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Sexual Abuse and Civil Rights: The Impact of the PLRA Physical Injury Requirement

By Giovanna Shay[1]

Two women prisoners are strip searched by male guards. Following the incident, one suffers stress-induced migraine headaches. The other attempts suicide and must undergo a stomach pump.

Deputies at a jail subject women prisoners to constant verbal sexual harassment and requests for sexual favors. Deputies ask women to strip and masturbate in front of them. Women who comply are granted special privileges. Women who complain become the targets of retaliation.

A woman prisoner is raped by a male inmate who pays a guard to let him into her cell.

Do these incarcerated women have viable civil rights lawsuits? Regardless of the substantive law governing their claims, the Prison Litigation Reform Act of 1996 (PLRA) threatens their ability to seek relief in federal court.

In recent years, the problem of sexual abuse of incarcerated women in United States prisons and jails has gained increasing attention. Cases such as *Cason v. Seckinger*,[2] *Women Prisoners of D.C. v. District of Columbia*,[3] and *Lucas v. White*[4] have exposed rampant sexual misconduct and shocking incidents of sexual assault. The United States Department of Justice is litigating cases alleging systemic sexual abuse in both the Arizona[5] and Michigan state systems.[6] Human rights agencies[7] and the popular press[8] report grievous sexual violence against incarcerated women. In 1998, the United Nations Special Rapporteur on Violence Against Women toured the U.S. to investigate the problem of sexual exploitation of women in U.S. state custody.[9]

Yet even as incarcerated women and their advocates expose sexual abuse, the PLRA threatens to close federal courts to prisoners who have been victimized. Specifically, a provision of the PLRA bars recovery in federal civil rights actions by prisoners who cannot demonstrate a physical injury. It states: "no federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury." 42 U.S.C. Section 1997e(e). Lawyers for women prisoners have reason to fear that courts will interpret this provision to bar relief for some types of sexual harassment, abuse, and assault.[10]

A case that did not even involve a sexual assault, *Siglar v. Hightower*, foreshadowed the impact of the PLRA on the civil rights of sexually abused women prisoners. In *Siglar*, the Fifth Circuit dismissed a Section 1983 action brought by a prisoner alleging excessive force.[11] The prisoner, Lee Andrew Siglar, II, alleged that, in an incident arising out of his possession of a biscuit, a prison guard had verbally abused him, twisted his arm behind his

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EDITOR'S NOTE

Dear Subscriber:

As you are aware, the *Journal* has gone through many changes and interruptions over the last few years. Cutbacks in our budget and staff forced us to alter the *Journal's* glossy appearance of the early nineties. In addition, our seasonal issues occasionally have been combined, doubling the size of a regular issue, but reducing the number of mailings you would receive in one year. I apologize for any confusion this practice may have caused. I hope to resume our regular schedule of four separate issues each year in the near future.

Despite these changes, the quality of the *Journal's* content has never diminished. This tradition will continue as the variety of prisoner issues we cover broadens and the applicability to our subscribers expands.

I appreciate your patience while our publication goes through this period of transition and thank you for your past loyal support.

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back, and twisted his ear.[12] Although Siglar's ear was bruised and sore for three days, he neither sought nor received medical treatment, and he sustained no injury.[13] The Fifth Circuit applied Eighth Amendment standards in interpreting the PLRA physical injury requirement.[14] The court concluded that, because Siglar's injuries were *de minimis*, he had failed to articu permanent late a claim under the Eighth Amendment and to demonstrate the physical injury required by the PLRA.[15]

Unfortunately, a U. S. Magistrate soon applied *Siglar* in a case involving a cross-gender strip search, with disastrous results for the plaintiffs. In *Moya v. City of Albuquerque*, a federal magistrate in the district of New Mexico dismissed a claim by two incarcerated women who had been strip searched by male guards in violation of the Fourth Amendment.[16] One of the plaintiffs suffered migraine headaches due to the stress of the incident. The other attempted suicide and was subjected to a stomach pump. The court relied on *Siglar* to interpret the PLRA physical injury requirement. It concluded: "Even if the *Court* were to consider any injury to Lisa Martinez as a result of her attempted suicide as a qualifying physical injury under the statute, a few hours of lassitude and nausea and the discomfort of having her stomach pumped is no more than a *de minimis* physical injury. Similarly, the mere fact that Sharon Moya now suffers headaches which she attributes to the stress of her strip search is not a serious physical injury. Following the guidance of *Siglar*, such injuries are insufficient to overcome the hurdle posed by Section 1997e(e)."[17]

In *Luong v. Hatt*, a U. S. Magistrate Judge employed a similar analysis to dismiss a Texas prisoner's failure to protect claim. Although not a sexual assault case, *Luong* contained facts common to sexual assault scenarios. According to his DOC medical records, the plaintiff, who had been attacked by other inmates, suffered "cuts, scratches, abrasions, lacerations, redness, and bruises."[18] The Magistrate Judge concluded, however, that the plaintiff's medical records described only *de minimis* injuries, and that, therefore, the prisoner had failed to demonstrate the requisite physical injury under Section 1997e(e). The court reasoned that only injuries involving "lasting disability" or "severe pain" constitute physical injuries within the meaning of the PLRA.[19] It concluded that, "a physical injury is an observable or diagnosable medical condition requiring treatment by a medical care professional."[20]

Not all federal courts have demonstrated such callousness. In *Nunn v. Michigan Dept. of Corrections*, a federal district

court concluded that the Section 1997e(e) physical injury requirement did not bar an Eighth Amendment claim brought by prisoners who had been raped and sexually assaulted by DOC employees.[21] Such attacks, the court reasoned, necessarily entail a physical injury at least sufficient to overcome a Rule 12(b)(6) motion.[22]

Advocates for incarcerated women may attempt to escape the "mental or emotional injury" label by emphasizing their clients' somatic reactions to sexual abuse. In the pre-PLRA case *Women Prisoners of D.C. v. District of Columbia*, plaintiffs' expert testified that systemic sexual harassment and misconduct caused plaintiffs to suffer "significant depression, nausea, frequent headaches, insomnia, fatigue, anxiety, irritability [and] nervousness."[23] In another pre-PLRA case, *Jordan v. Gardner*,[24] the Ninth Circuit concluded that a policy allowing male guards to conduct random, non-emergency, suspicionless clothed body searches on women prisoners violated the plaintiff prisoners' rights under the Eighth Amendment. The court based its conclusion on the fact that such searches caused many members of the plaintiff class severe emotional distress and psychological suffering, largely due to the women's prior experiences of sexual abuse.[25] However, it highlighted an extreme somatic reaction: a prisoner who, after being subjected to such a search, "had to have her fingers pried loose from bars she had grabbed during the search . . . and vomited after returning to her cell block."[26] As *Moya* demonstrates, however, some courts may reject such physical reactions as *de minimis* injuries under *Siglar*.

The D.C. Circuit recently concluded that certain somatic symptoms were insufficient to establish a physical injury within the meaning of Section 1997e(e). In *Davis v. District of Columbia*, a prisoner who had sued for mental and emotional distress arising from the disclosure of his HIV status sought to amend his complaint to allege physical injury.[27] He relied on an affidavit by his psychiatrist stating that he had experienced "weight loss, appetite loss, and insomnia after the disclosure of his medical status."[28] The D.C. Circuit declined to allow him to amend. It concluded that the Section 1997e(e) requirement of a "prior" physical injury, as well as the legislative purpose of discouraging "frivolous" lawsuits "preclude reliance on the somatic manifestations of emotional distress that Davis alleges."[29] It remains to be seen whether other courts will follow *Siglar* and *Davis* in cases involving severe and long-lived somatic reactions to sexual abuse.

Perceiving that Section 1997e(e) prohibits relief even for psychological torture, prisoners' advocates have attempted to challenge the provision on constitutional grounds. Several early opinions by magistrate judges questioned the constitutionality of the physical injury requirement.[30] However, both the Seventh and D.C. Circuits have upheld the provision against constitutional challenges. Ironically, both courts did so on grounds that left open the possibility of injunctive relief.

In *Zehner v. Trigg*, 133 F.3d 459 (7th Cir. 1997), the plaintiffs challenged Section 1997e(e) on three grounds, claiming that: (1) Congress lacks the power to strip federal courts of their power to remedy constitutional violations; (2) Section 1997e(e) violates equal protection by impinging on the plaintiffs' fundamental right of access to the courts; and (3) Section 1997e(e) violates separation of powers by impermissibly directing the outcome of constitutional cases.[31]

The Seventh Circuit rejected all three claims. The court disposed of the jurisdiction-stripping argument by stating that, "the Constitution does not demand an individually effective remedy for every constitutional violation."[32] As for access to courts, the court wrote, Section 1997e(e) does not limit prisoners' access to courts, but, rather, their access to relief.[33] Finally, the court concluded that Section 1997e(e) does not prescribe a "rule of decision" any more than any other statute setting out prima facie elements.[34]

The D.C. Circuit upheld Section 1997e(e) on similar

reasoning in *Davis*.[35] The plaintiff in *Davis* claimed that prison officials had violated his fundamental constitutional right of privacy by disclosing his HIV status. He alleged mental and emotional distress arising from the constitutional violation.[36] The district court dismissed his claim, relying on Section 1997e(e).[37] The plaintiff appealed to the D.C. Circuit, alleging, *inter alia*, that Section 1997e(e) violated his rights to equal protection and access to the courts.[38]

The D.C. Circuit rejected both claims.[39] It concluded that the physical injury requirement did not impermissibly infringe on the plaintiff's fundamental right of privacy because it "is merely a limitation on damages."[40] Reading the statute as applying only to injuries "suffered" in the past, the court reasoned that it did not preclude prospective relief such as declaratory and injunctive relief.[41] It further noted that "suits for declaratory and injunctive relief against the threatened invasion of a constitutional right do not ordinarily require proof of any injury other than the threatened constitutional deprivation itself."[42] Precluding "backward-looking" relief in cases alleging only mental and emotional injury, it reasoned, did not "directly and substantially" interfere with the plaintiff's exercise of his constitutional right of privacy.[43] The court rejected the right of access claim on similar grounds.[44] In circuits following *Zehner* and *Davis*, therefore, plaintiffs may seek injunctive and declaratory relief for sexual harassment.

In an opinion by Judge Reinhardt, the Ninth Circuit offered prisoners and their advocates some hope. In *Canell v. Lightner*, the Ninth Circuit concluded that a prisoner's constitutional claim did not fall within the Section 1997e(e) prohibition on claims for "mental or emotional" injury. The court declined to apply Section 1997e(e) to bar a prisoner's claim that officials had violated his rights under the Establishment and Free Exercise Clauses of the First Amendment to the U. S. Constitution.[45] The court reasoned: "Canell is not asserting a claim for 'mental or emotional injury.' He is asserting a claim for a violation of his First Amendment rights. The deprivation of First Amendment rights entitles a plaintiff to judicial relief wholly aside from any physical injury he can show, or any mental or emotional injury he may have incurred. Therefore, Section 1997e(e) does not apply to First Amendment Claims regardless of the form of relief sought."[46] Similarly, sexual abuse plaintiffs may argue that they claim violations of their Eighth and Fourteenth Amendment rights, not mere "mental or emotional injury."

ENDNOTES

1. This article was supported by a grant from the Open Society Institute's Center on Crime, Communities & Culture's Soros Justice Fellowship Program. I have relied heavily on both the ACLU National Prison Project's *Significant Decisions Regarding the Prison Litigation Reform Act* and John Boston's *The Prison Litigation Reform Act: The Story So Far*.

2. Consent Order filed in Civil Action No. 84-313-1-MAC (M.D. Ga. November 23, 1994).

3. *Women Prisoners v. District of Columbia*, 877 F. Supp. 634 (D.D.C. 1994), *vacated in part, modified in part*, 899 F .Supp. 659, *remanded*, 93 F.3d 910 (D.C. Cir. 1996), *cert. denied*, 117 S. Ct. 1552 (1997).

4. "U.S. Prisons Will Change Sexual Assault Policies," *N. Y. Times National*, March 4, 1998, at A13.

5. Tony Ortega, "Feds Sue Arizona: State Accused of 'Failing to Protect Women Inmates From Sexual Misconduct' Involving Prison Guards," *Phoenix New Times*, March 13, 1997.

6. Anjali J. Sekhar, "In Michigan: Female Inmates Abused and Mistreated, Suit Claims, Corrections Officials Say Justice Department Lacks Evidence," *The Detroit News*, June 6, 1997, at D3.

7. Human Rights Watch, "All too Familiar: Sexual Abuse of Women in U.S. State Prisons" (1996); Human Rights Watch, "Nowhere to Hide: Retaliation Against Women in Michigan State Prisons" (1998); Women's Institute for Leadership Development for Human Rights, "Human Rights for Women in U.S. Custody" (1998).

8. Nina Siegal, "Locked Up in America: Slaves to the System," *Salon Magazine*, http://www.salonmagazine.com/mwt/feature/1998/09/cov_01feature4.htm.

9. International Human Rights Law Group Women's Rights Advocacy Program, The United Nations Special Rapporteur on Violence Against Women: Q & A Fact Sheet (May 1998).

10. The PLRA physical injury requirement does not apply to plaintiffs who are no longer incarcerated; *Kerr v. Puckkett*, 138 F.3d 321, 323 (7th Cir. 1998); and courts have declined to apply the provision retroactively; *see Swan v. Banks*, 160 F.3d 1258 (9th Cir. 1998); *Craig v. Eberly*,1998 WL 886748 at 3 (10th Cir. 1998).

11. *Siglar v. Hightower*, 112 F.3d 191 (5th Cir. 1997).

12. *Id.* at 193.

13. *Id.*

14. *Id.* at 193.

15. *Id.* at 194. *But see Gomez v. Chandler*, 1999 WL 304 at 4 (5th Cir. 1999)(distinguishing *Siglar* and noting that "there is no categorical requirement that the physical injury be significant, serious, or more than minor.").

16. No. 96-1257 DJS/RLP, Mem. Op. and Order (D.N.M. Nov. 17, 1997) (unpublished).

17. *Id.* at 4.

18. *Luong v. Hatt*, 979 F. Supp. 481, 485 (N.D. Tex. 1997).

19. *Id.*

20. *Id.*, 486.

21. *Nunn v. Michigan Dept. of Corrections*, No. 96-CV-71416, Order and Op. at 9 (E.D. Mich. Feb. 4, 1997)(unpublished).

22. *Id.* at 9.

23. 877 F. Supp. at 665.

24. 986 F.2d 1521 (9th Cir. 1993).

25. *Id.*, 1525-26.

26. *Id.*, 1523.

27. 1998 WL 743572 (D.C. Cir. 1998).

28. *Id.* at 6.

29. *Id. See also Plascencia v. State of California*, 1998 WL 804713 at 8 (C.D. Cal. 1998)("weight loss is insufficient to constitute a prior physical injury under PLRA"); *Valentino v. Jacobson*, 1999 WL 14685 at 3 (S.D.N.Y. 1999)("anxiety" and "somatic emotional difficulties" fail to state a civil rights claim under PLRA).

30. *See, e.g., Calhoun v. DeTella*, 1997 WL 75658 (N.D. Ill. Feb. 18, 1997); *Dorn v. DeTella*, 1997 WL 85145 (N.D. Ill. Feb. 24, 1997).

31. 133 F.3d 459, 461-65 (7th Cir. 1997).

32. *Id.*, 462.

33. *Id.* at 463.

34. *Id.* at 464.

35. 1998 WL 743572 at 1.

36. *Id.* at 1.

37. *Id.*

38. *Id.* at 1.

39. *Id.* at 7.

40. *Id.* at 1.

41. *Id.* at 2.

42. *Id.*

43. *Id.* at 3.

44. *Id.* at 4.

45. 143 F.3d 1210, 1212 (9th Cir. 1998).

46. *Id.*, 1213. "See also Self-Allah v. Ammucci, 1998 WL 912008 at 5 (WDNY 1998)."

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Case Law Report: Highlights of Most Important Cases

By John Boston

Court of Appeals Cases

Prison Litigation Reform Act/ In Forma Pauperis/Standing

Lyon v. Krol, 127 F.3d 763 (8th Cir. 1997). The plaintiff lacked standing to challenge the "three strikes" provision of the Prison Litigation Reform Act. He could not allege a burden on his right of court access because he had not sustained actual injury, since he had enough money to pay the filing fee. Filing fees themselves do not unconstitutionally burden the right of court access. The statute does not limit litigants' ability to pursue legal claims, it merely limits their ability to proceed *in forma pauperis*. This opinion dishonestly evades the equal protection analysis by ignoring the fact that being charged the filing fee is sufficient injury in fact to confer standing.

Prison Litigation Reform Act/ Publications/In Forma Pauperis

Shabazz v. Parsons, 127 F.3d 1246 (10th Cir. 1997). The Prison Litigation Reform Act's filing fee provisions apply to appeals in actions filed before the statute was passed in which a notice of appeal is filed after that date. The provisions are not unconstitutional.

The plaintiff was denied entire issues of *Muhammad Speaks*. The defendants' refusal to redact offending portions of the publication is upheld under the *Turner* standard on the ground that the cost would be prohibitive and such a procedure would prevent the prisoner from obtaining meaningful administrative review.

Protection from Inmate Assault/Personal Involvement and Supervisory Liability/ Summary Judgment/ Evidentiary Questions/Verbal Abuse

Fischl v. Armitage, 128 F.3d 50 (2d Cir. 1997). The plaintiff, housed in protective custody, flooded the tier so the porters had to clean it up. Inmates complained to officers on the next shift. Six inmates got into the plaintiff's cell and assaulted him. His cell was opened from outside and he heard one of his assailants say the sergeant gave them ten minutes. It took two hours to get him medical care. He had facial fractures and was in the prison hospital for two weeks. One of the officers who had been on duty allegedly came to the hospital and threatened him, and continued to do so after his release from the hospital.

The defendants should not have been granted summary judgment. The district court drew inferences favorable to the defendants rather than the plaintiff. Since one defendant was the company officer, it was reasonable to infer for summary judgment purposes that he opened the plaintiff's cell; although there were other officers who could have used their keys to get access to the cell-opening mechanism, there was no evidence that any of them were present and the defendant had sole responsibility for the area. Since the officer was either in the control room or patrolling the unit at the time of the assault, a jury could infer either that he opened the cell or that he was present and did nothing when the attack occurred.

The defendant who threatened the plaintiff should not have been dismissed on the ground that only verbal abuse was at issue. The threats support an inference that he collaborated with the attackers (he allegedly brought a couple of them to the hospital with him when he threatened the plaintiff). The attackers' statements that the sergeant had given them ten minutes are not hearsay if the sergeant is a defendant; they are admissions. Also, the statement would not be admitted for the truth of what it asserted but as evidence that the sergeant had foreknowledge of the attack and endorsed it. It could also come in

as the statement of a coconspirator.

Medical Care--Fees/ Standing/ Non-English Languages/ Procedural Due Process--Property/Access to Courts

Reynolds v. Wagner, 128 F.3d 166 (3d Cir. 1997). A county prison charged $3.00 per sick call visit; doctor visits were free if referred by sick call staff but $5.00 if not; prescription medication and over-the-counter medication deemed necessary by medical staff were free, and OTC medication was also available in the commissary; initial examinations were free; treatment for chronic conditions was free; some emergencies were free, others--like a twisted ankle from recreation--were not. Mental health services were free. No one was denied care because of lack of funds. Half of incoming monies were credited toward any negative balance.

The defendants argued that the plaintiffs did not have standing under *Lewis v. Casey* because they did not show that serious medical conditions went untreated or that treatment was delayed because of the fee policy. The plaintiffs argued that *Helling v. McKinney's* holding concerning unreasonable risks to future health gave them standing. The court does not see these holdings as "necessarily inconsistent" but avoids the standing question because the plaintiffs lose on the merits. The notion that the fee itself constitutes "injury in fact" conferring standing is not mentioned.

The policy is not unconstitutional on its face. At 174: "If a prisoner is able to pay for medical care, requiring such payment is not 'deliberate indifference to serious medical needs.'" The program does not condition services on ability to pay, nor does it delay care. At 175: "If any delay occurs, it is solely because of decisions made by the inmates themselves, not because of any conduct on the part of the prison administration." (At 177: There is no support for the claim of delays; the claim of conflict with the need to spend money for litigation expenses fails because no "vital expenses" were cited and the most important commissary items are provided free to indigents.) The program is just "a modest disincentive to abuse sick call." The rationale of the program--to teach prisoners financial responsibility and to deter the abuse of sick call--passes muster under the *Turner* standard.

The policy is not unconstitutional as applied. Charging higher fees than Medicaid (if that is the case) is not unconstitutional. Failure to provide a Spanish-language version of the policy is not unconstitutional since it is explained by Spanish-speaking employees (though the court "urges" defendants to provide a translation). The failures to define "chronic illness" and "emergency" except by example are not unconstitutional. Charging for treatment of contagious diseases is not unconstitutional. Conceivably, a prisoner could show that a fee policy deterred others from getting treatment, risking an epidemic, but no such evidence appears here.

At 179: "Inmates have a property interest in funds held in prison accounts." Notice of the policy and the availability of a grievance proceeding to contest deductions satisfied due process requirements; authorization for each specific deduction was not required. At 181 n. 7: the state's heightened procedural protections do not create a liberty interest.

The policy is not rendered unconstitutionally vague by the definitions of "chronic" and "emergency."

The plaintiffs lack standing to argue that the policy denies access to courts by diverting funds from prisoners' legal expenses because they fail to show harm under *Lewis*. There is no First Amendment right to subsidized mail and photocopying.

Psychotropic Medications

Morgan v. Rabun, 128 F.3d 694 (8th Cir. 1997). *Washington v. Harper* is applied to an insanity acquittee who was involuntarily medicated in a state mental hospital. There was no substantive due process violation.

The doctor legitimately concluded that he was dangerous and ordered forcible medication on two occasions, since he had a prior homicide conviction and had a hostile demeanor. The plaintiff denied the latter, but even if this "self-serving denial" is true there was enough evidence that the doctor exercised his professional judgment based on the allegations of which the plaintiff had been acquitted (stabbing someone based on psychotic beliefs). The fact that he had been in jail for six months without medication and didn't hurt himself and others ("in such a volatile atmosphere for six months, unmedicated, and harboring active psychotic beliefs") supports the doctor's determination. (Heads I win, tails you lose. *Cf. Korematsu v. United States.*)

There was no procedural due process violation in the 18 months of daily non-forcible medication because the plaintiff accepted it voluntarily and was not forced to take it when he did refuse.

Procedural Due Process--Disciplinary Proceedings

Wagner v. Hanks, 128 F.3d 1173 (7th Cir. 1997). The relevant comparison, in determining whether placement in punitive segregation is "atypical and significant" under *Sandin*, is whether the confinement is substantially more restrictive than *any* non-punitive confinement anywhere in the state's prison system. At 1175: ". . . [U]nder *Sandin* the key comparison is between disciplinary segregation and nondisciplinary segregation rather than between disciplinary segregation and the general prison population." The court suggests that a national comparison might make sense but doesn't go that far.

At 1175: "When *Sandin* is interpreted in light of the transfer cases, it becomes apparent that the right to litigate disciplinary confinements has become vanishingly small." The court says the Second Circuit "seems inclined to leave the door open a bit wider than *Sandin*, when read in light of the transfer cases, appears to allow."

Ex Post Facto Laws/Personal Property

United States v. Williams, 128 F.3d 1239 (8th Cir. 1997). The Mandatory Victims Restitution Act, passed in 1996, is not an *ex post facto* law as applied to conduct partly performed before that date, since the defendant committed some of the conduct after that date and was on notice that his conduct might result in restitution to persons other than those victimized by the specific conduct for which he was charged. The court does conclude that in this statute, unlike other restitution statutes, the restitution is punishment.

Prison Litigation Reform Act/In Forma Pauperis

Tierney v. Kupers, 128 F.3d 1310 (9th Cir. 1997). Cases dismissed as frivolous or for failure to state a claim before the Prison Litigation Reform Act was passed count as "strikes" barring a prisoner from utilizing *in forma pauperis* procedures. Any other interpretation would permit the filing of additional frivolous IFP cases. The statute does not pose a retroactivity problem because it does not impair substantive rights but merely affects prisoners' right to proceed IFP.

Prison Litigation Reform Act/In Forma Pauperis

Keener v. Pennsylvania Bd. of Probation and Parole, 128 F.3d 143 (3d Cir. 1997). The Prison Litigation Reform Act's "three strikes" provision may be triggered by "strikes" that occurred before the passage of the statute.

Criminal Proceedings/Searches--Person/Deference

United States v. Holloway, 128 F.3d 1254 (8th Cir. 1997). The plaintiff was suspected of drug trafficking in prison and was placed in a "dry cell"; ultimately balloons of heroin were recovered from his feces. The court assumes without deciding that dry cell placement implicates the Fourth Amendment. However, the plaintiff's placement based on reliable information of intent to

smuggle drugs was a "proportionate response." The court appears to use the deference and exaggerated response standards of prison law rather than a standard of probable cause or reasonable suspicion, though the substantive difference does not seem large.

Sexual Abuse/Color of Law/ Prison Litigation Reform Act

Walker v. Taylorville Correctional Center, 129 F.3d 410 (7th Cir. 1997). The Prison Litigation Reform Act's revised standards for *in forma pauperis* screening do not apply to cases filed before PLRA was passed.

A staff member alleged to have sexually harassed the plaintiff acted under color of state law because she allegedly abused her state authority. The plaintiff went to her for help in her capacity as counselor, and the other alleged incidents were possible only because she had access to the plaintiff as a result of her official position. The fact that she may have been pursuing her own interests is beside the point.

Allegations that the officer harassed the plaintiff by rubbing his arm and his penis and making suggestive comments "appear to satisfy the threshold standard for sexual harassment claims in a § 1983 case." (414) The court holds only that the claim is not frivolous, since the defendant has not been served.

Protection from Inmate Assault

Rich v. Bruce, 129 F.3d 336 (4th Cir. 1997). The plaintiff, held in a segregation unit, was assaulted by another inmate who was known to have a grudge against him. The assault was made possible by the defendant officer's violation of four separate rules (e.g., no more than one inmate should be out of his cell for recreation at once). The defendant was not deliberately indifferent. Although he knew of the risk to the plaintiff, he was too stupid to perceive that his conduct was adding to it; in *Farmer*'s language, he did not "draw the inference."

Medical Care/Federal Officials and Prisons

United States v. Smartt, 129 F.3d 539 (10th Cir. 1997). A prisoner may be eligible for a "special circumstances reduction" of a prison sentence based on medical condition, but such a motion must be brought by the Director of the Bureau of Prisons.

In Forma Pauperis/Appeal

Wooten v. District of Columbia Metro. Police Dept., 129 F.3d 206 (D.C.Cir. 1997). The plaintiff, subject to an order requiring him to seek leave of the district court to file new complaints after certifying that they raised new matters, sought to appeal a dismissal for disobeying that order. The district court certified that his appeal was not taken in good faith. Therefore he must pay the filing fee on appeal unless the appeals court grants his motion to proceed IFP. The court rejects his motion; his appeal will be dismissed unless he pays the full fee.

Prison Litigation Reform Act/In Forma Pauperis

Henderson v. Norris, 129 F.3d 481 (8th Cir. 1997). When a prisoner has been denied IFP status on appeal by the district court because the appeal is not taken in good faith, the prisoner may move in the appeals court under Rule 24(a), Fed.R.App.P., to proceed IFP. Such a motion triggers the obligation to pay the full fee in installments under PLRA, or up front if the three strikes provision applies. A notice of appeal also triggers the obligation to pay fees. The fee will initially be assessed at $35 or other reasonable amount if the prisoner does not submit the required account information. Apparently there is no option to refuse to pay and have the appeal dismissed.

Prison Litigation Reform Act/Judicial Disengagement

Inmates of Suffolk County Jail v. Rouse, 129 F.3d 649 (1st Cir. 1997). The Prison Litigation Reform Act's termination provisions apply to consent decrees and not just "relief" flowing from them. Despite the linguistic uncertainty in the statute's use of "relief" and

"consent decree," the legislative intent is clear.

The statute does not violate the separation of powers. "Consent decrees of the type at issue here" are not final judgments for separation of powers purposes. Prospective equitable judgments "can succumb to legislative action if the legislature alters the underlying rule of law." (656) The underlying law is not the Eighth Amendment because there was no adjudication of rights. Rather, the underlying law relates to the authority of the federal court to maintain relief absent a federal law violation. Nor is there a violation of the *Klein* rule. The statute has changed the law and left the courts free to apply the new law to the facts as they discern them.

The statute does not deny due process. At 658: ".·.·. [F]rankly modifiable decrees cannot create vested rights." Any contract rights created by a consent decree are reviewed under a rational basis standard, which the statute meets.

The statute does not deny equal protection. It does not abridge detainees' right to be free from punishment because punitive conditions of confinement can be remedied under it. At 660: "[W]hile there is a constitutional right to court access, there is no complementary constitutional right to receive or be eligible for a particular form of relief." Absent violation of a fundamental right, the rational basis test applies. Limiting the powers of federal courts in prison cases and discouraging frivolous cases are clearly legitimate ends and the means are "stern" but reasonably related to the goals. The legislative record does not show that the statute was motivated by animus; sponsors' statements about prisoners are merely political rhetoric.

The district court concluded that its prior findings did not establish a constitutional violation, and the court defers to that conclusion. There is nothing in the record to suggest further inquiry into the constitutionality of conditions. The district court properly refused to predict whether there would be constitutional violations in the future.

The decree should be terminated, not vacated. Vacatur would eviscerate collateral effects of the judgment and would "cast a shadow" over past actions taken under it.

Correspondence--Non-Legal

Davidson v. Mann, 129 F.3d 700 (2d Cir. 1997). A directive limits the number of stamps that can be purchased for non-legal mail to 50 every two weeks, or 50 a month for prisoners in segregation. The plaintiff did not allege that he had ever been prevented from purchasing stamps or from sending mail, so the statute is assessed only on its face. Under *Turner*, there is a valid and rational connection between the regulation and interests in avoiding a backlog of mail and in allocating prison personnel efficiently. Limits on purchases are rational because stamps are like currency and the limits reduce the risk of thefts and disputes. Prisoners have the alternative of prioritizing their mailings, and there is an extenuating circumstances exception. There are no ready alternatives to the policy and no specific allegations of why anybody needs more than 50 or 100 stamps a month for non-legal mail.

Ex Post Facto Laws/Temporary Release/Habeas Corpus/State-Federal Comity

Plyler v. Moore, 129 F.3d 728 (4th Cir. 1997). The *Rooker-Feldman* doctrine bars federal court relitigation of an issue litigated before the state courts by the same parties here (a class of prisoners) unless federal jurisdiction is via habeas corpus. The relief sought here--earlier release--is habeas relief, so the doctrine does not apply.

A statute providing for furloughs six months before release to relieve prison overcrowding was amended to exempt prisoners convicted of certain offenses. The amendment violates the Ex Post Facto Clause under *Lynce* because it retroactively extends the length of some prisoners' incarceration.

Prison Litigation Reform Act/Judicial Disengagement

Dougan v. Singletary, 129 F.3d 1424 (11th Cir. 1997). The Prison Litigation Reform Act's termination provision does not reopen final judgments because consent decrees are not final for separation of powers purposes; they are "comparatively adaptable" relative to the *Plaut* judgment of dismissal. (*Klein* was not argued.)

Plaintiffs' due process argument fails for the same reason as the finality argument.

The statute does not deny equal protection. The court refuses to consider the PLRA as a whole. The termination provision does not restrict court access; it restricts relief. The statute passes rational basis scrutiny because it advances "the unquestionably legitimate end of minimizing prison operation by judges." (1427, footnote omitted)

The case is remanded for consideration of whether the consent judgment can survive under PLRA.

Protection from Inmate Assault/ Mental Health Care/Class Actions--Effect of Judgments and Pending Litigation/ Appointment of Counsel

Luttrell v. Nickel, 129 F.3d 933 (7th Cir. 1997). The plaintiff was double celled on arrival at a prison with a mentally disturbed prisoner; his request to be moved was not acted on, and he did not take it to a higher official. He was sexually assaulted, defended himself with a weapon, and was reprimanded for possession of the weapon.

Failing to transfer the plaintiff did not violate a court order because that order applied to a different prison. It was not deliberate indifference because the plaintiff did not show that the officer to whom he complained knew there was a substantial risk that he would be seriously harmed. At 936: "Her failure personally to investigate the cellmate's mental state and her response to his request with laughter did not amount to deliberate indifference." Anyway the assailant was taking medication to control his mental illness.

The failure to appoint counsel was not an abuse of discretion; the plaintiff, though he did not appear competent to try the action himself, had the assistance of "jailhouse lawyers."

District Court Cases

Medical Care--Standards of Liability--Deliberate Indifference

Palacios v. City of Oakland, 970 F.Supp. 732 (N.D.Cal. 1997). A police officer pushed the plaintiff and he fell and hit his head on the curb. He appeared to be uninjured and was taken to jail and not to a medical facility. He later proved to have an epidural hematoma and suffered injury.

The lack of visible evidence of injury means that the defendants did not know of his medical condition and cannot be found deliberately indifferent. The fact that he was unconscious at one point did not inform defendants of his medical condition, since he was also intoxicated, and since he regained consciousness and appeared normal.

Protection from Inmate Assault/Pre-Trial Detainees/ Qualified Immunity

Martinez v. Mathis, 970 F.Supp. 1047 (S.D.Ga. 1997). The defendant jailer disclosed to other inmates that the plaintiff was accused of child molestation; they later assaulted him. The jailer's comments, and statements made to him, showed his subjective knowledge of the risk to the plaintiff ("Martinez is going to get his butt kicked"). These facts make out a constitutional claim.

The jailer is entitled to qualified immunity. He acted within his discretionary authority, since anything he said to other inmates "occurred while he was acting within his authority and pursuant to his duties as a jailer." There is no case in point in which similar conduct has been found unconstitutional, so it "is not clearly established that prison officials violate constitutional laws when they make statements

in the presence of inmates that a particular inmate is 'sick' and 'should have his ass beat.'" (1052)

Publications/Correspondence--Postage and Materials/ Procedural Due Process--Property/Grievances and Complaints about Prison

Allen v. Wood, 970 F.Supp. 824 (E.D.Wash. 1997). The plaintiff was denied the receipt of catalogs, "sexually explicit" materials, postage stamps and an oversized greeting card.

The prohibition on catalogs is upheld under *Turner* based on concerns for storage space, fire hazards, preserving sanitation and limiting contraband. Some curio [sic] catalogs are permitted because of their rehabilitative value, and catalogs from various vendors are made available in common areas.

The prohibition of sexually explicit material is upheld. The defendant Director "avers, based on his research of numerous studies, that inmates exposed to pornography become desensitized to what they are viewing and require more and more graphic material which may ultimately result in acting out sexual fantasies," leading to more consensual and non-consensual homosexual activity, spread of STDs, aggressive and predatory behavior, and disrespect for female staff. There is no blanket prohibition of certain publications; each one is reviewed separately. Inmates have an alternative: they can read publications that are not prohibited. Publications, once admitted to the prison, cannot be controlled and can be read by anyone including sex offenders.

Postage stamps have monetary value and can be bartered, so the prohibition on receiving them from outside is upheld. Prisoners are permitted to buy stamps in the store.

The prohibition on oversize greeting cards is upheld because of storage concerns and because of the opportunity that oversized or padded or laminated or mechanical cards present to hide contraband.

The rejection of the plaintiff's mail does not constitute a Fifth Amendment violation, since there is no showing that the property was taken for public use.

The existence of an appeal process for rejected mail satisfies due process requirements. Prisoners are not constitutionally entitled to a grievance process.

Medical Care/Mootness/ Procedural Due Process--Disciplinary Proceedings/ Injunctive Relief/Habeas Corpus/ Disabled/Hygiene/Exercise and Recreation

West v. McCaughtry, 971 F.Supp. 1272 (E.D.Wis. 1997). The plaintiff's medical care complaint, which sought access to an outside specialist, was moot, since he had been taken to the specialist and had received physical therapy as a result.

The claim that the plaintiff was segregated because the defendants thought he could walk when he couldn't is barred under the Seventh Circuit's rule extending *Heck v. Humphrey* to all prison disciplinary convictions.

The failure to provide "walking assistance" so the plaintiff could return to general population was not atypical and significant under *Sandin*. However, the failure to provide showers and recreation because of his failure to walk stated an Eighth Amendment claim. No ADA claim was pled.

Prison Litigation Reform Act/Judicial Disengagement/ Modification of Judgments

Taylor v. State of Ariz., 972 F.Supp. 1239 (D.Ariz. 1997), *aff'd.* The PLRA's termination provision violates the separation of powers. It is retroactive legislation because it applies to decrees approved before its enactment. It explicitly provides for retroactive application so it is not necessary to resort to the *Landgraf* default rules; *Landgraf*'s comments on prospective relief are distinguished (n. 12). Consent decrees are final judgments. The fact that courts can reopen them does not mean that Congress can subject them to new reopening requirements. PLRA does not codify pre-existing reopening requirements. Finality for appeal and finality for separation of

powers purposes are not different.

Wheeling Bridge II provides for reopening of judgments by retroactive legislation only to the extent that they are based on "public rights common to all." At 1246: "Constitutional rights inhere to the individual and, as such, they are the very antithesis of public rights." The right to limit federal judicial activity is not a public right that the PLRA can act on; the focus of *Wheeling Bridge* is the rights protected by the judgment. The fact that constitutional rights may still be protected under PLRA is not dispositive. At 1246: "The separation of powers is concerned with Congressional encroachment on judicial power, not that such encroachment will lead to a violation of the rights underlying the judgment."

Wheeling Bridge may also be read to create an exception only for injunctions based on statutory, rather than constitutional, rights. (1247 n. 15)

The *Benjamin* district court opinion is distinguished at length. The court notes that PLRA "is precisely the type of legislation that is inimical to separation of powers." Legislatures setting aside judgments is one of the things the separation of powers was designed to avoid.

Absent the PLRA, there is no basis to terminate the consent decree in this case. *Rufo* rather than *Dowell* applies because *Rufo* is a prison case. (The court does not treat these cases as applying to different questions, which is more accurate.) The lack of a continuing constitutional violation does not compel termination.

A modification granted based on notice only to a plaintiffs' lawyer who had been relieved in 1980 was not consistent with due process, and is therefore void. The modification is set aside.

Personal Property/In Forma Pauperis/Prison Litigation Reform Act

Beck v. Symington, 972 F.Supp. 532 (D.Ariz. 1997). A state statute requiring installment payment of court fees by prisoners, similar to the subsequent federal Prison Litigation Reform Act, does not unconstitutionally chill the fundamental right of access to courts; it merely burdens the right "to file a lawsuit free of charge," which does not exist. The statute is upheld under the rational basis test against both court access and equal protection claims, relying on authority upholding the PLRA.

Medical Care/Service of Process

Webber v. Hammack, 973 F.Supp. 116 (N.D.N.Y. 1997). The court grants summary judgment to defendants against the complaint of a prisoner with a knee injury who received a lot of treatment, does not appear to have identified any substantial maltreatment, and aggravated his own problems by engaging in athletic activities during recovery.

The Department of Correctional Services should not have returned a mail summons addressed to "Dr. Hammock"; they should reasonably have inferred that it was for "Dr. Hammack." However, the plaintiff lacked good cause for failing to make service because he failed to do anything about this for seven years.

Procedural Due Process--Disciplinary Proceedings

Glaspie v. Mahonie, 973 F.Supp. 401 (S.D.N.Y. 1997). It was not clearly established as of 1992 that there must be an independent assessment of confidential informants' credibility in disciplinary hearings. Segregated confinement for three weeks pending disposition of disciplinary proceeding did not deprive the plaintiff of a liberty interest under *Sandin*. Under *Briscoe v. Lahue*, a staff member's testimony at a disciplinary hearing is "a legally insufficient predicate for constitutional tort liability." (405) (*Briscoe* is actually about the absolute immunity of witnesses in a judicial proceeding. *Freeman v. Rideout* supports the same conclusion in prison disciplinary proceedings without resort to immunity doctrine.)

This prisoner served 270 days in SHU for an assault based on the eyewitness testimony of a confidential informant despite the

presence of a "go-around sheet" showing he was locked in his cell at the time. An officer testified at the hearing that these sheets are correct only about 50% of the time and that he had heard that other prisoners had disarmed their cell door locks with magnets and other devices.

Procedural Due Process--Disciplinary Proceedings/Habeas Corpus/Damages--Due Process Violations

Wright v. Miller, 973 F.Supp. 390 (S.D.N.Y. 1997). The plaintiffs were convicted of disciplinary offenses, had their convictions administratively reversed, and were convicted again on rehearing. The results of the rehearings cannot be challenged under § 1983 because they have not been overturned in state proceedings or via habeas. However, challenges to their initial convictions are not barred. Even though the result of the second hearings had been the same, the plaintiffs would be entitled to nominal damages and to compensation for mental anguish resulting from the due process violation itself, but not for the penalties imposed.

Segregated confinement of 12 to 15 months requires a factual determination of whether the plaintiffs were subjected to an atypical and significant hardship under *Sandin*.

Law Libraries and Law Books/Standing/Class Actions--Conduct of Litigation

Walters v. Edgar, 973 F.Supp. 793 (N.D.Ill. 1997). The court had found court access violations in several segregation units, but the proceeding was still open when *Lewis v. Casey* was decided. The court interprets *Lewis* as requiring *the named plaintiffs* to prove individual prejudice at trial (797-98). The actual injury requirement is satisfied by allegations and proof that a plaintiff wanted to present a claim with arguable merit, and could not. If one named plaintiff shows this at trial, standing requirements are satisfied. At 798: "A court can then look at injuries suffered by other plaintiffs of the same type in determining the scope of appropriate relief." The court notes (804-05) that those who are most likely to have inadequate access to courts are least likely to come forward as named plaintiffs.

In this case, one of the named plaintiffs' claims failed because the legal question he had wished to present concerning his criminal conviction was held not to provide a basis for habeas corpus and since the state court decision on which he relied had been held not retroactive; the only way he could have benefited would have been to raise the issue on direct appeal, where he was represented by counsel and did not have *Bounds* rights. Also, during some of the period when he said he needed assistance, he was not in segregation.

The second named plaintiff failed to establish that some of his various claims had arguable merit; for other claims, he had counsel and therefore access to court.

Procedural Due Process--Disciplinary Proceedings/Religion/Work Assignments/Habeas Corpus/Deference

Rowold v. McBride, 973 F.Supp. 829 (N.D.Ind. 1997). The plaintiff was disciplined for refusing to work on his "religious day of rest." He is both a Messianic Jew and a Seventh Day Adventist.

There was some evidence that he had refused to work, so his conviction did not deny due process. A disciplinary conviction for being a habitual offender did not constitute double jeopardy by being imposed while the same issues were before the federal court in a habeas proceeding. The Double Jeopardy Clause has no application in prison disciplinary proceedings even if they result in extending the prisoner's release date.

The court incoherently discusses the fact that the plaintiff's loss of good time on an earlier conviction was reversed but was reimposed in a proceeding accusing him of being a habitual offender. The bottom line is indecipherable.

Requiring the plaintiff to work on his Sabbath is upheld under the *Turner* standard. At

837: "If this court were to hold Rowold's right to assert his religious beliefs outweighed the rights of the penal system to maintain order and balance it is quite possible other prisoners would convert to Judaism or the Adventist following to avoid Sabbath work duty."

Under the Anti-Terrorism and Effective Death Penalty Act, a petitioner must show that the challenged conduct was contrary to, or unreasonably applied, clearly established federal law as determined by the Supreme Court, or involved an unreasonable determination of the facts. This rule applies to challenges to administrative as well as judicial action.

Pre-Trial Detainees/Use of Force/Verbal Abuse

Albritten v. Dougherty County, Ga., 973 F.Supp. 1455 (M.D.Ga. 1997). A use of force after arrest but before arraignment is governed by the Fourth Amendment, at least where the force was close in time to the initial arrest, the arresting officer was still present and had custody, the stated purpose of the force was to effect a search incident to arrest, and the apparent purpose of the incarceration was something other than pre-trial detention.

The use of racial epithets by one of the officers could support a conclusion that the use of force was predicated on race-based animus, which would show that the force used was unreasonable.

Procedural Due Process--Disciplinary Proceedings/Good Time

Marino v. Klages, 973 F.Supp. 275 (N.D.N.Y. 1997). Generally, SHU confinement for under a year has not been held atypical and significant under *Sandin*. It is the actual and not the potential penalty that governs. The plaintiff's 300 days in SHU is therefore not actionable. In New York, loss of good time does not deny liberty because disciplinary hearings can only recommend the loss of good times and the Time Allowance Committee, which makes the decision, applies discretion, and therefore there is no liberty interest.

Federal Officials and Prisons/ Programs and Activities/Pre-Trial Detainees

United States v. Sutton, 973 F.Supp. 488 (D.N.J. 1997). The decision whether to place a federal prisoner in the shock incarceration program is to be made by the Bureau of Prisons and not the sentencing court. The court does recommend that the defendant be placed in a prison near his family in New Jersey.

There is controversy whether deplorable conditions of pre-trial detention justify a downward departure under the federal sentencing guidelines. The court concludes that it has authority to do so, but declines to do so. The plaintiff's ten months in jail were largely a result of his own conduct in engaging in plea negotiations and in providing cooperation with the government. (Heads they win, tails you lose.) The jail conditions, while criticized in a court monitor's report, were not shown to be atypical compared to jails in other jurisdictions. At 493:

> Although the Court recognizes that pre-trial detention is not "punishment" within the constitutional meaning of the word, . . . even a regulatory measure, such as pretrial detention, can have deterrent and punitive effects. There can be little doubt that pretrial detention in substandard conditions can have a punitive effect not contemplated by the Guidelines.

Punitive Segregation/Education and Training

Leacock v. DuBois, 974 F.Supp. 60 (D.Mass. 1997). The plaintiff's confinement in disciplinary segregation (a two-year sentence for an injurious assault on another prisoner) did not violate the Eighth Amendment. He has daily exercise and interaction with other prisoners; the ability to earn telephone privileges and in-person visits after 30 days of good behavior; access to mental health care; and a defined term of

confinement. Expert evidence of the potential consequences of isolated confinement does not suffice in the absence of evidence that the plaintiff has suffered such damage.

A state statute limiting "isolation" to 15 days did not apply to the plaintiff's confinement; inmates in isolation were not permitted television, radio, outside contact, or any books other than religious books.

A prohibition on educational materials in disciplinary segregation is not unconstitutional under *Turner* because it is reasonably related to deterring misconduct.

Use of Force/Res Judicata and Collateral Estoppel/Personal Involvement and Supervisory Liability/Medical Care/ Procedural Due Process--Disciplinary Proceedings/Use of Force--Restraints

Mitchell v. Keane, 974 F.Supp. 332 (S.D.N.Y. 1997). The plaintiff's criminal conviction for assault estops him from claiming that a disciplinary charge for assault for the same incident was done from retaliatory motive.

An allegation that an officer twisted his baton in the plaintiff's shackles, inflicting considerable pain, supported an Eighth Amendment claim. The fact that the plaintiff had assaulted an officer earlier that day did not justify this treatment in the absence of any evidence that he was being aggressive or resisting. At 341: "While the Eighth Amendment permits the use of force to subdue a violent prisoner, it does not allow an officer to inflict pain in retaliation for a previous episode of violence." A supervisory official who was present at the time of the incident and did not intervene could also be liable.

Refusing to remove the shackles did not violate the Eighth Amendment in light of the prisoner's earlier conduct.

The failure to x-ray the plaintiff's back did not violate the Eighth Amendment; such a medical decision is not actionable. Nor is the failure to fill out an injury report, which is not medically necessary.

Confinement in involuntary protective custody for three days before a disciplinary hearing was not a liberty deprivation under *Sandin*.

Criminal prosecution and prison discipline for the same conduct do not violate the Double Jeopardy Clause.

Religion--Practices--Diet

Abdullah v. Fard, 974 F.Supp. 1112 (N.D.Ohio 1997). The plaintiff complained that Halal meat was not provided for Muslim prisoners. The prison provided a nutritionally adequate meat alternative. Defendants are entitled to summary judgment.

At 1117: "To be protected by the Constitution, the particular religious ritual must be central or indispensable to the inmate's religious observances and must be a conviction shared by an organized group as opposed to a personal preference." Defendants' policy, which acknowledges that not eating pork is central but says avoiding non-Halal food is not, is not unconstitutional. There is also no substantial burden, since a nutritionally adequate alternative has been provided.

Having concluded that no fundamental right is burdened, the court need not apply the *Turner* analysis. However, the standard is met. Although the defendants submitted no economic analysis, it is "obvious" how burdensome it would be to accommodate "each and every unique request from each sect"; hence the prison's policy of dealing with "faith groups" (e.g., all Muslims) rather than "sects." Defendants' contention that they would be subjected to a "barrage" of requests for special treatment need not be supported by evidence either. Evidence that the defendants had not found an Ohio supplier of Halal meat "demonstrates that no ready source" is available.

The denial of Halal meat even though kosher meals are provided to Jews does not deny equal protection absent a "discriminatory purpose" *and* a sufficient showing under the *Turner* test. Defendants' assertion that the number of Orthodox or Conservative Jewish inmates is small and that there are

local suppliers suffice to satisfy this court. (Note the contradiction between their actions with respect to Jews and their concern about a "barrage" of requests if they accommodated the Muslims.)

Medical Care

Davis v. City of Greenville, Miss., 974 F.Supp. 884 (N.D.Miss. 1997). The plaintiff was assaulted by other inmates and received a puncture wound; he said that he had been threatened, but nonetheless was put back in the same cell with them. They poured caustic solution in his eyes; a jailer looked at him through the tray slot and determined nothing was wrong. Another jailer took him out about three hours later; after another four hours he was taken to the hospital.

The second jailer was not entitled to summary judgment. Either he did nothing to ensure medical care for four hours or he did nothing to ensure that his orders for medical care (if he gave them) were carried out. The assault claim is not at issue on this motion.

Federal Officials and Prisons/Programs and Activities/ Exhaustion of Remedies

Gissendanner v. Menifee, 975 F.Supp. 249 (W.D.N.Y. 1997). The petitioner sought a writ of mandamus requiring the warden of Allenwood to consider him for the Intensive Confinement Center, a shock incarceration program. He did not have a "clear right" under Bureau of Prisons policy statements or the authorizing statute, both of which grant the Bureau discretion, or the due process clause, which does not confer a protected interest in classifications or eligibility for programs. Therefore he was not entitled to mandamus.

The petitioner had also failed to exhaust his administrative remedies. At 251: "A mere conclusory allegation of futility is insufficient to excuse the petitioner from the requirement that he exhaust the remedies available to him through the BOP Administrative Remedy Procedure. . . ."

Protection from Inmate Assault/Exhaustion of Remedies/ Prison Litigation Reform Act

Morgan v. Arizona Dept. of Corrections, 976 F.Supp. 892 (D.Ariz. 1997). The plaintiff alleged that he had been identified by prison officials to other inmates as a child molester, that his requests for protective custody had been refused, and that he had been assaulted. He did not get a timely response to his grievance and abandoned the process because it would provide no "resolution" to the assault. He sued for damages and to be placed in protective custody.

The complaint is dismissed for failure to exhaust administrative remedies. At 895: "When the exhaustion of administrative remedies is required by federal statute, the failure to exhaust is a jurisdictional defect that prevents the district court from hearing the claim." A continuance to exhaust is no longer permitted, although a continuance to amend the complaint may be. Here, none is granted because the plaintiff admits he did not exhaust. The fact that he had not gotten a timely response from the early stages of the process did not excuse him from proceeding with the rest of it; the rules provide that if a time limit passes the prisoner is entitled to proceed to the next step. The case involves a "prison condition" within the meaning of PLRA.

Procedural Due Process--Disciplinary Proceedings/Habeas Corpus

Burnell v. Coughlin, 975 F.Supp. 473 (W.D.N.Y. 1997). Under Second Circuit law, the court cannot determine whether a sentence of 730 days SHU, reduced to 365, is atypical and significant under *Sandin*. A recommendation of a year's loss of good time is atypical and significant. The court notes that good time is provided by statute but does not address the argument that loss of good time is contingent in New York disciplinary proceedings and the ultimate decision by the Time

Allowance Committee is discretionary.

The plaintiff's claim is barred by *Edwards v. Balisok*; his allegation, of a biased and deceitful hearing officer, is exactly the same as in that case. In addition, the court thinks the procedural violations alleged (refusal to take certain testimony, contacting witnesses outside plaintiff's presence, etc.) would also "impl[y] the invalidity of the conviction." The court also states its belief that *Balisok* applies to all disciplinary cases regardless of the sanction imposed. At 477: "The rationale is the same---where an inmate complains about the process and procedure at the hearing that cause him to lose good time, or result in confinement in SHU, his remedy is not an action for damages but an action to 'overturn' the conviction."

Hazardous Conditions and Substances/Personal Involvement and Supervisory Liability/ Statutes of Limitations

Doyle v. Coombe, 976 F.Supp. 183 (W.D.N.Y. 1997). The plaintiff alleged that he was exposed to asbestos during his ordinary duties as a maintenance worker while removing asbestos-containing insulation from pipes. He was also forced to work in areas where asbestos removal was going on and which were marked as such, and complained that his cell was "open to the same air space" as asbestos in the basement.

The court considers qualified immunity *sua sponte* and grants it as to his exposure during his ordinary work activities and in his cell, since in 1990-92 no Supreme Court or Second Circuit case had held that exposure to asbestos or any other substance causing delayed harm was actionable under the Eighth Amendment. Qualified immunity did not bar his claims of being required to enter areas clearly marked as being dangerous. At 188: "While failing to protect inmates from possible exposure to asbestos has [sic] not been clearly established as unlawful prior to 1993, actively forcing an inmate to work under known dangerous conditions certainly was."

An amended complaint naming new parties does not relate back to the filing of the complaint unless, *inter alia*, the party to be added should have known that but for a mistake of identity he or she would have been sued. The failure to identify individual defendants whom the plaintiff knows must be named is not such a "mistake."

Pre-Trial Detainees/Class Actions--Conduct of Litigation/ Prison Litigation Reform Act/ Monitoring/Injunctive Relief--Changed Circumstances/ Negligence, Deliberate Indifference and Intent

Jones v. City and County of San Francisco, 976 F.Supp. 896 (N.D.Cal. 1997). In this jail conditions case, the court dismissed the individual claims of the named plaintiffs and then granted a motion to decertify the class subject to the naming of a new class representative.

In response to defendants' continuing claims of changed conditions, the court directed that the record be closed as of a date certain, "so as to account for recent changes without making summary adjudication impracticable." (903) It deems this action consistent with *Farmer v. Brennan*.

A special master who antedated the Prison Litigation Reform Act was not "appointed under [the PLRA] subsection," and the PLRA did not apply to his appointment or his activities. At 903: "Even if the PLRA governed the appointment of the Special Master in this case, the provision obviously serves to protect parties *excluded* from the Special Master's *ex parte* communications; defendants have no standing to object to the Special Master's conversations with their own employees."

The special master's report was entitled to deference under the "clearly erroneous" standard because the injunctive claims were nonjury claims. The presence of jury claims did not require a different result; those claims could be tried separately.

Under the Eighth Amendment, deliberate indifference must be shown; in a

pre-trial detainee case, "reckless indifference" will also suffice. The Special Master's finding that defendants had actual and constructive knowledge of jail deficiencies, combined with his report from 1990, established deliberate indifference.

Programs and Activities, Recreation and Exercise (907): "[Some] conditions intrinsically cannot have constitutional significance, such as the quantity of programs available to inmates, . . . and the physical condition of the upper and lower exercise yards."

Crowding, Cell Confinement, Length of Stay, Injunctive Relief--Changed Circumstances, Negligence, Deliberate Indifference and Intent (907-08): The jail was at 124 per cent of capacity, resulting in double celling in 41-square-foot cells; inmates were in their cells 16 hours a day and in some cases 23 hours a day or 25 hours at a time on alternate days because of lack of staff to supervise out-of-cell activities. The average tenure was 103 days. "The many harmful consequences of this overcrowding on inmates' health and safety appear obvious, and they include such phenomena as increased violence due to inadequate supervision levels per inmate, a taxing of the physical facilities such that inadequate plumbing and sewage treatment pose health risks, and a depletion of opportunities for time outside of the cell for such activities as recreation and religious services." These conditions amounted to punishment. However, defendants' efforts to move inmates out to relieve overcrowding, which had eliminated double celling, preclude a finding of current deliberate indifference. However (at 916), the risk of recurrence is such that injunctive relief is warranted.

Fire Safety (908-09): "Inmates 'have the right not to be subjected to the unreasonable threat of injury or death by fire and need not wait until actual casualties occur in order to obtain relief from such conditions.'" (Citation omitted). The defendants had eliminated many hazards, but not the absence of fire-rated door assemblies to separate the jail's central core, or the absence of sprinklers in critical areas, or the use of flammable mattresses, or combustible storage, or inadequate staffing for evacuation during one shift, or the deteriorating electrical system. The persistence of serious inadequacies "suggests that defendants' response has been something less than reasonable" under *Farmer*. "In determining whether to find deliberate indifference in this case, the Court cannot restrict its examination to whether defendants made substantial efforts to improve safety, thereby excluding any consideration of whether the improvements have actually left inmates reasonably safe from fire." *Ruiz* is distinguished as an Eighth Amendment case.

Physical Conditions--Structure, Financial Resources, Negligence, Deliberate Indifference and Intent (909-10): The building's structural deficiencies pose a "high seismic risk," and its malfunctioning bar locking system and inadequate staffing enhance the risk by potentially leaving inmates trapped in their cells. The fact that buildings like libraries present similar risks is not dispositive because people don't live in them. The existence of building codes requiring that such buildings be vacated, repaired, or demolished suggests that society does not tolerate such risks. The fact that a retrofit would cost $3 million and defendants have tried to pass a referendum to pay for it does not negate deliberate indifference, since the City "chose the one type of measure, a referendum, that required approval of two-thirds of the voters," unlike a general obligation bond or certificate of participation. Also, it had allocated the money but diverted it to other projects.

Plumbing (910): The antiquated water supply system, sanitary fixtures in disrepair, deteriorated asbestos insulation, absence of vacuum breakers, and sewage treatment deficiencies, as well as other health hazards, violates the Fourteenth

Amendment. Plaintiffs need not produce evidence that these conditions have resulted in disease.

Food, Changed Circumstances (910-11): Repeated food service sanitation violations do not constitute deliberate indifference because of defendants' recent improvements, including implementing a regular extermination program and requirement of immediate disposal of unused foods, and allocating money for physical improvements, though none of it has been spent.

Protection from Inmate Assault (911-13): The court denies cross-motions for summary judgment. There are identified hazards: "a jail designed to house petty thieves and drunks will not accommodate maximum-security pretrial felons with histories of violence, escape and gang activity. . . . The excessive length of the tiers and their numerous sight obstructions inhibit the detection of malfeasance." Staffing and surveillance are inadequate for supervision. Population reductions have not had much effect on violence rates. "It is not self-evident that the occurrence of one fight every three days--in a facility housing 500 high-security pre-trial felons--subjects inmates to an unconstitutionally high risk of violence." (At 911 n. 14: The relevant figure is the rate of violence per capita, not the number of incidents; that rate was .19 or .20 per inmate-year.) The court needs more evidence to determine what risk is acceptable.

Heating and Ventilation (912-13): The air ducts seem never to have been cleaned, asbestos is on steam pipes and elsewhere in the building, and there is no air flow in some areas. There are dozens of broken radiators and heaters, inadequate thermostats, hundred of broken windows which the maintenance staff lacks the resources to replace, etc. Defendants have made efforts to correct the problems but the court cannot grant summary judgment on this record.

Medical Care, Mental Health Care (913-14): No violation is found despite deteriorated physical facilities based on improvements made by defendants.

Visiting (913): No violation found.

Attorney Consultation (913-14): The lack of privacy in attorney-client consultations raises a Fourteenth and Sixth Amendment issue; defendants' claims concerning a video conferencing system are insufficiently detailed to support summary judgment. The lack of a showing of harm is not dispositive under *Lewis v. Casey*, which permits relief when harm is "imminent." That is likely where inmates might be hesitant to disclose important information to their attorneys. In any case, Sixth Amendment analysis is not subject to *Lewis*.

Law Libraries and Law Books (914): The law library seems adequate for everyone but non-English speakers, but plaintiffs identified no one who had been denied court access within the meaning of *Lewis v. Casey*.

Religion--Services Within Institution (914-15): Limitations on congregate worship are upheld under the *Turner* test because they result from limited space in the jail and plaintiffs put forward no "ready alternative."

Noise (915): Noise levels typically ranging from 73 to 96 decibels violate the Fourteenth Amendment. Defendants have given deputies control over TV volume and put more deputies on the tiers. These efforts are cosmetic. Plaintiffs are granted summary judgment.

Lighting (915): "Where lighting appears so poor as to be inadequate for reading and to cause eyestrain and fatigue, the conditions appear unconstitutional even under the Eighth Amendment." Lighting generally less than 5 foot-candles is unconstitutional.

Recreation and Exercise (916): Improvements affording about 6 hours a week of exercise meet constitutional standards despite inadequate clothing for cold weather exercise.

Inmate Legal Assistance

Tineo v. United States, 977 F.Supp. 245 (S.D.N.Y. 1996). The absence of "trained

paralegals" in federal prison law libraries does not provide cause for having failed to raise habeas corpus claims in his first petition. At 254: "A prison is not required to provide assistance from 'persons with legal training,' but may do so as an alternative to an adequate law library."

Religion--Practices

Combs v. Corrections Corp. of America, 977 F.Supp. 799 (W.D.La. 1997). The American Indian Religious Freedom Act "is a law without teeth. It creates neither a cause of action nor any judicially enforceable individual rights." The Indian Civil Rights Act, which requires Native American tribal governments to protect certain constitutional rights, has no bearing on a civil rights suit against prison officials.

Under the *Turner/O'Lone* standard, restricting the practice of Native American religion to persons of Native American ancestry is unconstitutional. It "offends the fundamental constitutional right to practice religion of one's choice. The policy is akin to a requirement that practicing Catholics prove an Italian ancestry, or that Muslims trace their roots to Mohammed. Under the Constitution, the freedom to believe, or not to believe, in a religious faith is reserved not to a select class of citizens, but to all." Defendants said that the penological interest behind their policy was to prevent a prison gang, but there are other ways to do this--for example, limiting the size of religious gatherings.

The policy requiring Native American religious objects to be secured in the chaplain's office is "provisionally acceptable, but incomplete." The court directs that plaintiffs be allowed to practice the Native American religion at the same frequency as before the challenged policies were introduced, and that they be allowed to use sacred items not described in the policy when these do not breach prison security. However, restrictions on the construction of a sweat lodge are upheld.

--Effect of Judgments and Pending Litigation

Imprisoned Citizens Union v. Shapp, 977 F.Supp. 335 (E.D.Pa. 1996). An order certifying the plaintiff class as including prisoners at six named prisons limited the scope of the subsequent consent judgment to those prisons, notwithstanding general language indicating that the defendants would comply with their own regulations and try to ensure compliance by "all institutional staff."

Only institution- or system-wide patterns of noncompliance may be brought before the court because the consent decree says so; it explicitly disavows creating a private cause of action or a private contempt claim. A provision for "appropriate legal proceedings" to enforce the decree does not authorize *pro se* filings. At 341: ". . . [I]t is clear that the only appropriate legal proceeding in a class action is one initiated by class counsel." (Here, class counsel had notified the court that he would not adopt most of the *pro se* filings before the court.)

Prisoners must exhaust the prison grievance procedures before moving to enforce the consent judgment because the consent judgment says so.

The Prison Litigation Reform Act is not addressed in this opinion.

False Imprisonment/Federal Officials and Prisons/Exhaustion of Remedies

Puccini v. United States, 978 F.Supp. 760 (N.D.Ill. 1997). The plaintiff, while serving a federal sentence, was arrested on a state charge, went into state custody, and was denied bail because of the federal detainer. She was granted a writ of habeas corpus on the ground that she should have been returned to federal custody and her time would have been credited against her state sentence.

The individual defendants are entitled to qualified immunity on the Eighth Amendment claim because there is no indication they were deliberately indifferent to her rights. A more thorough investigation would not have helped; defendants went "by the book." The habeas court

concluded that the "book" was wrong, but that conclusion was not self-evident. Her due process claim also lacked merit. Her successful habeas petition satisfied due process.

The court notes that the plaintiff did not exhaust her administrative remedies formally, and notes that to do so would have been futile.

The Federal Tort Claims Act claim fails because the FTCA excepts claims arising out of false imprisonment except when they relate to the conduct of "investigative or law enforcement officers of the United States Government," and the persons responsible here were "acting as prison administrators, not investigative or law enforcement officers."

Procedural Due Process--Disciplinary Proceedings/Federal Officials and Prisons

Thompson v. Hawk, 978 F.Supp. 1421 (D.Kan. 1997). The petitioner was convicted of possession of a weapon found in a light fixture in his cell. The federal prisons' "constructive possession" rule, which makes a prisoner responsible for anything found in his cell unless exculpatory evidence makes application of the rule unreliable, is not unconstitutional. The court relies on *Hamilton v. O'Leary*, which holds that a 25% probability of guilt is sufficient to convict. This petitioner was the sole occupant of his cell, and the "open door" policy does not undermine the application of the rule. At 1424: "Application of the constructive possession rule is not defeated by a claim that prison officials failed to search a cell for contraband prior to assigning prisoners to the cell."

At 1424: "The denial of documentary evidence in a prison disciplinary hearing can give rise to a due process claim. . . It has been recognized that *Brady v. Maryland*, . . . requires the disclosure of material exculpatory evidence in prison disciplinary proceedings." The evidence sought, records of the theft of the knife and of inspections of light fixtures, would not have been sufficiently probative that their withholding is a due process denial on these facts.

Religion--Practices--Diet

Washington v. Garcia, 977 F.Supp. 1067 (S.D.Cal. 1997). The plaintiff alleged that he was denied a Muslim diet in segregation during Ramadan. The defendants are not entitled to summary judgment. They argued that the policy of regular meals in segregation was constitutional, but failed to establish that that was indeed the policy or that it precluded religious meals during Ramadan, or that it was logically connected to valid penological interests. The plaintiff had alternative means of religious exercise, like fasting and praying, but the court is not convinced this meets the *Turner* standard. At 1073: "If it were, the factor would have no meaning because an inmate would always be able to pray privately." The plaintiff admitted that he "gassed" (threw feces and urine on) various staff members. However, the defendants did not show that they were justified in not letting him save his meals until non-daylight hours. Defendants did not show that they could not accommodate his request; in fact, his Prisoner Appeal was ultimately granted. The latter point suggests that there was a ready alternative (giving him the meal).

The plaintiff's right to religious meals may have been clearly established; defendants are not entitled to summary judgment on qualified immunity.

Publications

Miniken v. Walter, 978 F.Supp. 1356 (E.D.Wash. 1997). Defendants treated *Prison Legal News* as "bulk mail" and destroyed it without notice to publisher or subscriber. The publication did not even fit the prison's definition of "bulk mail," though they changed it twice after the lawsuit was filed.

Jones v. North Carolina Prisoners' Labor Union is not controlling because this case does not involve "bulk mail" as *Jones* used the term; this mail was paid for and specifically addressed to the prisoner.

At 1361: "The court is satisfied that the Defendants have

set forth a valid rational connection between the ban on mass mailing types of truly bulk mail, such as unsolicited catalogs addressed to 'current occupant'[,] and a legitimate neutral purpose, but as previously noted, that is not the issue." The question is whether such a policy is properly applied to subscriptions from nonprofit organizations. The original policy prohibited mail "without endorsement (i.e., address correction requested. . .)"; PLN bears that endorsement; so after suit was filed, defendants changed the policy twice to permit only mail bearing the endorsement "return postage guaranteed," then to include mail marked as "non-profit" or "bulk mail." The court gives no credibility to defendants' explanation of the policy and its changes.

Under *Turner*, no legitimate penological interest has been provided for excluding publications like *Prison Legal News*. The claim that such mail often lacks a complete address is answered by the fact that a separate rule excludes mail that lacks a complete address. The most recent change in the rule discriminates against nonprofit publications. There is no alternative for the plaintiff, since the entire nonprofit operation is centered on mailing the publication third class as an economic matter and subscribers can't force the publisher to send the publication by more expensive means. There is no evidence that delivering the publication would have more impact on prison personnel and resources than delivery of first class mail. Defendants have ready alternatives to exclude publications for other reasons and to limit the number or volume of publications received or possessed.

The failure to notify either the recipient or the publisher of the denial of the publication denied due process. The court does not explicitly say that *both* must be notified. The court gives weight to the statement in *Thornburgh v. Abbott* acknowledging the presence of procedural protections.

The defendants are not entitled to qualified immunity. At 1364: ". . . [N]o reasonable prison official could have believed that an absolute prohibition of a paid-for subscription, without any reasonable connection to a legitimate, neutral prison policy, did not violate a prisoner's First Amendment rights."

District Court Non-Prison Cases

Use of Force/Judicial and Prosecutorial Immunity

Martin v. Henderson, 127 F.3d 720 (8th Cir. 1997). A police officer who used force on the plaintiff in court pursuant to a judge's order to remove her was entitled to absolute immunity from her claim that he used excessive force.

Disabled/Standing

Jairath v. Dyer, 972 F.Supp. 1461 (N.D.Ga. 1997). At 1467: money damages are not available under the ADA, so a plaintiff who cannot benefit from an injunction lacks standing to challenge alleged violations of the ADA.

Federal Rules Decisions

Class Actions--Certification of Classes

Death Row Prisoners of Pennsylvania v. Ridge, 169 F.R.D. 618 (E.D.Pa. 1996). The court certifies a class of death row prisoners who have not yet filed federal habeas petitions and who sought an injunction to prevent Pennsylvania from claiming to be an "opt-in" state under federal law with a six-month statute of limitations on filing for habeas relief. (The Supreme Court has subsequently held that this question is not justiciable under Article III. *Calderon v. Ashmus*, 118 S.Ct. 1694 (1998).)

Numerosity should not be rigidly applied when injunctive relief is sought, since the defendant will not be prejudiced by class certification. There were 201 class members and 20-25 more are added each year. The class size, its fluidity, the need for speedy resolution of the issue, and the illiteracy, isolation, and

mental illness of some of the class members support certification.

Class Actions--Certification of Classes

Hill v. Butterworth, 170 F.R.D. 509 (N.D.Fla. 1997). The court certifies a class of death row inmates who challenge Florida's claim to be an "opt-in" state under federal law with a six-month statute of limitations on filing for habeas relief. Numerosity is generally not satisfied by fewer than 21 plaintiffs, but 40 is generally adequate. Here, 31 suffices. Other factors, including the ease of identifying class members, are relevant. The presence of an unknown number of future class members bolsters the claim of numerosity rather than defeating it. At 514: "The proper focus is not on numbers alone, but on whether joinder of all members is practicable in view of the numerosity of the class and all other relevant factors." (Citation omitted)

The court finds the Florida Office of Capital Collateral Representative competent to act as class counsel despite a state statute limiting their involvement in civil litigation, which the state Supreme Court refused to apply, and despite the office's previous assertions that it lacked staffing and funding to handle its existing obligations. The court rejects the claim that there is a conflict of interest because the office is seeking additional funding for itself.

The court rejects the lack of necessity argument for class certification. Injunctive relief which benefits non-parties and class-wide injunctive relief may be appropriate in individual actions, but that does not preclude certification where the requirements of Rule 23 are met. Essentially, defendants are making a "superiority" analysis appropriate for Rule 23(b)(3), and plaintiffs seek certification under Rule 23(b)(2).

Federal Officials and Prisons/ Service of Process

Hurlburt v. Zaunbrecher, 169 F.R.D. 258 (N.D.N.Y. 1996). Incarcerated *pro se* IFP prisoners are entitled to rely on the Marshals Service for service of process. When service is defective but the defendant has actual notice of the action and is not prejudiced, some courts have implicitly or explicitly deemed the service effective, and others have ordered the Marshals Service to do it right or directed the plaintiff so to request.

The Second Circuit requires the latter approach, which the court terms "the ultimate in exalting form over substance." (259) Here, where the defendant refused to acknowledge mail service, the court directs the Marshals to serve the defendant personally, but orders that if the defendant continues to insist on this, the full cost will be imposed on her personally, and reimbursement by any third party will be prohibited.

Pleading/Parties Defendant/ Statutes of Limitations

Henderson v. Hackel, 170 F.R.D. 430 (E.D.Mich. 1997). The plaintiff, who had been assaulted by other prisoners, sought to amend his complaint to add the identities of John Doe defendants. The claims against the new defendants relate back to the filing of the original complaint; the existing defendant would have had to investigate the allegations when initially served, and the court cannot believe that he would not have discussed the matter with the other jail personnel involved, and therefore they must have had notice and knew or should have known that they would have been named but for the plaintiff's ignorance of their identity.

Access to Courts--Punishment and Retaliation/Access to Courts--Confiscation and Destruction of Legal Materials

Riley v. Coutu, 172 F.R.D. 224 (E.D.Mich. 1997). The plaintiff's verified complaint and answer state that the defendant confiscated and destroyed some of his legal materials in retaliation for his exercise of his right to court access, resulting in actual injury. The defendant's motion for summary judgment was therefore denied. After *Lewis v. Casey*, the defendant obtained leave to file a motion based on

changes in the law. However, in the Sixth Circuit, *Lewis* did not change the law. Nor is there any change of law with respect to the plaintiff's retaliation claim. A due process "shocks the conscience" analysis does not apply where the plaintiff asserts retaliation for the exercise of an enumerated constitutional right.

Class Actions--Settlement of Actions/Attorneys' Fees and Costs

In re Southern Ohio Correctional Facility, 173 F.R.D. 205 (S.D.Ohio 1997). The parties jointly moved for approval of a settlement in a class action arising from a 1993 riot and subsequent lockdown at the Lucasville prison, alleging failure to protect inmates during the riot, excessive force and other misconduct by staff during the riot, and a retaliatory lockdown after the riot. The class had been certified under Rule 23(b)(2) despite the presence of damage claims. Counsel and consultant Steve Martin had negotiated an end to the lockdown, the restoration of many services, the revision of the classification system, a special disciplinary procedure for riot-related charges, etc.

The settlement provides terms affecting "quality of life" issues including single-celling maximum security inmates, modifying the classification system, and other policy and practice changes, plus a $4.1 million settlement fund for compensation of those persons, or their estates, if the prisoner was murdered during the riot, physically injured during the riot, lost property during or as a result of the riot, or suffered other serious riot-related injury and the settlement's other provisions are seriously inadequate for that person.

Notice was mailed to all prisoners who had been at the prison at the pertinent time and was posted in all cellblocks; notice and the settlement itself were placed in every prison library; class counsel visited class members at seven prisons.

At 211: "The law generally favors the settlement of complex class actions." The court must preliminarily approve the settlement, notice must be given, and after a hearing the court must determine whether the settlement is fair, reasonable and adequate and consistent with the public interest.

The court approves the settlement. The "quality of life" provisions are better than the law would provide:

Crowding (212-13): Double celling is not unconstitutional (*Rhodes v. Chapman* came from this prison), but the settlement requires single celling.

Classification, Transfers (213): There is no constitutional right to a particular classification or to be housed at a particular prison, but this settlement gives prisoners access to their classification documentation so they can know how to improve their classification and get transferred out of the prison.

Cell Confinement (213): It would be difficult to prevail at trial on terms such as the settlement's provisions for 40 hours a week out of cell time.

Procedural Due Process--Disciplinary Proceedings (213): *Sandin* limited the due process rights of inmates facing lockdown status, but the settlement institutionalizes disciplinary procedures.

The settlement fund is also the largest such fund established in a case of this nature. Litigating this case would result in substantial delay and expense. Experienced trial counsel recommends the settlement. Only 25 out of 3000 class members objected, and the court is not impressed by their objections. The settlement is in the public interest because it addresses some of the causes of the riot and avoids costly litigation.

Attorneys' fees are awarded on the basis that this is a "common fund" case, and not under § 1988 (permitting the court to avoid dealing with the Prison Litigation Reform Act, which is not mentioned in this opinion). However, the court uses the lodestar method rather than the more common percentage of the recovery method, though it doesn't explain the calculations, and notes that the result represents 34% of the settlement fund.

Criminal Proceedings/Prison Records/Discovery

United States v. Storey, 173 F.R.D. 290 (D.Kan. 1997). A prisoner charged with conspiracy was to be provided, per prior order, with any documents from the Bureau of Prisons' files on the Aryan Brotherhood at Leavenworth that would establish that he was not a member of it by virtue of his not being named in them, but the court allowed the government to comply simply by declaring that its files do not reflect his involvement. The defendant objected, stating that he is entitled to know how many documents there are, how many persons are identified as AB members in them, how many times each confirmed member is mentioned, and the general nature of the information in the documents. The court directs provision of the number of documents, whether they contain any information about the defendant, and how many AB members are identified in the documents. Another opinion, 173 F.R.D. 292 (D.Kan. 1997): the government provided a summary of information forming the basis of its belief that two other prisoners with whom the defendant ate meals were AB members; they didn't have to produce names of informants and other suspected gang members.

Procedural Due Process--Disciplinary Proceedings/Class Actions--Certification of Classes/ Habeas Corpus

Umar v. Johnson, 173 F.R.D. 494 (N.D.Ill. 1997). The plaintiff challenged a practice at Stateville of denying prisoners the right to call witnesses at disciplinary hearings by having an investigator interview requested witnesses separately and provide a summary of their testimony.

The court previously certified a class of prisoners who have had or will have pending disciplinary hearings and whose requested witnesses are denied as a result of defendants' policy, and who had or will have the potential loss of good time credits at stake.

Heck bars the plaintiff's challenge to the result of his hearing, but his narrower challenge to the defendants' procedures is not barred because it would not *necessarily* imply the invalidity of the loss of good time. *Edwards v. Balisok* modifies the law as previously stated by the Seventh Circuit.

A request for prospective injunctive relief is not barred by *Heck* because it does not imply the invalidity of an earlier loss of good time.

The plaintiff's individual claim, as *de facto* amended in motion papers after discovery, is no longer representative of the class's claim, so he cannot represent the class. The class need not be decertified. Cases like *Geraghty* "teach that once a class has been certified it acquires an existence separate and apart from that of the individual named plaintiff, so that the failure of his or her individual claim does not impair the class' entitlement to relief." The appropriate procedure is to substitute a new named plaintiff.

The named plaintiff's claim has no merit because he did not request one witness until he appeared at the hearing. Another of his witnesses had previously testified at his own hearing and the Adjustment Committee considered that testimony, which the plaintiff had no right to be present for; use of this prior testimony was not an abuse of the discretion conferred by *Wolff v. McDonnell*.

Use of Force/Discovery

Cox v. McClellan, 174 F.R.D. 32 (W.D.N.Y. 1997). In a use of force case, the prisoner plaintiff was entitled to production of records of the prior arrest for assault of one of the officers. At 34: "Prior civilian complaints made against the defendants and incidents of excessive force by individual defendants are clearly discoverable in § 1983 actions. . . . Moreover, evidence which demonstrates that Heuser's supervisors knew about his prior assault may be relevant or lead to relevant evidence to prove plaintiff's claims against Heuser's supervisors." The fact that the charge was adjourned in contemplation of dismissal does not matter. The conduct, and not the disposition of the charge, is what is relevant. The holding

that the evidence is discoverable does not establish its admissibility, and the defendant may move *in limine* to exclude it.

Federal Rules Decisions Non-Prison Cases

Class Actions--Certification of Classes/Class Actions--Conduct of Litigation

Wyatt by and through Rawlins v. Poundstone, 169 F.R.D. 155 (M.D.Ala. 1995). Here is another example of an attack on a class action and on class counsel similar to *R.C. by Alabama Disabilities Advocacy Program v. Nachman*, 969 F.Supp. 682 (M.D.Ala. 1997)

An action that had been treated as a class action for 25 years would continue to be so treated, even if no one can find a formal order certifying the class.

At 160: "Where the court is confronted with named plaintiffs who no longer have live interests, the appropriate course is to substitute new named class members."

The court declines to decertify because of differing opinions among class members, noting that some of the conflict arises from misinformation disseminated by the defendants. (They sent a letter to guardians of mentally retarded residents stating that plaintiffs' counsel wanted to close the facilities down. They neglected to add what plaintiffs wanted to replace them with.) In any case the remedy is to provide accurate information and reevaluate any expression of conflict. At 161: ". . . [T]he question should not be whether there is a 100% concurrence of interests within the class, but rather whether the class as a whole and as to some primary issues being litigated is being adequately represented." Here, the position taken by some class members is being adequately articulated by *defendants*, resulting in adequate representation. If necessary, subclasses can be certified, and class members can intervene for the purpose of representing a subclass.

The defendants argued that class counsel had not been adequate representatives because they examined clients' records without first obtaining their guardians' permission. However, the court has upheld their right to do so. Counsel was not negligent in failing to post notices of the status of the action; they depend on defendants' cooperation for this. Defendants argued that plaintiffs had become "the *dominus litus*," which the court rejects.

The class should be certified under Rule 23(b)(2), not Rule 23(b)(3) as defendants advocate.

At 167: ". . . [A] structure should be established in which plaintiffs' counsel could have regular and adequate access to the plaintiff class." Also, there should be a procedure for providing immediate notice, followed by regular and adequate notice, of the issues in and status of the litigation, to the plaintiff class and their guardians, caretakers, next of kin and attorneys.

Discovery

Morrissey v. City of New York, 171 F.R.D. 85 (S.D.N.Y. 1997). The plaintiff police officer was shot in the foot in a scuffle with another police officer, who was a "cooperator" in the 30th Precinct corruption investigation.

Complaints to the Civilian Complaint Review Board and disciplinary charges against the defendant officer are relevant, whether substantiated or not. Though they may not be admissible, they are reasonably calculated to lead to the discovery of admissible evidence.

Information on wrongdoing by other "cooperators" is relevant to plaintiff's allegation that defendants had a policy or custom of permitting dangerous and violent individuals to continue carrying weapons and acting as police officers without adequate supervision.

The law of privilege in police misconduct cases "is extremely muddled and confused" (89), and Judge Motley undertakes to sort it out. In the Second Circuit, there is both a federal "law enforcement privilege" which protects investigations, and a broader "official information privilege." The privacy of police officers generally is not a concern

of the law enforcement privilege. The law enforcement privilege may be invoked without an ongoing investigation if the ability to conduct future investigations would be seriously impaired by disclosure. The names of unindicted officers and civilians may not be redacted under this privilege. Status reports in which action is contemplated against particular officers are not protected because the investigations are all concluded, and there is no showing that future investigations will be jeopardized by disclosure.

Information on how recording devices are attached to informants is not discoverable because plaintiffs showed no need for it.

The official information privilege addresses "the state's general concern in protecting police personnel files and investigative reports from 'fishing expeditions.'" (92) However, there must be a "substantial threshold showing" of specific harm likely to result from disclosure in order to invoke the privilege, and *after* such showing is made, the factors set out in *King v. Conde* govern the decision whether disclosure is required. Here, defendants have made a threshold showing with respect to the legitimate privacy interests of unindicted police officers and civilians in avoiding association with a highly publicized corruption investigation. They have failed to do so with respect to the status reports on officers subject to investigation. At 92: [block indent]Numerous court in this District and elsewhere have expressed skepticism about the assertion by police departments that disclosure will result in the chilling of police candor. . . . It is extremely likely that police candor will at all be affected by disclosure of this report because police officials do not have § 1983 cases in mind when drafting reports of this kind.

The identities of unindicted persons are barely relevant and need not be disclosed; it is cooperators who are at issue.

Plaintiff need not be provided with his own pre-employment file to prove wrongdoing by defendants, and defendants have an interest in preserving their ability to perform background checks. The officer defendant's pre-employment file is highly relevant and should be produced.

All documentation to be produced is subject to an order of confidentiality (protective order) forbidding disclosure and use of the information in other litigation.

Discovery

Collins v. Mullins, 170 F.R.D. 132 (W.D.Va. 1996). Witness statements collected by the Sheriff's Department concerning an alleged use of force by a deputy are not protected by the work product doctrine. The court rejects the argument that they are prepared in anticipation of litigation. To be protected, they must have been prepared *because* of the prospect of litigation, and these statements were collected consistently with the normal practice of the Sheriff's Department in handling civilian complaints.

The Sheriff in any case cannot assert a work product privilege because he is about to be a non-party, the court having found no basis for a claim against him.

Discovery

Wiggins v. Burge, 173 F.R.D. 226 (N.D.Ill. 1997). The 13-year-old plaintiff alleged that he was tortured by the Chicago police. The case settled on the eve of trial. During discovery, the plaintiff obtained investigative files concerning his and ten other alleged police torture cases, along with other internal police reports, subject to an agreed protective order in another case. The plaintiff then moved to strike the confidential designation of these documents; various intervenors supported the motion; the Fraternal Order of Police intervened to oppose it.

At 228: "Generally, 'pretrial discovery must take place in public unless compelling reasons exist for denying the public access to the proceeding.'" (Citation omitted) The parties' agreement to keep discovery confidential does not obviate the need to show good cause for issuance of a protective order. The determination of good cause is

within the discretion of the court.

Good cause for nondisclosure is not shown here. Allegations of police torture are of significant public interest. Privacy interests are diminished when the party seeking protection is a public person subject to legitimate public scrutiny. The court does not believe that this kind of disclosure makes much difference to officers when they file their reports. At 229: "Before determining that there is a chilling effect, the court should have some empirical evidence that police officers conceal or distort statements in their internal reports." Defendants produced none. The fact that the allegations may be false does not support nondisclosure. The public is sophisticated enough to understand that allegations are not proof.

Class Actions--Certification of Classes

Caroline C. by Carter v. Johnson, 174 F.R.D. 452 (D.Neb. 1996). The numerosity requirement is generally met by a class exceeding 40 members. The financial resources of class members, their ability to institute individual suits, and requests for injunctive relief that would benefit future class members are factors affecting certification. These plaintiffs, who are mentally ill and lack knowledge and sophistication, are in a poor position to seek legal redress individually.

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NPP Litigation Docket Highlights for 1998

Young v. Harper (Oklahoma): The United States Supreme Court appointed the NPP to represent the prisoner. The Court ruled unanimously in June 1997 that the prisoner had been denied due process when he was removed from pre-parole without a hearing.

Carty v. Farrelly (Virgin Islands): The NPP had challenged seriously inadequate medical and mental health care, resulting in a settlement in which the defendants agreed to expanded medical services, including testing and treatment for tuberculosis, and a separate program for mentally ill prisoners. In 1997 the district court found defendants in contempt for failing to obey the consent decree requiring comprehensive improvements in prison conditions.

Shumate v. Wilson (California): In 1994 the NPP had filed suit on behalf of the approximately 5,500 women at the Central California Women's Facility and the California Institution for Women. The women were receiving systematically inadequate treatment for a number of chronic diseases, including HIV/AIDS, cancer, heart disease, tuberculosis, sickle cell anemia, as well as inadequate gynecological care. In December 1997, the district court approved a settlement agreement providing for comprehensive improvements in the medical care for the women. The plaintiffs have continued to monitor, and in December 1998 the Assessors appointed under the settlement agreed with plaintiffs that the two facilities are not yet in full compliance with the settlement.

Casey v. Lewis (Arizona): The NPP had challenged systematically inadequate mental health care in Arizona prisons. Many mentally ill prisoners never received treatment, or received clearly inadequate treatment, because of a lack of staff. Seriously mentally ill male prisoners were placed in segregated confinement without treatment for long periods of time, while there was essentially no treatment at all for mentally ill women. The district court found that the mental health deficiencies constituted cruel and unusual punishment in violation of the Eighth Amendment and that the failure to treat women was a violation of their equal protection rights. The court ordered the appointment of a special master

to help the defendants implement a constitutional system. After the order, the state legislature passed a statute designed to make it impossible for the special master to continue her work. The Ninth Circuit Court of Appeals held the statute unconstitutional. The Supreme Court refused to grant the state's petition for a writ of certiorari.

Onishea v. Herring (Alabama): Alabama is one of three states that test all incoming prisoners for HIV, and completely segregate all prisoners who test positive. The segregated prisoners are denied access to general population programs otherwise available to prisoners, such as work release and education and vocational classes. The Eleventh Circuit Court of Appeals reversed a decision from the district court upholding the exclusion of HIV-positive prisoners from all prison programs. The court of appeals also ordered that the judge who had twice ruled against the plaintiffs be removed from the case before the next trial. The Eleventh Circuit granted rehearing en banc. The full court held arguments in October 1998, we await a decision.

Craig v. Eberly (Colorado): This case challenges the provision of the PLRA that prohibits prisoners from bringing litigation regarding mental or emotional injuries in the absence of physical injury. The district court upheld the constitutionality of the provision, and held that it applied to a lawsuit already pending when PLRA was enacted. The plaintiffs appealed to the Tenth Circuit, and the NPP joined the case to provide counsel on appeal. On December 21, 1998, in a published decision, the Tenth Circuit Court of Appeals unanimously reversed, holding that the physical injury requirement does not apply to cases already in court at the time PLRA was enacted.

Amos v. Maryland Dept. of Public Safety & Correctional Services (Maryland): NPP represents severely physically disabled prisoners in their damages action against the State of Maryland for its failure to accommodate them in the design and operations of a prison built after the enactment of the Rehabilitation Act. In 1997, the Fourth Circuit Court of Appeals upheld the district court's dismissal of plaintiffs' case. On June 22, 1998, the Supreme Court granted plaintiffs' petition for certiorari and reversed the Fourth Circuit's decision in light of *Pennsylvania Dep't. of Correction v. Yeskey*, in which it held that the Americans with Disabilities Act applies to state prisoners. Following remand, the Fourth Circuit ordered briefing on whether Congress had exceeded its authority in enacting the statute. Plaintiffs presented oral argument in December, 1998.

Hadix v. Johnson (Michigan): In 1996 the defendants filed a PLRA motion to terminate a consent decree requiring adequate medical and mental health care, and to stay all relief under the PLRA automatic stay provision. The district court held the automatic stay provision of PLRA unconstitutional. The defendants appealed that decision to the Sixth Circuit. In May 1998, the Sixth Circuit issued a decision construing the automatic stay provision to be ineffective in changing the ordinary standards by which federal courts are to grant or deny stays, and therefore constitutional. Further, the court said that if the provision had affected the standard for granting or denying stays, it would have been held unconstitutional. This decision, which in large part neutralizes the provision of the PLRA, has become the leading decision on this issue.

Cody v. Hillard (South Dakota): This case involved a consent decree designed to assure medical and mental health care, physical plant sanitation, and legal access at the South Dakota State Penitentiary. In 1996, the defendants filed a motion to dismiss, which the district court granted in April 1997. In March 1998 the court of appeals unanimously reversed and remanded in a published decision. After remand, the district judge

transferred the case to a new judge. The parties have extensively rebriefed defendants' motion to dismiss. An evidentiary hearing is scheduled for March 1999.

Prison News

NPP endorsed **Senator Paul Wellstone's Mental Health Juvenile Justice Act** at a press conference held in February to introduce his new legislation. It authorizes badly needed improvements in the treatment of emotionally disturbed children enmeshed in our criminal justice system and creates a narrow but important exception to the Prison Litigation Reform Act.

It is estimated that 20 percent of incarcerated juveniles suffer from a diagnosable psychiatric disorder. Too often, these children are held in clinically inappropriate settings where they receive substandard or non-existent medical care. In addition, these children are routinely abused or neglected by inexperienced and ill-equipped correctional staff. Lawsuits brought by NPP and other public interest groups to improve conditions in these institutions have been hampered by passage of the 1996 PLRA.

Senator Wellstone's bill addresses these problems on all fronts. For example, it improves training that will help correctional staff more promptly identify juvenile prisoners suffering from emotional disturbance or substance abuse, and it funds more effective intervention and diversion programs that can provide mental health services and reduce recidivism. It also bolsters efforts to educate prosecutors, judges and defense attorneys about mental illness.

NPP is especially pleased that the bill limits the scope of the Prison Litigation Reform Act in targeted cases. The PLRA, intended to reduce frivolous lawsuits by prisoners, has gone too far in depriving federal judges of the tools they need to enforce the Constitution in prisons and jails. As a result, the Act has had a disastrous impact on the conditions in which juvenile and mentally ill prisoners are housed. Senator Wellstone's bill will simply permit federal judges to enforce the constitutional guarantee against cruel and unusual punishment in limited circumstances involving these especially vulnerable inmates.

Amnesty International launched its year long campaign against human rights abuses in the United States with the release of its report, *United States of America: Rights for All*, in October. The report criticizes America's refusal to ratify significant United Nations' human rights conventions and exposes U.S. failure to adhere to current international standards. The report highlights issues on police abuse of power, brutality and violence in prisons and jails, and the immoral expansion of the death penalty. Amnesty International also released, in November, *Betraying the Young: Human Rights Violations Against Children in the US Justice System* as part of their campaign. This report exposes the horrors of conditions of confinement for detained youth and the unjust transfer of prosecution of children to adult criminal court. Amnesty plans to release their final report in March which will focus on women in prison.

Prisoners with HIV-Infection: A Global Perspective, a report drafted by Dr. Abe M. Macher, Chief Medical Advisor at the U.S. Public Health Service, and Dr. Eric P. Goosby, Director of HIV/AIDS Policy at the U.S. Public Health Service, highlights numerous presentations at the 12th International AIDS Conference in Geneva. Statistics show, in New York State, HIV infection rates decreased among male prisoners but remained high and stable for female prisoners. Additional data from a state prison in California indicated that HIV-infected inmates experienced higher morbidity and mortality rates for Pneumocystis carinii pneumonia (PCP) compared to non-incarcerated HIV-infected persons in the community. For more information, write to U.S. Public Health Service, 5600 Fishers Lane, Room 7A-55, Rockville, MD 20857.

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