# *THE NATIONAL PRISON PROJECT JOURNAL*

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As you can see, this quarter's edition of the National Prison Project *Journal* is rather more subdued than usual -- missing our red mast head, glossy paper and even photographs. This last quarter has been a particularly difficult one for the NPP. We have been telling you for the past six months about the legislation currently before Congress known in different bills as the "Stop Turning Out Prisoners Act" or the "Prison Litigation Reform Act". As we go to press we do not know which of these bills, if either, will pass, when they will become law or precisely what their impact will be on our work. We do know that they will have a significant impact (the details of the legislation and the nature of that impact are explained in the article below). While we wait to see exactly what is going to happen and how best we can adjust to the radically changed circumstances in which we will be working, we are limiting our expenditures to basic necessities. Providing information to our *Journal* subscribers is certainly a necessity -- the color printing and the glossy papers we can forgo. We hope by our next edition we will be producing something that looks rather more like the *Journal* you are used to.

## The Prison Litigation Reform Act

The "Stop Turning Out Prisoners Act" (STOP), which passed the House as Title III of HR 667 and was before the Senate Judiciary Committee as S.400, became part of the State, Justice and Commerce Appropriations Bill (H.R. 2076) this fall, added by the Appropriations Sub-Committee Chair (and aspiring Republican presidential candidate) Phil Gramm.

When the bill reached the floor of the Senate, Senators Orrin Hatch and Bob Dole (another aspiring presidential candidate) substituted their Prison Litigation Reform Act (PLRA) for the STOP language and this version passed the Senate by a voice vote on September 29. As the *Journal* goes to print, the bill is due to come before the joint Senate-House Conference Committee. When a compromise has been worked out between the House and Senate bills, H.R. 2076 will either be sent to President Clinton for signature as it stands, or it will be joined together with other bills and sent to him as part of a long-term Continuing Resolution to provide funds to run the government until the detailed budget is worked out.

The PLRA is in some respects even worse than STOP. While proponents of the bill have been talking a great deal about "frivolous" prisoner lawsuits as though they were the only target of this legislation, the reality is that the PLRA will impact meritorious lawsuits involving serious constitutional issues. It will severely limit the federal courts in remedying abuses suffered by prisoners in *all* cases, even those that seek to enjoin the rape of juvenile and women prisoners by prison guards, the sadistic beatings of prisoners, and the failure to provide prisoners with minimally adequate medical and mental health care.

Among many provisions the bill would --

**Prevent states from entering into consent decrees** by requiring a finding of a violation before a court could issue any relief in a prison conditions case, thereby effectively prohibiting court-enforceable consent decrees. If plaintiff's counsel are not agreeable to a non-enforceable settlement agreement, which will be the case in most circumstances, the bill forces prison officials

to choose between (1) going to trial and risking a finding of liability, even in a case that they believe they will lose; or (2) making an admission of liability.

**Call for the immediate termination of all existing consent decrees**, upon motion by the defendant, unless the court holds a trial and makes a finding of a current violation of a federal right. The provision destroys all the work that has been done by both sides in reaching agreement and could lead to conditions in every prison and jail that is currently operating under a consent decree declining to their previous unconstitutional state.

**Render emergency relief all but ineffective** by requiring a preliminary injunction to terminate 90 days after entry unless the court makes the injunction final within the 90 days. The parties would therefore have to complete discovery and the court complete a trial and issue a decision within the 90-day period, an extremely unrealistic time frame. Preliminary injunctions are designed to address emergencies, often involving life and death situations, that cannot wait for the length of time required to conduct a full trial. Termination of a preliminary injunction, without attention to whether there is good cause for the injunction to remain in effect, deprives a court of the power to prevent a defendant from returning to life threatening practices.

**Require any relief that is the subject of a pending motion to go out of effect 30 days after the filing of a motion.** This provision is particularly damaging given that the bill requires a court to terminate all existing consent decrees, unless the court conducts a trial and finds a violation of federal law. Thirty days is simply not an adequate amount of time for the parties to engage in discovery and the court to hold a trial and issue a ruling. This provision allows defendants to revert to practices that were found by a court to be unconstitutional, simply because the court has not had time to retry the case.

**Render special masters ineffective** by limiting a master's powers to making findings based on the record, essentially making a master a second judge or Magistrate. The most useful purposes served by masters relate to formulation and implementation of injunctions, mediation of disputes between the parties, and reporting to the court on compliance with a court's orders. The bill prevents a court from appointing a master to serve in these capacities. The bill also limits the compensation of special masters so severely that it will be very difficult to find suitably qualified experts to undertake the work.

**Drastically limit the availability of attorney's fees** by preventing a court from awarding attorney's fees in all settled cases and for work done by plaintiff's counsel during the remedial stage of litigation. With no compensation payable for monitoring, defendants would be insulated from any oversight of their compliance with a court's orders. This would make the orders worth little more than the paper they are written on because defendants could fail to obey them with impunity.

The bill also severely limits attorney's fees for all other prison litigation work, tieing them to CJA Act rates, despite the fact that prison litigation fees are contingent on winning the case and have to cover all the fees and expenses for experts.

**Deny prisoners damages for mental or emotional injury that leaves no physical scars** effectively allowing prison guards to torture prisoners without being liable for damages provided that the torture does not cause "physical injury."

In addition to its impact in class action suits, the bill also imposes new restrictions on *pro-se* filings (described in the "Dear Prison Project" box on page 15) and prohibits some amenities, such as weightlifting equipment and in-cell televisions, in federal prisons.

Taken together, the provisions of this bill constitute the latest and most destructive steps in the current movement towards the harsher and more mean-spirited treatment of prisoners -- a movement that has been condemned by corrections officials as well as prisoners' rights activists. Of course, a number of the provisons are of questionable constitutionality and will be challenged in the courts. However, final resolution of those challenges will take some time.

# Case Law Report -- Highlights of Most Important Cases

by John Boston

## ACCESS TO COURTS

As the Supreme Court prepares to review a prison court access case for the first time in 18 years, *see Casey v. Lewis*, 43 F.3d 1261 (9th Cir. 1994), *cert. granted*, 115 S.Ct. 1997 (1995), two federal appellate courts have issued strikingly regressive decisions concerning the scope of the right. Both decisions are notable not only for their results but also for their reliance on catchphrases from prior case law in preference to any analysis of the nature of the right to court access.

Prisoners' right of access to courts was first acknowledged in *Ex parte Hull*, 312 U.S. 546 (1941), which struck down a state regulation requiring official approval before prisoners could file *habeas corpus* petitions, and in *Johnson v. Avery*, 393 U.S. 483 (1969), which invalidated a disciplinary rule forbidding prisoners to assist one another in preparing legal papers. Both *Hull* and *Johnson* rested largely on "the fundamental importance of the writ of *habeas corpus*...." *Johnson*, 393 U.S. at 485.

In *Bounds v. Smith*, 430 U.S. 817, 828 (1977), however, the Supreme Court held that there is a more general "constitutional right of access to the courts" and that prison officials are required not only to refrain from obstructing it but affirmatively to "assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law."

In *Cornett v. Donovan*, 51 F.3d 894 (9th Cir. 1995), the question presented was "whether the constitutional right of access to the courts requires a state to provide legal assistance beyond the pleading stage." It arose at an Idaho state mental hospital, which did not provide a law library but--after being sued--contracted with the county public defender to provide limited legal services to its patients. (The courts have treated the court access rights of the civilly committed or detained as generally equivalent to those of prisoners. *See*, e.g., *Ward v. Kort*, 762 F.2d 856, 858 (10th Cir. 1985); *Orantes-Hernandez v. Smith*, 541 F.Supp. 351, 384 (C.D.Cal. 1982) (immigration detainees).)

The *Cornett* court held that the obligation to provide legal assistance did not extend beyond the pleading stage. It supported this conclusion primarily by marshalling out-of-context phrases from Supreme Court cases. For example, it cited as "the most direct statement on the subject" the observation in *Wolff v. McDonnell*, 418 U.S. 539, 576 (1974), that "the Fourteenth Amendment due process claim based on access to the courts . . . has not been extended by this Court to apply further than protecting the ability of an inmate to prepare a petition or a complaint." However, this statement was made in the course of upholding the inspection of legal correspondence in the prisoner's presence, against a claim that it could not be inspected at all. The question of legal assistance beyond the pleading stage was not presented, and indeed *Bounds v. Smith*, the first systematic statement of the right of court access, had not even been decided. The *Wolff* Court also held that prisoners had the right to seek assistance from one another in civil rights actions as well as in *habeas corpus* proceedings. Referring to this discussion, the appeals court in *Cornett* cites references to "present[ing] ... allegations" and "articulat-[ing] their complaints" as supporting its view that assistance is required only at the pleading stage. But here, too, the question was not presented in *Wolff* and the Court did not purport to address it. *Cornett* makes similar use of sound bites from *Bounds v. Smith*.

The Ninth Circuit is not the first federal appeals court to take this approach The Tenth Circuit held some years ago that the right to court access extends no further than the filing of a complaint or petition. *Nordgren v. Milliken*, 762 F.2d 851, 855 (10th Cir ), *cert. denied*, 474 U.S 1032

(1985). This view is actually more restrictive than the Ninth Circuit's; *Cornett* does define the "pleading stage" slightly more broadly than the initial filing, so as to include the reply to a counterclaim or the answer to a cross-claim if one is asserted. 51 F.3d at 899. The other circuit to rule on this question took an even broader view of the pleading stage. In *Knop v. Johnson,* 977 F.2d 996, 1000 (6th Cir. 1992), *cert. denied sub nom. Knop v. McGinnis*, 113 S.Ct. 1415 (1993), the Sixth Circuit held that the state "is not obligated to do anything more than assist inmates at the pleading stage," 977 F.2d at 1007 (quoting the district court). However, it had earlier stated that meaningful court access, "as the [district] court correctly noted, entails not only the drafting of complaints and petitions for relief but also the drafting of responses to motions to dismiss and the drafting of objections to magistrates' reports and recommendations." *Id.* at 1000 (citing the same passage from the district court). Presumably, then, the Sixth Circuit includes this motion and objection practice as part of the "pleading stage."

The rationale for the *Cornett* holding is the perceived necessity to

> *distinguish[] between the constitutional right of access to the courts and the constitutional right to counsel. .... The right of access is designed to ensure that a habeas petition or a civil rights complaint of a person in state custody will reach a court for consideration. Once the claim reaches a court, an indigent institutionalized person is in the same position as an indigent noninstitutionalized person filing, for example, a civil rights claim.... The court can determine whether the claim warrants appointment of counsel to represent the plaintiff. If so, the court may request an attorney to represent an indigent plaintiff.*

51 F.3d at 899 (citations omitted).

This reasoning is questionable on two grounds. First, it ignores reality to claim that institutionalized indigents ever are in the same position as those who are not physically confined. As another court pointed out:

> *[This] argument overlooks the fact that an unincarcerated indigent person is free to go to an attorney, explain his claim, and try to convince the attorney to accept the representation. Furthermore, if an unincarcerated person chooses to represent himself, he can go to a law library to do legal research and education himself on how to prepare his petition or complaint.*

*Carper v. Deland*, 851 F.Supp. 1506, 1522 (D.Utah 1994), *rev'd*, 54 F.3d 613 (10th Cir. 1995). Add to this the unwillingness of many lawyers to deal with prisoners, plus the fact that an incarcerated person faces substantial restrictions in attempting to locate and interview witnesses and otherwise gather evidence in a factually contested proceeding, and the absurdity of *Cornett*'s view becomes apparent.

The other prong of *Cornett*'s reasoning--that once a proper pleading is before the court, the court can determine whether to appoint counsel--is also at odds with reality. The widespread practice in the federal courts is seriously to consider the merits of a request for counsel only after the case has survived dispositive motions. Very often the relevant motion will be a motion for summary judgment and not a motion to dismiss. Summary judgment does not appear to be included even in *Knop*'s expanded definition of "the pleading stage." Thus, under *Cornett*'s and *Knop*'s reasoning, the prisoner would not be entitled either to the use of a law library or the assistance of legally trained persons at this crucial point in the case.

In addition, courts can only request attorneys to represent indigent prisoners, *see Mallard v. U.S. District Court for the Southern District of Iowa*, 490 U.S. 296, 104 L.Ed.2d 318 (1989), and the supply of willing lawyers is inadequate. (For example, even in the Southern District of New York, with its concentration of lawyers, its strong *pro bono* tradition, and its well-organized counsel appointment system, there is a very large

backlog of cases in which the courts have ruled that counsel should be assigned but no attorney has been found.)

A different question about the scope of *Bounds* is presented in *Carper v. DeLand*, 54 F.3d 613 (10th Cir. 1995). *Carper* arose in the Utah prison system, which--like the mental hospital in *Cornett*--provides legal assistance through a contract with local attorneys; there are no law libraries in the prisons and inmates are not allowed assistance from "writ writers."

Several Utah prisoners filed suit when the contract, formerly of broad scope, was changed to eliminate general legal assistance in civil matters and to restrict the attorneys' services to writs of *habeas corpus* and challenges to conditions of confinement. The federal district court granted a preliminary injunction to the named plaintiffs and to several additional prisoners preserving the existing level of services to those individuals. A class was then certified of "all current and future inmates in the Utah prison system who seek to exercise certain legal rights." *Carper v. DeLand*, 851 F.Supp. 1506, 1510-11 (D. Utah 1994). The court upheld some aspects of the Utah system but granted summary judgment to the plaintiffs on several issues and issued an injunction.

The applicability of *Bounds* to civil proceedings had not previously been addressed by the federal courts in any consistent or systematic fashion. In *Jackson v. Procunier*, 789 F.2d 307, 311 (5th Cir. 1986), the court stated generally that the right extended to civil claims, but the case at hand involved only an appeal from an adverse civil judgment. The same court had earlier stated that the right applies to "general civil legal matters including but not limited to divorce and small claims." *Corpus v. Estelle*, 551 F.2d 68, 70 (5th Cir. 1979). Two courts had held that the right is "strongest" with respect to "direct and collateral appeals of criminal convictions"; it is "also strong" in civil cases involving fundamental constitutional rights; and it is "weaker" when the case does not raise any constitutional claims. *Cofield v. Alabama Public Service Commission*, 936 F.2d 512, 517 (11th Cir. 1991); *accord*, *In re Green*, 669 F.2d 779, 785 (D.C.Cir. 1981); *see Straub v. Monge*, 815 F.2d 1467, 1470 (11th Cir. 1987) (*Bounds* right applies to civil forfeiture proceeding). The Sixth Circuit adopted a more restrictive bright-line rule in *John L. v. Adams*, 969 F.2d 228, 234-37 (6th Cir. 1992), holding that the *Bounds v. Smith* right of "affirmative assistance" applies only to civil actions related to prisoners' incarceration. With respect to other kinds of civil actions, this court held, prison officials' obligation is limited to refraining from imposing barriers or impediments to court access.

The district court in *Carper* took the approach of the Eleventh and District of Columbia Circuits and applied it with specificity to a number of types of civil claims. The court distinguished between claims that it thought raise "fundamental interests" and those that do not. Thus, it concluded that the state must provide assistance in opposing proceedings to terminate parental rights and in divorce proceedings, relying on the importance--and the legal protections--that the Supreme Court has accorded to them in cases such as *Boddie v. Conecticut*, 401 U.S. 371 (1971) (exempting indigents from costs and fees in divorce proceedings), *Stanley v. Illinois*, 405 U.S. 645 (1972) (requiring hearings for unwed fathers before termination of parental rights), and *Little v. Streater*, 452 U.S. 1 (1981) (requiring free blood tests for indigents in paternity proceedings).

The *Carper* district court similarly held that assistance is required in workers' compensation matters, which it analogized to the welfare benefits at issue in *Goldberg v. Kelly*, 397 U.S. 254 (1970), and for small claims involving property taken or destroyed by persons acting under color of state law. However, it held that other small claims, name change proceedings, personal injury and other tort cases, breach of contract claims, and collection matters do not invoke the *Bounds* holding. Interestingly, the court also held that the obligation with respect to family law matters "would not extend to matters

involving enforcement or contempt proceedings or modification proceedings in divorce cases." 851 F.Supp. at 1506.

The district court's analysis can be faulted. It is not clear that distinctions made for purposes of requiring hearings, eliminating filing fees, and ensuring adequate fact-finding can be imported wholesale into the *Bounds* analysis. Nor is it clear why a claim for workers' compensation for an injury should be treated differently from a claim for tort compensation for the same injury sustained off the job, since either award may provide the only means of sustenance for the injured person and his or her family. Nonetheless, the *Carper* district court opinion is the most substantial effort by any court to explore the implications of *Bounds* for civil proceedings.

On appeal, the Tenth Circuit responded to this laborious analysis by dismissing it out of hand, citing previous circuit authority that stated, e.g., that "we are persuaded that we should not hold that the right of access to the courts requires more than the assistance of counsel through completion of the complaint for a federal habeas or civil rights action." *Carper v. Deland*, 54 F.3d 613 (10th Cir. 1995), quoting *Nordgren v. Milliken,* 762 F.2d 851, 855 (10th Cir.), *cert. denied*, 474 U.S. 1032 (1985).

The appeals court's statement that "settled precedent" requires reversal of the district court's decision is simply false. Like *Cornett v. Donovan*, it marshals out-of-context sound bites from previous opinions while ignoring the fact, explained in detail in the district court's opinion, that the question of *Bounds'* applicability to civil proceedings was not actually presented in Nordgren and the other Tenth Circuit cases. Rather, these decisions focused on the question whether the right extends to assistance beyond the pleading stage (discussed above). Similarly, references in Supreme Court cases, e.g., to "original actions seeking new trials, release from confinement, or vindication of fundamental rights," *Bounds v. Smith*, 430 U.S. at 427, were made in the course of describing the issues before the Court in the particular case, not in defining the reach of prisoners' court access rights.

By its misplaced reliance on prior dicta, the appeals court was able to avoid the need for any actual analysis of the issues before it, which were substantial. The question of the proper scope of the *Bounds* right can be answered only by starting with a clear understanding of the nature and purpose of the right to court access.

This may seem like a hard task in theory, given the vagueness of the origins of the right, which have been found variously in the Due Process Clause, the Equal Protection Clause, the First Amendment, and the Privileges and Immunities Clause of Article IV of the Constitution. *See, e.g., Murray v. Giarratano*, 492 U.S. 1, 11 n. 6, 109 S.Ct. 2765 (1989); *John L. v. Adams*, 969 F.2d 228, 231-32 (6th Cir. 1992). But common sense provides ample guidance. The purpose of a court system is presumably to provide for the fair resolution of disputes. It follows that meaningful access to that system does not end with the filing of a pleading that then goes nowhere. *See Bonner v. City of Pritchard, Ala.*, 661 F.2d 1206, 1212-13 (11th Cir. 1981) (right of court access was not satisfied by permitting prisoner to file a complaint and then dismissing his case until the end of his ten-year sentence); *NAACP v. Meese*, 615 F.Supp. 200, 206 n. 18 (D.D.C. 1985) (right of court access extends past pleading stage). Instead, it entails "all the means a defendant or petitioner might require to get a fair hearing from the judiciary." *Gilmore v. Lynch*, 319 F.Supp. 105, 111 (N.D.Cal. 1970), *aff'd sub nom. Younger v. Gilmore*, 404 U.S. 15 (1971) (*per curiam*). Such means include, among others, the ability to respond to motions directed to the pleadings, to respond to or make motions for summary judgment or default judgment, to pursue discovery and to engage in discovery motion practice when necessary, to obtain the appearance of necessary witnesses, to prepare the pretrial submissions required by modern courts, to address issues of evidence and of jury procedure and instruc-

tions that arise at the trial, to pursue or defend appellate proceedings, and to enforce or defend against the enforcement of judgments.

Restricting court access rights to *habeas* and civil rights proceedings is also insupportable if the right is viewed as one of meaningful access to society's institutions for fair dispute resolution. The reason the state has an affirmative obligation to facilitate prisoners' court access is that incarceration limits their ability to act for themselves. *Compare DeShaney v. Winnebago County Dept. of Social Services,* 489 U.S. 189, 200 (1989) (holding that the state's Eighth Amendment duties to a prisoner arise "from the limitation which it has imposed on his freedom to act on his own behalf.") The consequences of being locked up are the same whether one is pursuing a § 1983 action or a tort claim or defending a divorce or contract proceeding, and the risk of denial of a fair hearing and resolution of one's claim or defense is likewise the same.

It is worth noting that, although the right of court access is generally viewed as an aspect of liberty, the legal claims that a court system is designed to protect are "a species of property protected by the Fourteenth Amendment's Due Process Clause." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 429 (1982). This long-settled principle is reinforced by more recent decisions holding that "[t]he hallmark of property ... is an individual entitlement grounded in state law, which cannot be removed except 'for cause'"--a description that is broad enough to cover the right to use established adjudicatory procedures, and to assert defenses as well as claims for relief. *Id.* at 430-31 (citations omitted).

Holdings that a criminal sentence broadly extinguishes a prisoner's liberty interests during the term of confinement, *see Meachum v. Fano,* 247 U.S. 215, 224 (1976), do not extend to property interests, since criminal convictions in the United States do not automatically impair or extinguish these. Forfeiture or confiscation of a convict's property must be specifically authorized either in the criminal sentence itself (e.g., by fine or restitution order) or by a separate statute or judgment.

For these reasons, a court access system that provides for the filing of pleadings, but not for the fair opportunity to prosecute and to try the underlying claims, runs counter to the due process concerns that the right of court access is designed to satisfy. The same is true of a court access system that extends to some legal claims but not to others.

These broad principles apply no matter what kind of court access system a state elects to provide. However, as a practical matter, it is no accident that the regressive holdings of *Cornett* and *Carper* were both asserted in cases involving legal assistance programs and not law libraries. Once an institution has bought and installed a law library, it makes little sense--and it would probably be unworkable--to limit its use to prisoners working on pleadings. Similarly, the same expensive sets of case reporters and digests are required for research on criminal and civil rights matters as for other kinds of civil proceedings; once these are purchased, it is hardly practical to restrict the kinds of issues that can be researched, and the additional cost of a few treatises and form books for civil matters is relatively low.

By contrast, when *Bounds* is satisfied by hiring lawyers, the cost of the program will be directly related to the services rendered. Many prisoner advocates are a little cynical about reliance on law libraries, which confer great benefits on the glib and the clever but, without more, do very little for the majority of prisoners, many of whom are poorly educated, inarticulate, illiterate, or not fluent in English. But *Carper* and *Cornett* show that a lawyer-based court access system may come with so many strings attached that the seeming advantage of professional assistance is ultimately illusory.

## Other Cases Worth Noting

### U.S. COURT OF APPEALS

**Hazardous Conditions and Substances**

*Weaver v. Clarke*, 45 F.2d 1253 (8th Cir. 1995). The plaintiff was double-celled with a heavy smoker and complained of various medical consequences. The defendants did nothing effective about it until a doctor ordered that he be transferred. Although the events occurred before *Helling v. McKinney*, the plaintiff alleged the violation of a clearly established right under *Estelle*, since the defendants were allegedly indifferent to his present medical needs and not just his future needs.

**Communication/Expression**

*Jones v. Coughlin*, 45 F.3d 677 (2d Cir. 1995). The plaintiff's allegation that he was "subjected to false misconduct charges as retaliation for his exercise of a constitutional right such as petitioning the government for redress of his grievances" states a substantive due process claim. It should not have been dismissed as conclusory on this record, since the plaintiff had had no discovery, and since his testimony that one of the defendants made retaliatory threats, as well as the time sequence of events, would support an inference of retaliation.

**Use of Force**

*Melendez v. City of Worcester*, 870 F.Supp. 11 (D.Mass. 1994). Allegations that police officers forced an arrestee in a holding cell to the floor and left him hog-tied for 40 to 45 minutes supported a claim of unconstitutional misuse of force.

**Searches--Person--Arrestees**

*Kelly v. Foti*, 870 F.Supp. 126 (E.D.La. 1994). The plaintiff was arrested after making an illegal turn and being unable to produce her driver's license. A visual body cavity search of her violated the Fourth Amendment. Her lack of a picture ID and failure to post a low cash bond did not create reasonable suspicion justifying the search.

**Standing/Class Actions--Certification of Classes**

*Hvorcik v. Sheahan*, 870 F.Supp. 864 (N.D.Ill. 1994). The Sheriff failed to implement safeguards to ensure that invalid or obsolete arrest warrants were purged from the computer. The court distinguishes Lyons and holds that there is standing, since the threat of recurrence of the conduct (i.e., baseless arrest) is greater, and since a class had been certified, unlike either *Lyons* or *O'Shea v. Littleton*. The question is whether the class has can demonstrate sufficient stake to establish standing.

**Mental Health Care Judicial Disengagement**

*Taylor v. Wolff*, 158 F.R.D. 671 (D.Nev. 1994). A consent decree concerning mental health care was entered in 1984; in 1988, the court found that the defendants had complied with only two of the provisions. The court appointed a monitor.

The court makes a "finding of compliance" ("in the dynamic sense"). However, it finds that compliance with requirements concerning transfer of inmates needing inpatient care to a new regional facility has now been accomplished, but that the maximum security inmates moved there are subject to lock-in and strip search requirements that preclude the quality of treatment required in an inpatient facility. The court states that continued compliance will require satisfactory progress toward resolving this problem to provide effective mental health care in a safe environment. Until this is done the case will not be closed even if the one-year period for additional monitoring expires.

**Discovery/Sanctions**

*Callwood v. Zurita*, 158 F.R.D. 359 (D.V.I. 19994). After the defendants in a police misconduct case filed by a pro se prisoner failed to reply to his discovery requests and motions despite several court orders, the court deems the complaint's allegations established, precludes them from asserting any defense or presenting any evidence or argument refuting the admissions they had failed to respond to, and precludes them from amending their answer to assert any counterclaims and from filing any dispositive motions.

**Protection from Inmate Assault**

*Hobbs v. Lockhart*, 46 F 3d 864 (8th Cir. 1995). The plaintiff, who was supposed to be kept isolated from other inmates, was attacked when another inmate was released while he was outside his cell. The magistrate judge ordered a "pre-jury hearing" (citing the Fifth Circuit case *Spears v. McCotter*) and then concluded that no reasonable jury could have found in his favor; the district judge dismissed the complaint.

This procedure was improper. *Spears* hearings are intended to determine whether a plaintiff is permitted to proceed *in forma pauperis*, and that issue had been decided. It was not a hearing on a mo-

The "unclean hands" of those class members who absconded from the drug facility did not provide the city a defense, since the class of plaintiffs as a whole did not act in bad faith.

**Contempt/Release of Prisoners/Consent Judgments**

*Harris v. City of Philadelphia*, 47 F.3d 1342 (3d Cir. 1995). The defendants unilaterally changed their procedure for designating prisoners for release under a consent decree. They could not be held in contempt for doing so, since the decree did not require obtaining court approval. The change reduced the number of inmates eligible for release by eliminating several categories: inmates with "other holds," inmates with state or federal detainers, and inmate who are "a danger to themselves or others" (i.e., have bail over $75,000 or need mental health treatment). The defendants cannot be held in contempt for the first category absent an unambiguous provision requiring their eligibility. The contempt finding is upheld with respect to the other two categories. At 1352: "While prior practice may be of assistance in interpreting a contract for purposes other than contempt, prior practice does not provide the clarity of language that precedent informs us is a predicate for any contempt ruling."

**Protection from Inmate Assault/Jury Instructions and Special Verdicts**

*Randle v. Parker*, 48 F.3d 301 (8th Cir. 1995). The plaintiff and his assailant were on each other's "enemies list" after a fight; they were twice let out into each other's presence contrary to prison policy and the plaintiff was assaulted both times. The plaintiff received injuries to his groin and eye and required surgery. A jury awarded him $3500.

A jury verdict for the plaintiff based on instructions that a defendant could be held liable based on what he should have known was erroneous under *Farmer* and requires reversal. The jury instructions are quoted as to all the elements of an Eighth Amendment claim.

**Recreation and Exercise**

*Allen v. Sakai*, 48 F.3d 1082 (9th Cir. 1995), *amending* 40 F.3d 1001 (9th Cir. 1994). The plaintiff alleged that while in segregation he was permitted only 45 minutes a week of outdoor recreation. The defendants had a "goal" of five hours a week but said they didn't meet it because of the "logistical difficulties" of taking one inmate at a time to the yard.

Deprivation of regular outdoor exercise has been previously defined as a basic human need. The subjective requirement of the Eighth Amendment is met by the defendants' awareness of their own goal of five hours a week. Vague references to logistical problems cannot entitle the defendants to summary judgment. At 1088: "A rational fact-finder after hearing the evidence might determine that the defendants acted with at least deliberate indifference to Smith's basic human needs ... by placing inconsequential logistical concerns that might be no more than matters of convenience above Smith's need for exercise."

Since the plaintiff was subject to harsh conditions and indefinite and potentially long-term segregation, in light of *Spain v. Procunier* the defendants were not entitled to qualified immunity. *LeMaire v. Maass* did not benefit them because in that case the plaintiff had been deprived of outdoor exercise because of his misconduct in segregation.

**Pro Se Litigation/Pleading**

*Simmons v. Abruzzo*, 49 F.3d 83 (2d Cir. 1995). The district court should not have dismissed the plaintiff's complaint for violation of the requirement of Rule 8, Fed.R.Civ.P., of a short and plain statement of the claim and concise and direct averments. The complaint gave fair notice of the claims asserted: that medical staff falsely recorded plaintiff's high temperature as normal, that defendants refused to give him prescribed medication for his pneumonia, and that they repeatedly exposed him to cold ambient temperatures that increased his breathing difficulties. It indicated the general time period and the locations of the events and ascribed many acts to identified individual defendants. The existence of additional unclear material did not make the complaint inadequate. (After all, the defendants had already answered the complaint.) These allegations were also sufficient to state a claim.

**Religion--Practices--Hair and Shaving/Religion--Services Within Institution**

*Werner v. McCotter*, 49 F.3d 1476 (10th Cir. 1995). The district court erred in relying on the *Turner* standard. At 1479:

> *...The recent passage of the Religious Freedom Restoration Act of 1993 ... legislatively overturned a number of recent Supreme Court decisions, including* Turner *and* Shabazz, *by defining a statutory (if not a constitutional) right to the exercise of religion. ...While we have yet*

*to interpret the Act, our fellow circuits have determined that the claims of prisoners fall within its broad language, ... and that the Act is to be applied retroactively.... This interpretation accords both with the plain language of the statute and with the legislative history of the Act, ... and we see no reason to disagree.*

RFRA explicitly mentions *Yoder*, and the court reads into the Act *Yoder*'s "threshold requirements" for a Free Exercise claim. At 1479 n. 1:

*First, the governmental action must burden a religious belief rather than a philosophy or a way of life.... Second, the burdened belief must be sincerely held by the plaintiff.... A plaintiff, however, need not hew to any particular religious orthodoxy; it is enough for the plaintiff to demonstrate that a government has interfered with the exercise or expression of her or his own deeply held faith.*

The plaintiff in a RFRA case must show a "substantial burden" on religious exercise or expression. At 1480:

*....To exceed the "substantial burden" threshold, government regulation must significantly inhibit or constrain conduct or expression that manifests some central tenet of a prisoner's individual beliefs,...; must meaningfully curtail a prisoner's ability to express adherence to his or her faith; or must deny a prisoner reasonable opportunities to engage in those activities that are fundamental to a prisoner's religion.... Thus, reasonable time, place, or manner restrictions upon communal religious gatherings would often not necessitate the identification of a compelling state interest; however, regulations that, for example, prevented a devout Muslim from observing daily prayers would be subject to the "compelling interest" test.... Similarly, the Act need not drive a prison to employ clergy from every sect or creed found within its walls; however, the failure to provide or allow reasonably sufficient alternative methods of worship would, in the absence of a compelling state interest, run afoul of the Act.* [Citations and footnote omitted]

The plaintiff made out a *prima facie* case with respect to the denial of access to a sweat lodge; the fact that the plaintiff is a high-security inmate, by itself, provides inadequate basis to balance the competing interests. Summary judgment for defendants was erroneous. The same is true for possession of medicine bags, since the defendants relied on the "now-abandoned 'reasonable relationship' test," although the court suggests that the defendants are probably entitled to win on this issue because high security inmates are more apt to use the bags for smuggling drugs.

The absence of a Cherokee religious advisor did not violate the plaintiff's rights; the prison had six nondenominational part-time chaplains and two Native American spiritual advisors, who were Lakota Sioux.

**Women/Programs and Activities**

*Pargo v. Elliott*, 49 F.3d 1355 (8th Cir. 1995). The district judge dismissed a claim that prison programs for women were not unconstitutionally unequal to men's programs, citing *Klinger*, but making no findings. At 1356: "*Klinger* does not stand for the proposition that women and men prison inmates can never be similarly situated for purposes of equal protection analysis.. ." In this case, unlike *Klinger*, the plaintiffs focused on differences in programs within the same types of custody classification and sentence length.

The case is remanded to the district court for findings about the various programs and services, whether men and women were similarly situated in terms of any particular program area, the differences in the programs, and the reasons for them. The trial court should also address whether the *Turner* standard or "heightened scrutiny" is applicable. The court cites with seeming approval *Pitts v. Thornburgh*, which holds that heightened scrutiny applies to prison gender cases involving "general budgetary and policy choices" rather than day-to-day prison management.

## DISTRICT COURTS

**Protection from Inmate Assault/Appointment of Counsel**

*Tabron v. Grace*, 871 F.Supp. 227 (M.D.Pa. 1994) The plaintiff's allegation that he was assaulted after making known to prison officials that he was in danger from a particular prisoner had sufficient merit to support the appointment of counsel. The plaintiff's lack of legal education, the conflict of his work hours with the prison library hours, and the need for discovery support appointment of counsel. The fact that there are credibility issues in a case where state of mind is a critical element supports the appointment of counsel. The dif-

ficulty of finding counsel to take the case does not militate against appointing counsel.

The plaintiff's allegation is sufficient to withstand summary judgment; the court notes that summary judgment is particularly inappropriate given issues of credibility and state of mind.

**Medical Care/Procedural Due Process--Disciplinary Proceedings**

*McCorkle v. Walker*, 871 F.Supp. 555 (N.D.N.Y. 1995). The allegation that the plaintiff has asthma and the defendants ignored a medical order to house him on a lower tier until after he had had an asthmatic attack stated a claim; the court is unimpressed by the defense that the plaintiff was in keeplock so it didn't matter where he was housed.

An undisputed allegation that the plaintiff was disciplined on the basis of false charges stated a claim for denial of *substantive* due process.

The plaintiff's allegation that he was denied counsel during a custodial interrogation stated a claim; the defendants submitted no evidence contesting its characterization as custodial. The lack of actual injury went to damages and not to the existence of a claim.

The defendants were not entitled to summary judgment on the plaintiff's claim that he was not provided legal materials while in keeplock. Records that showed that materials were signed out for him failed to show that he received them.

**Medical Care--Denial of Ordered Care**

*Starbeck v. Linn County Jail*, 871 F.Supp. 1129 (N.D.Iowa 1994). The plaintiff had a herniated disc; two doctors recommended corrective surgery.

The plaintiff's back condition constituted a serious medical need.

Evidence that one defendant had said that surgery would not be permitted because the state did not want to pay the cost of guards for the plaintiff during his recuperation raised a material question of fact barring summary judgment as to defendants at one prison. Defendants at another prison were not entitled to summary judgment in the absence of any explanation why they did not carry out the course of treatment recommended by the consulting doctors. In the absence of such evidence, their claim that this case is about a difference of medical opinion is insubstantial.

**Procedural Due Process--Disciplinary Proceedings/Immunity--Prosecutorial and Judicial**

*Payne v. Axelrod*, 871 F.Supp. 1551 (N.D.N.Y. 1995). Disciplinary hearing officers are entitled only to qualified immunity, not absolute immunity.

A claim that false disciplinary charges were filed in retaliation for the plaintiff's prior report of officer misconduct states a claim for violation of the right to petition for redress of grievances.

**Heating and Ventilation/Sanitation/Use of Force**

*Miller v. Fairman*, 872 F.Supp. 498 (N.D.Ill. 1994). Allegations that a jail was improperly ventilated and that after inmates broke windows to obtain ventilation, they were not replaced during the winter, and the jail was so cold that the plaintiff had to wear his bed linens and could see his breath, involved core Eighth Amendment requirements and *a fortiori* violated the Due Process Clause. Allegations that the defendants knew about the problem sufficed to state a deliberate indifference claim.

At 504: "This court fails to see how having a pretrial detainee sleep in a flooded area on a wet mattress infested with insects and mice furthers any legitimate governmental interest in maintaining the detention facility." The court believes that these allegations would not pass muster under the Eighth Amendment, which the Seventh Circuit has held require "extreme" deprivations.

At 505: "Pretrial detainees have a Fourteenth Amendment due process right against being subjected by jail guards to excessive force that amounts to punishment."

**Medical Care--Standards of Liability--Serious Medical Needs**

*Carnell v. Grimm*, 872 F.Supp. 746 (D.Haw. 1994). At 755: "A 'serious' medical need exists if the failure to treat the need could result in further significant injury or 'unnecessary and wanton infliction of pain.'" (Citation omitted) Police officers who had information that would lead a reasonable person to believe that a person in their custody had just been raped would have been confronted with a serious medical need. At 756. ". . . [A]n officer who has reason to believe someone has been raped and then fails to seek medical and psychological treatment after taking her into custody manifests deliberate indifference to a serious medical need." Where there was evidence that the defendants had such knowledge, they were not entitled to qualified immunity.

**Correspondence--Non-Legal/Procedural Due Process--Disciplinary Proceedings**

*Gee v. Ruettgers*, 872

F.Supp. 915 (D.Wyo. 1994). The plaintiff wrote to his brother making allegations about the conditions of his confinement, alleging retaliatory actions by prison officials, and stating that he might die because of stoppage of his medication and dehydration. The letter was confiscated and the plaintiff was convicted at a disciplinary hearing with providing false information to the public.

The defendants are not entitled to summary judgment, having failed to explain how allegedly untruthful information mailed to a family member outside the jail could threaten institutional security and order.

The correspondence rules are not unconstitutionally vague. The prohibition on providing "false information to any official, court, news media, penitentiary employee, or the general public" is not unconstitutionally vague on its face, but it is vague as applied to letters to a prisoner's immediate family. (The overbreadth of the rule was apparently not raised.)

**Habeas Corpus**

*Parisie v. Morris,* 873 F.Supp. 1560 (N.D.Ga. 1995). A claim attacking the process employed by the parole board and not its decision can proceed under § 1983 without exhaustion of state remedies, notwithstanding *Preiser. Heck v. Humphrey* did not alter that rule, established by precedent in this circuit. A judgment in the plaintiff's favor "would not have the *result* of shortening his stay in prison (although this may be the ultimate *effect*)...." (1566, emphasis supplied)

**Education and Training**

*Nichols v. Riley*, 874 F.Supp. 10 (D.D.C. 1995). The provision of the 1994 Violent Crime Control and Law Enforcement Act prohibiting the use of Pell Grant funds for federal or state prisoners does not deny equal protection. The rational basis test applies, under which "courts look to whether there are plausible reasons for congressional action; if so, judicial inquiry is at an end." (13) Budgetary constraints, the desire to maximize available funding for law-abiding students, the conclusion that other sources of educational funding for prisoners are available, the desire to eliminate fraud, "the notion that prisoners and nonprisoners are not similarly situated with regard to the contemporaneous need for higher education," or a desire to shift these costs to the states could all provide a sufficiently rational purpose. Substantive due process was not violated; all that was required is "a reasonable fit between governmental purpose and the means chosen to advance that purpose." (14)

**Summary Judgment/Religion--Services Within Institution**

*Campbell-El v. District of Columbia*, 874 F.Supp. 403 (D.D.C. 1994). The plaintiff, a Grand Sheik of the Moorish Science Temple, was held in maximum security for protective custody, and was subject to 23-hour a day lock-in and a rule that limited gatherings, including group prayer, to ten or twelve inmates.

The 23-hour lock-in is not unconstitutional; it was justified by security and in any case it was voluntary.

The court can not determine whether the limit on gatherings of inmates passes muster under the Religious Freedom Restoration Act and the First Amendment. Although the defendants cited security concerns, a factual record is necessary.

**Hazardous Conditions and Substances**

*Gonyer v. McDonald*, 874 F.Supp. 464 (D.Mass. 1995). The plaintiffs' claim of free-floating asbestos fibers in the prison environment met the Eighth Amendment's requirement of objective seriousness. Allegations that the prison had been cited for health code violations for these violations supported this claim. At 466: "With respect to prison health hazards, state health codes reflect established public attitudes as to what those standards are." The danger of cancer from exposure to asbestos is sufficient to support an Eighth Amendment claim.

Allegations that the prison warden knew of the asbestos problem for several years sufficiently met the subjective prong of the Eighth Amendment.

**Procedural Due Process**

*Browning v. Vernon*, 874 F.Supp. 1112 (D.Idaho 1994). The plaintiffs are assigned to Idaho's "Rider Program," under which courts may retain jurisdiction of persons convicted of felonies and place them in prison initially for purposes of being evaluated for potential release on probation. Under the relevant procedures, prison staff prepare and notify the inmates of the initial recommendation and permit them to read (but not keep) all evaluations; anybody with a negative recommendation is immediately placed in segregation. About 24 hours later, the inmate is given a hearing and allowed to rebut any information or recommendation, calling members of the staff and other inmates as witnesses. A final report is then sent to the sentencing court.

The plaintiffs alleged that these procedures violate due

process because 24 hours is not sufficient notice, they are not given copies of the relevant documents to help them prepare for the hearing, and their placement in segregation means they cannot speak to their attorneys, contact witnesses, or have access to the law library.

The lack of written regulations governing the procedures denies due process because it exposes the plaintiffs to a high risk of arbitrary deprivation.

The placement of riders with an adverse tentative recommendation in segregation is left to future resolution on this summary judgment motion. However, the defendants must provide staff assistance and access to a telephone for counsel calls. If staff assistance is unavailable, defendants must ensure some other way of contacting witnesses. Staff witnesses must be made available. The defendants can require that plaintiffs summarize witnesses' testimony in advance so that cumulative or irrelevant testimony can be excluded.

Riders must be given notice that they have the right to call witnesses at the rebuttal hearing. Riders are entitled to a copy of all materials that come before the decision-maker (staff evaluations, chronological reports, etc.), including psychological evaluations normally not provided to sex offenders.

An impartial fact-finder must be guaranteed by a prohibition against ex parte contact with the decision-maker and there must be guidelines for who may serve on the committee.

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

# Dear Prison Project

**Dear Prison Project:**

I understand that the Prison Litigation Reform Act going through Congress will make a big difference to the filing of *pro se* suits as well as to the class actions that your office does. What effect is it going to have?

***Pro se* litigant**

**Dear *Pro Se***

The Prison Litigation Reform Act (part of HR 2076 -- the Commerce, State and Justice Appropriations Bill) has a number of provisions designed to limit the filing of *pro se* suits. These include --

- requiring that prisoners exhaust all administrative grievance procedures (with no time limit given)
- empowering courts to summarily dismiss any suit that is "frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief"
- barring claims for mental or emotional injuries, unless a physical injury is first proven
- providing for hearings to be held in the prison, or by telephone or video conference
- allowing defendants to waive answering complaints, unless the court finds that the plaintiff has a reasonable opportunity of prevailing on the merits
- requiring payment of at least partial filing fees and court costs by prisoners and establishing a garnishment procedure for prisoners' accounts
- banning further filings by any prisoner who has had three or more cases dismissed as frivolous, malicious or failing to state a claim (unless there is imminent danger of serious physical injury)
- allowing the court to revoke a federal prisoners good time credits as a punishment for filing "malicious" or "harass[ing]" claims.

Remember, these new rules are not yet in effect but they are almost certainly going to be passed by Congress and may be in effect by the end of the year (or even sooner) -- we'll give you an update in our next issue.

# Highlights -- National Prison Project Litigation

The following are major developments in the National Prison Project's litigation program since July 1, 1995. Further details of any of the listed cases may be obtained by writing the Project.

***Casey v. Lewis*** --In May 1995, the Supreme Court granted *certiorari* to the defendants for review of the trial court's ruling that the Arizona Department of Corrections' policies unconstitutionally restrict prisoners' access to the courts. The trial court's ruling was made in November 1992 and upheld by the Ninth Circuit Court of Appeals, in a unanimous decision in November 1994. The court affirmed virtually all of the trial court's order which applies to all 15,000 prisoners in the Arizona system. Oral argument in the Supreme Court is scheduled for November 29, 1995. The parties have filed their briefs. A number of *amicus* briefs were also filed, including an *amicus* by the Solicitor General supporting the prisoners.

***Dulany v. Carnahan*** -- In June, the NPP, together with the local ACLU affiliate, filed a class action suit on behalf of the women prisoners in the Chillicothe Correctional Center and the Renz Correctional Center, the women's prisons in Missouri, alleging inadequacies in the medical care delivery system, including inadequate emergency care and treatment for women with chronic health problems. Defendants responded by filing a motion to dismiss and a motion for summary judgement. A hearing will be held on these motions on November 21, 1995.

***Goldsmith v. Dean*** -- The NPP filed a motion in federal court on August 25 asking the judge to issue a preliminary injunction to end physical and sexual abuse of prisoners in Vermont's sex offender behavior modification program. Affidavits filed by several prisoners allege abusive treatment during the drama therapy sessions including simulated rape. Vermont's behavior modification program for sex offenders allegedly includes other techniques which the NPP is challenging as unconstitutional as part of its overall conditions of confinement case filed in. A hearing on the preliminary injunction will be held in November.

***Shumate v. Wilson*** -- The NPP, together with the Northern and Southern ACLU and local counsel, filed suit in April alleging that women at the Central California Women's Facility at Chowchilla and the California Institution for Women at Frontera received constitutionally inadequate medical care. The court held oral argument on the class action motion on September 14 and subsequently announced its intention to certify the class.

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