decision, upheld the trial court’s ruling that the Arizona Department of Corrections denies prisoners access to the courts. The ruling affirmed virtually all of the trial court’s order, and applies to all 15,000 prisoners in the Arizona system. The order, however, will not be implemented until the Supreme Court decides whether to grant review of the decision because in May 1994 the Supreme Court, with four Justices dissenting, granted a stay of the trial court decision.

**Knop v. Johnson**—involves four Michigan prisons. The case was filed in 1984 after the original comprehensive consent decree reached by the Department of Justice and the state of Michigan in *United States v. Michigan* was replaced with a modified five-page, non-enforceable consent decree. The new lawsuit, *Knop v. Johnson*, raised the same claims as *U.S. v. Michigan* as well as some additional ones. In 1992, the Sixth Circuit affirmed the trial court’s finding of a denial of access to the courts but remanded to the trial court to revise the remedy. In June 1993 the defendants filed their legal access plan which the plaintiffs opposed. In March 1994 the district court held oral argument on the plan. On December 22, 1994 Judge Enslen issued an order rejecting the defendants’ plan and requiring them to implement a revised plan at the Michigan Reformatory on a trial basis. After evaluation of the plan at the Reformatory, it will be ordered implemented at all the *Knop* facilities.

**Sandin v. Conner**—The NPP filed an *amicus curiae* brief on behalf of the respondent in this case before the Supreme Court. Conner, a Hawaii state prisoner, claimed that he was punished with 30 days of solitary confinement without an adequate due process hearing after allegedly resisting a strip-search. The Ninth Circuit Court of Appeals, overturning the trial court’s ruling in favor of prison officials, held that the prisoner had a right not to be arbitrarily subjected to punitive segregation. The Supreme Court granted prison officials’ petition for *certiorari* from that decision. Oral argument is scheduled for February 28, 1995.

**Onishea v. Herring**—(originally Harris *v. Thigpen*) challenges the Alabama Department of Corrections policy of testing all state prisoners for HIV, segregating all those who test positive and preventing them from taking part in work, educational, recreational and other programs available to non-segregated prisoners. The plaintiffs sought relief on various constitutional claims and under §504 of the Rehabilitation Act. In 1991 the Eleventh Circuit Court of Appeals vacated and remanded the dismissal of plaintiffs’ §504 claim challenging this blanket exclusion, and the dismissal of the plaintiffs’ legal access claims. Years of settlement discussions finally proved fruitless, and the issues were retired before Judge Varner in November 1994. We are waiting for the court’s decision.

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