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Congressman Challenges Privatization Trend

Representative Ted Strickland of Ohio's Sixth district introduced legislation on March 4, 1999 prohibiting placement of federal prisoners in private for-profit correctional institutions and denying grants to states and localities that contract with private facilities. At the time of publication, Rep. Strickland's Public Safety Act, H.R. 979, is stalled at the subcommittee level. The bill currently has 93 co-sponsors; 68 Democrats and 25 Republicans.

Congressman Strickland's interest in prison issues stems from his professional background and his state's tumultuous experiences. Before entering the House of Representatives, Strickland worked as a psychologist for nine years at the Southern Ohio Correctional Facility in Lucasville, Ohio. During his first term in the House, a devastating riot broke out at the Lucasville prison. Strickland went to Lucasville and spent many hours consoling family members of trapped correctional officers. Then last year, the Northeast Ohio Correctional Center in Youngstown gained national notoriety. A Department of Justice report released in November of 1998, cited the inexperience and lack of training of staff at the private Corrections Corporation of America facility and the resulting excessive use of force by staff. The report also noted CCA's failure to recognize its responsibilities as a correctional service provider and its reluctance to accept blame for unconstitutional conditions of confinement at its facility. District of Columbia prisoners transferred to the facility filed suit against CCA. After two stabbing deaths, several escapes and medically-related deaths, CCA settled the case and agreed to pay $1.65 million in damages.

In a July 18, 1999 *Washington Post* editorial, Rep. Strickland called the United States' trend toward prison privatization "...a dangerous mistake." He asserted that in our democratic society, the deprivation of liberty is one of the most powerful controls a state exercises over its citizens, which must be exercised lawfully and humanely and free from inappropriate pressures such as monetary rewards.

Rapidly increasing incarceration rates caused by mandatory sentencing policies continue to worsen prison overcrowding. For-profit companies take advantage of the predicament many states and the federal government find themselves in because of bad criminal justice policies. They build and operate correctional institutions and benefit financially by housing inmates transferred from overcrowded public prisons. In nine years, the number of prisoners in private beds grew to 132,572 in 1998 from just under 11,000 in 1989.

As indicated in the proposed Public Safety Act, the cost conscious private prison industry has little incentive to meet constitutional standards, encourage rehabilitation or establish productive instructional programming in a safe and secure correctional institution. A company's loyalty lies primarily with its stockholders. As a result, there have been serious problems in several private prisons. In a facility operated by Wackenhut Corporation in New Mexico, a riot resulted in several injuries and extensive facility damage. The riot occurred only a few months after two attempted cover-ups by supervisors of correctional staff's excessive use of force and two inmate stabbing deaths. Last year, a juvenile correctional facility run by another for-profit company in

Tallulah, Louisiana was taken over by the State because of inhumane conditions. A Justice Department investigation found that the young inmates were routinely beaten.

Some of the strongest supporters of the Public Safety Act include correctional officers' unions and other coalitions. Organizations like the American Federation of State, County and Municipal Employees, the American Federation of Government Employees, AFL-CIO and the Corrections and Criminal Justice Coalition became active in the anti-privatization movement because of concerns over the loss of public jobs to the non-unionized, lower paid private sector. Private prisons' "cost-cutting" leads to the hiring of inexperienced and poorly trained staff; a major cause of the many private prison incidents and disturbances across the country. Phil Glover, President of AFGE's Council of Prison Locals, points out how cutbacks not only hurt the quality of staff, but affect all conditions of confinement. "To reduce costs, the private prison must cut staff, food, programs, and other items which in a prison setting are detrimental to safely housing convicted felons." Gerald W. McEntee, President of AFSCME, agrees: "The perils of prison privatization are clear -- violence, escapes, and incidents of prisoner abuse are well-known and should not be tolerated. The members of Congress who are sponsoring this legislation should be commended for recognizing that government -- and only government -- should have the awesome responsibility of incarcerating criminals and for keeping society safe from these individuals."

The decision to place an offender in prison, and the decision to impose a particular length of sentence, are critical social policy decisions that should not be contaminated by profit considerations. Initiatives to end for-profit influences and restore government control over our criminal justice system should be applauded.

Bush Vetoes Legislation for Indigent Defendants

By Jerry Wesevich

On June 20, 1999, Governor George W. Bush of Texas vetoed a major civil rights bill. The Texas Legislature passed the bill to reform the way lawyers are appointed to represent poor people who are accused of a crime.

The system that Texas has used for decades has been widely criticized by national press, defense lawyers, and civil liberties groups. It left elected state judges in charge of spending county money on lawyers who, in turn, influence the amount of time that judges must spend to adjudicate allegations against indigent defendants. For example, some judges limit all fees in first degree felony cases to as low as $350 per case. This effectively requires lawyers, who perform all necessary investigation, motion practice, and trial preparation, to work for free. Some 25% of Texas judges who responded to a recent State Bar survey admitted that they have considered whether a lawyer has contributed to their election campaign in deciding who to appoint to represent an indigent defendant. Both of these common features of the present system can result in pressure on indigent defendants to plead guilty without thorough consideration of the risks and benefits of using Texas's Code of Criminal Procedure to test the charges.

NPP *JOURNAL*

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While the bill is not an instant comprehensive overhaul, it is a major first step in that direction. It addresses every major deficiency in Texas's present indigent defense structure as follows: (1) The counties whom pay for indigent defense must formally adopt any method that they choose for meeting the indigent defense responsibilities that are delegated to them by the State. By formal action of each county commissioners' court, counties may keep judges in charge of appointing counsel, they may choose a local or regional public defender system, or they may develop their own administrative system for appointing counsel. The state's current patchwork of laws that allow counties varying authority over what kinds of public defender systems they may adopt is abolished. Any method chosen by the counties must be publicized and open to any attorney who meets the county's published requirements. (2) Indigent defendants cannot be jailed for more than 20 days after they request counsel, and they must be told how to request counsel. Present law requires appointment "as soon as possible" after a request for counsel is made by a defendant found to be indigent, but it sets no outside limit, nor does it require defendants to be told how to request counsel under each county's unique system. Consequently, in some jurisdictions people wait in jail up to four months before counsel is first appointed to look into their cases. (3) The state will begin gathering comprehensive data on the quality of indigent defense in each one of Texas's 254 counties so that all can learn from those with effective systems.

The bill culminates several years of effort by Senator Rodney Ellis (D–Houston), who has fought for reform with a major indigent defense bill each legislative session since 1993. NPP counsel consulted with Sen. Ellis's current and former staff as the bill was drafted, and helped distill the key ideas from Sen. Ellis's previous efforts. NPP staff also explored the shape of appropriate reform with local judges, defense counsel, professors, pretrial services officers, and civil libertarians. Finally, NPP staff helped form a coalition to promote the legislation that included University of Texas law professor Raoul Schonemann, Texas Appleseed Center Executive Director Annette LoVoi, and Texas Criminal Defense Lawyers' Assn. counsel Keith Hampton.

Despite these efforts, as quoted by Nat Hentoff's July 3 editorial in *The Washington Post*, Gov. Bush still believes, "Judges are better able to assess the quality of legal representation." Hentoff criticizes Bush's veto as "...indifference to, or ignorance of a fundamental constitutional right."

Jerry Wesevich is a staff attorney at NPP.

Recent Publications on Custodial Sexual Misconduct

By Joanna Schwartz[1] and Giovanna Shay[2]

In 1991, the ACLU National Prison Project (NPP) *Bibliography of Materials on Women in Prison* contained three items in the section entitled "Rape/Sexual Assault." In the 1999 update, NPP plans to include at least five times that number. Although NPP anticipates expansion of all sections of its forthcoming *Bibliography on Incarcerated Women*, the proliferation of literature on sexual misconduct against incarcerated women is particularly noteworthy. Successful civil rights cases,[3] criminal prosecutions,[4] investigative reports by human rights organizations,[5] and increasing popular media attention[6] have contributed to growing awareness of the problem of sexual misconduct. This Note describes some of the most important publications about custodial sexual abuse of this decade.

In 1996, Human Rights Watch released its report *All Too Familiar: Sexual Abuse of Women in U.S. State Prisons*. The report described sexual misconduct in California, the District of Columbia, Georgia, Illinois, Michigan, and New York. At the time of the report, most of these jurisdictions already had

faced litigation addressing custodial sexual misconduct.[7] "Sexual misconduct is often so entrenched," Human Rights Watch explained, "that, in those correctional systems where class action suits have not yet occurred . . . such abuse is still largely an invisible problem . . ."[8] *All Too Familiar* focused popular media attention on public documented examples of the abuses behind prison walls.[9]

Two years later, Human Rights Watch followed *All Too Familiar* with a special report on retaliation against women who had complained of abuse in Michigan state prisons. In *Nowhere to Hide: Retaliation Against Women in Michigan State Prisons*, Human Rights Watch documented retaliation against the plaintiffs in a lawsuit alleging sexual misconduct jointly prosecuted by private attorneys and the Department of Justice.[10] Human Rights Watch reported: "women believed they were being sent a clear message by the guards and the corrections department . . any attempt to protect themselves from sexual abuse by reporting it would result in punitive actions by guards."[11]

In response to these reports, U.N. Special Rapporteur on Violence Against Women, Radhika Coomaraswamy, toured the U.S. in June, 1998, to investigate sexual misconduct against female prisoners. The Special Rapporteur presented her report to the U.N. Human Rights Commission in March, 1999. She concluded that, "it is clear that sexual misconduct by male corrections officers against women inmates is widespread "[12]

In March, 1999, Amnesty International released another major report entitled *Not Part of My Sentence: Violations of the Human Rights of Women in Custody. Not Part of My Sentence* documented sexual misconduct in nineteen U.S. jurisdictions: Alabama, Arizona, California, the District of Columbia, Florida, Idaho, Illinois, Maryland, Massachusetts, Michigan, New Hampshire, New York, Ohio, Texas, Virginia, Washington, West Virginia, Wyoming, and the Federal Bureau of Prisons. Amnesty concluded that many women in U.S. prisons and jails are subjected to "sexually offensive language; male staff touching inmates' breasts and genitals when conducting searches; male staff watching inmates while they are naked, and rape."[13] The report further concluded: "contrary to international standards, prisons and jails in the USA employ men to guard women and place relatively few restrictions on the duties of male staff. As a consequence, much of the touching and viewing of their bodies by staff that women experience as shocking and humiliating is permitted by law."[14] Like the earlier Human Rights Watch report, *Not Part of My Sentence* received significant domestic press attention.[15]

In recent years, increasing numbers of state legislatures have responded to reports of sexual abuse by criminalizing "consensual" sexual relations between inmates and corrections staff. In 1998, Brenda Smith surveyed state criminal laws sanctioning custodial misconduct in *An End to Silence: Women Prisoners' Handbook on Identifying and Addressing Sexual Misconduct*. The survey indicated that thirty-five states and the District of Columbia provided such criminal sanctions.[16] In the forthcoming second edition of the manual, additional states including Montana,[17] Tennessee,[18] Virginia,[19] and West Virginia[20] will join that list.

A few U.S. lawmakers also have attempted to address custodial sexual abuse. Last year, Congresswoman Eleanor Holmes Norton commissioned a General Accounting Office (GAO) study on problems facing women in prison, including sexual abuse.[21] Released in July, 1999, the first installment of a two-part report addressed sexual misconduct in four correctional systems: the federal Bureau of Prisons, California, Texas, and the District of Columbia.[22] "Staff sexual misconduct occurs," the report stated, "although the full extent is unknown [due to inadequate reporting mechanisms]."[23] In fact, the GAO noted that, "[n]one of the four jurisdictions we studied had readily available, comprehensive data or reports on the number, nature, and outcomes of staff-on-inmate sexual misconduct allegations."[24] It concluded that, "[t]he systemic

absence of such data or reports makes it difficult . . . to effectively address staff sexual misconduct issues."[25]

Recent commentators have documented not only incarcerated women's experiences of abuse while in prison, but also their prior life experiences of physical and sexual abuse.[26] In April, 1999, the Bureau of Justice Statistics released findings on *Prior Abuse Reported by Inmates and Probationers*.[27] The BJS found that 57.2% of women state prison inmates had suffered physical or sexual abuse prior to admission, as compared to 16.1% of male state inmates.[28] Advocates have relied on such findings to challenge cross-gender search and surveillance techniques, arguing that these practices cause undue distress to incarcerated women who have survived prior abuse.[29]

The ACLU National Prison Project currently is updating its Bibliography on Incarcerated Women. Please send additional materials for inclusion to the attention of Giovanna Shay, Soros Justice Fellow Attorney, ACLU National Prison Project.

1. J.D. expected May, 2000, Yale Law School

2. Soros Justice Fellow Attorney, ACLU National Prison Project. This article was supported by a grant from the Open Society Institute's Center on Crime, Communities & Culture's Soros Justice Fellowship Program

3. *See, e.g., U.S. v. Arizona*, Settlement Agreement in Civil Action NO. 97-476-PHX-ROS (D. Ariz. March 11, 1999) (Arizona); *Lucas v. White*, Private Settlement Agreement in Civil Action No. 96-02905 (N.D. Ca. February, 1998)(Federal Bureau of Prisons); *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)(District of Columbia); *Cason v. Seckinger*, Consent Order filed in Civil Action No. 84-313-1-MAC (M.D. Ga. November 23, 1994)(Georgia).

4. *See, e.g.*, P. Coyle & M. Perlstein, *N.O. Cops Angry that Deputies Didn't Tell Them of Rape Case*, NEW ORLEANS TIMES-PICAYUNE, March 6, 1999, at B2; *Officer Accused of Assault*, CORRECTIONS DIGEST, April 16, 1999, at 7-8; *Former Sheriff's Deputy Charged*, CORRECTIONS DIGEST, April 9, 1999, at 8; *Consensual Sex Still a Crime*, CORRECTIONS DIGEST, February 26, 1999, at 6-7; Bob France, *Ex-Jailer Sentenced, Declared Sexual Predator*, THE NEWS-JOURNAL, September 23, 1998, at 3C.

5. *See infra.*

6. *See, e.g.*, DATELINE, HONOR GUARD? WOMEN WHO SUFFER SEXUAL ABUSE AT THE HANDS OF GUARDS WHILE IN PRISON (November 1, 1998); Nina Siegal, *Locked Up in America: Slaves to the System*, SALON MAGAZINE, http://wwww.salonmagazine.com/mwt/feature/1998/09/cov_01feature4.htm; Nina Siegal, *Women in Prison*, MS., October 26, 1998, at 65; Bobbie Stein, *Life in Prison/Sexual Abuse: Guards Let Rapists into Women's Cells*, THE PROGRESSIVE, July 1996, at 23.

7. *See* ALL TOO FAMILIAR at 62, 110, 127, 224.

8. ALL TOO FAMILIAR at 5.

9. *See, e.g.*, Steven A. Holmes, *With More Women in Prison, Sexual Abuse by Guards Becomes a Troubling Trend*, N.Y. TIMES, December 27, 1996, at A1; Pierre Thomas, *Growing Female Inmate Population Facing Greater Assault Risk, Study Says*, WASH. POST, December 8, 1996, at A18.

10. Also in 1998, the Women's Institute for Leadership Development (WILD) for Human Rights released HUMAN RIGHTS FOR WOMEN IN U.S. CUSTODY, which addressed human rights violations against incarcerated women, including sexual misconduct.

11. NOWHERE TO HIDE at 7.

12. *Report of the Mission to the United States of America on the Issue of Violence Against Women in State and Federal Prisons*, Commission on Human Rights, 55th Sess., Agenda Item 12 (a) at 15, U.N. Doc. E/CN.4/1999/68/Add.2 (1999). *See also* Elizabeth Olson, *U.N. Panel is Told of Rights Violations at U.S. Women's Prisons*, N.Y. TIMES, March 31, 1999, at A16.

13. NOT PART OF MY SENTENCE at 38. In April, 1999, Amnesty also released a report entitled UNITED STATES OF AMERICA: THE FINDINGS OF A VISIT TO VALLEY STATE PRISON FOR WOMEN, CALIFORNIA. The report described problems including sexual abuse, stating that "inmates reported that it was common for some male officers to watch them dressing and undressing . . . [and that] several guards were being investigated for sexual misconduct, including an alleged rape." FINDINGS OF A VISIT TO VALLEY STATE PRISON at 2.

14. *Id.*, 39.

15. Barbara Vobejda, *Abuse of Female Prisoners in U.S. Is Routine, Rights Report Says*, WASH. POST, March 4, 1999, at A11.

16. BRENDA V. SMITH, AN END TO SILENCE: WOMEN PRISONERS' HANDBOOK ON IDENTIFYING AND ADDRESSING SEXUAL MISCONDUCT 46-65 (1998).

17. Mont. Code Section 46-18-219, as amended by Mt. S.B. NO. 32, March 16, 1999.

18. Tenn. Code Section 41-21-241.

19. Va. Code Section 18-2-64.2.

20. W. Va. Code Section 25-1-22.

21. Press Release, *Norton Gets GAO to Study Sexual Abuse and Sexual Harassment of Female Prisoners*, issued by Congresswoman Eleanor Holmes Norton, December 10, 1998.

22. U.S. GENERAL ACCOUNTING OFFICE, WOMEN IN PRISON: SEXUAL MISCONDUCT BY CORRECTIONAL STAFF, GAO/GGD-99-104, at 1 (1999).

23. *Id.* at 7.

24. *Id.* at 16.

25. *Id.*

26. *See, e.g., Effective Management of Female Jail Detainees with Histories of Physical and Sexual Abuse*, AMERICAN JAILS 50 (May/June 1998).

27. CAROLINE WOLF HARLOW, BUREAU OF JUSTICE STATISTICS SELECTED FINDINGS: PRIOR ABUSE REPORTED BY INMATES AND PROBATIONERS (April 1999).

28. *Id.*, 1.

29. *See, e.g.*, Michael P. Mayko, *Prison Pat-Down Put Down: Inmates Tell Court Searches Recall Traumatic Events*, CONNECTICUT POST, March 29, 1999, at A1. *See also Jordan v. Gardner*, 986 F.2d 1521, 1525-26 (9th Cir. 1993).

HIV/AIDS Support Groups Benefit Inmates

By Jackie Walker

According to the *1996-1997 Update: HIV/AIDS, STDs, and TB in Correctional Facilities*, 67% of state and federal prisons provided HIV/AIDS support groups coordinated by local

service organizations. Sixty-three percent of prisons offered support programing led by correctional staff and 33% had groups led by peer educators. In this article, a support group facilitated by correctional staff and another led by an AIDS service organization are profiled.

U. S. Disciplinary Barracks at Ft. Leavenworth

Between 1994 and 1998, an HIV/AIDS group at the U.S. Disciplinary Barracks at Ft. Leavenworth provided prisoners living with HIV/AIDS, a range of options for support and education. A support group facilitated by Martha O'Neal, a social worker with Munson Army Hospital, and a staff nurse began as a outgrowth of O'Neal's individual counseling sessions with three prisoners living with HIV/AIDS.

The three initial prisoner-participants then recruited other prisoners into the group. Although staffed by O'Neal, the prisoners had substantial input into the issues to be addressed by the program. Prisoners discussed practical issues including inmate and correctional officer relations and medication delivery problems. Some prisoners specialized in researching HIV/AIDS treatment issues and shared their results with group members. Their expertise in HIV/AIDS treatment issues became so well known that some prisoners living with HIV/AIDS would seek advice from support group members instead of attending meetings. O'Neal described the group in this way, "We used the empowerment approach, in which we were facilitating these inmates as fully responsible for themselves and their knowledge."

Since many prisoners in the group had release dates within five or six years, discharge planning became an integral part of group discussions. To give prisoners a sense of the process, O'Neal often asked prisoners with upcoming release dates to discuss their discharge plan with the group members. A typical plan covered issues on access to medication, employment or benefits, medical care, and partner notification. If a prisoner was being released locally, Ryan White representatives were brought in to help with the discharge plan. O'Neal explained, "In this way the process became more concrete and less frightening for everyone."

Another benefit of the support group was its impact on the health of its members. During the program all but one participant received combination therapy with a protease inhibitor. Of those on combination therapy, all but one maintained undetectable viral loads for well over a year. This success was attributed, in part, to support group members encouraging each other to take their medications, monitor their diets, and exercise regularly.

Over the course of the support group's existence, O'Neal was able to coordinate a range of activities: bringing in drug company representatives and arranging for support group members to co-present on HIV/AIDS issues for mental health staff. She also showed and facilitated discussions on films like *Philadelphia* and *The Band Played On.* O'Neal offers the following advice to others interested in starting support groups: "First, recognize the best resource is your inmates. So look for leadership and the need among them. Second , always maintain participation on a voluntary basis. Third, maximize your access to good educational materials."

Members of the AIDS/HIV support group, which ended in 1998, now participate in a prisoner led self-growth group.

District of Columbia Jail

During Willie Byrd's incarceration at the Correctional Treatment Facility in Washington, D.C., the support group for prisoners living with HIV/AIDS first began. The group was founded in 1995 by two prisoners living with HIV/AIDS, Cochise Robertson-El and the late Rosalind Moore-Bey. Now, an Outreach Advocate with the HIV Community Coalition (HCC), Byrd reflects, "Back then, I didn't make it known that I was HIV-positive." During his incarceration, he guarded his health status so closely that Robertson never knew he was HIV-positive. He did not learn of Byrd's status until they both were released and working at HCC.

These days Byrd co-facilitates a support group for prisoners living with HIV/AIDS with the help of a mental health nurse and a discharge planner from Family Medical Counseling Services at

the District of Columbia Jail. The strongest aspect of the program includes the retelling of his own story of moving from invisibility to acceptance and empowerment. It is a story he regularly shares with both prisoners and members of the general community.

Attendance at support group has ranged from 16 to 32 men. On a weekly basis an average of 23 men attend. Attendance in the group is voluntary and topics range from nutrition, to pressing issues like violations of confidentiality. Many of the prisoners who had stopped taking their medications prior to attending the support group now engage in a more active role in their healthcare.

Attendance in the support group also has other benefits. The discharge planner from Family Medical Counseling Services works with prisoners with upcoming release dates to facilitate the transition into the community. The support group also gives prisoners a forum to address institutional problems. In one case, an inmate informed Byrd of the verbal harassment he endured and the confidentiality violations committed by a correctional officer. Grievances were later filed regarding this incident. Since then, Byrd has heard fewer complaints regarding violations of confidentiality.

Some prisoners who hear about the group often wait weeks before coming. Byrd believes inmates wait because of the continuing stigma associated with HIV/AIDS and the lack of support they receive on their cell blocks. He says of these prisoners, "Until they come to the group many of them are living the life of a recluse." In many instances, Byrd says, the latecomers are sorry they had not attended meetings earlier and do become active participants.

Jackie Walker is the AIDS in Prison Project Coordinator at NPP.

Prison News

Voices From Inside, an hour long video documentary produced and directed by Karina Epperlein is now available from *New Day Films* as an educational resource.

The film chronicles the experiences of four incarcerated women who create poetry and music for a performance behind bars. Epperlein also highlights the women's relationships with their children and exposes the difficulty of separation for mother and child.

Information about the video can be obtained by contacting: *Karina Epperlein at Transit 2000, 641 Euclid Avenue, Berkeley, CA 94708 or by calling 510-559-8892.*

Case Law Report: Highlights of Most Important Cases

By John Boston

Court of Appeals Cases

PLRA--Exhaustion of Administrative Remedies/Res Judicata and Collateral Estoppel/Access to Courts--Punishment and Retaliation

White v. McGinnis, 131 F.3d 593 (6th Cir. 1997). The PLRA exhaustion requirement applies to a case filed after the statute was passed even though it concerns events that pre-dated it. The plaintiff had filed a grievance but failed to appeal it. He did not allege that he was precluded from exhausting his remedies at this point. Dismissal for failure to exhaust should be without prejudice.

A claim for retaliation for a lawsuit is not barred by the judgment in the earlier lawsuit.

Rehabilitation/Procedural Due Process/Ex Post Facto Clause/Injunctive Relief/Equal Protection/Habeas Corpus

Neal v. Shimoda, 131 F.3d 818 (9th Cir. 1977). A state statute provides that a "sex offender" is anyone who has been convicted at any time of any sex offense or who engaged in sexual misconduct during the course of an offense, and that every sex offender in prison must go through a treatment program to become eligible for parole. The program requires admitting the

offenses and taking responsibility for the behavior.

The district court rejected the claim that the definition of sex offender is over inclusive for equal protection purposes, and the argument is abandoned on appeal.

A challenge to the sex offender statute is not barred by *Heck* and *Preiser* because, unlike a challenge to the procedures used in denying parole to a prisoner, an order making them eligible for parole does not guarantee their earlier release and does not change the standards for parole release.

The plaintiffs' claim under the Ex Post Facto Clause is ripe because the state has taken "concrete action" that will bar their parole eligibility, even though they would not yet be eligible even without the statute. There is no benefit to either party in delaying decision. Their Ex Post Facto claim is rejected. Under *Kansas v. Hendricks*, the treatment requirement is treatment and not punishment, as evidenced by the fact that prisoners can be required to submit to treatment for conduct of which they were not convicted. (There is a lengthy dissent on this point.)

The sex offender program implicates a liberty interest. The stigmatizing effect of labeling as a sex offender is analogous to the effect of commitment to a mental hospital, held in *Vitek v. Jones* to require due process protections. Such labeling is "atypical and significant" under *Sandin*. The fact that the treatment in *Vitek* was mandatory and this treatment is not does not matter, since refusal makes the prisoner completely ineligible for parole, creating a "practical and inevitable coercive effect" that is "functionally equivalent" to the mandated treatment in *Vitek*.

The same conclusion follows from *Kentucky Dept. of Corrections v. Thompson*, though the court notes that the case's analysis has probably been disapproved by *Sandin*. Here it is mandatory that the labeled inmate successfully complete the treatment program in order to become parole eligible; this elimination of discretion constitutes "mandatory language" applicable to the "substantive predicate" of sex offender labeling. The court then reiterates that the liberty interest at stake is similar to that in *Vitek*. (This is incorrect reasoning supporting a correct conclusion: if state law creates a liberty interest under pre-*Sandin* liberty interest analysis, it is because the substantive predicate of sex offender labeling follows from the mandatory language defining who can be so labeled.)

The process due before sex offender labeling is that prescribed by *Wolff v. McDonnell*. That means a prisoner actually convicted of a sex crime in an adversarial proceeding (including plea bargain) has already received due process. However, those who are merely indicted for such a crime have not, and the opportunity to write a letter protesting the classification does not satisfy due process requirements.

The plaintiff who was not convicted of a sex crime may not recover damages because the defendants are entitled to qualified immunity, but he is entitled to an injunction to remove the classification unless and until he receives a *Wolff* hearing.

At 832: "Requiring inmates labeled as sex offenders to admit their offenses and take responsibility for their sexual behaviors as part of the treatment program does not violate the inmates' privilege against self-incrimination." One plaintiff had been convicted of rape, has expressed no intention to collaterally attack the conviction, and is therefore protected by the Double Jeopardy Clause from further prosecution. The other plaintiff entered into a plea agreement barring the state from prosecuting him in the future for his alleged sex offenses, and has given no indication he will ever seek to withdraw his plea. The contract and consent for the treatment program warned that information about other sex offenses need not be provided but that if it was, it would be reported to law enforcement authorities; such disclosures would be voluntary and not compelled.

The sex offender treatment serves important and laudable goals and does not violate the Eighth Amendment.

Procedural Due Process--

Administrative Segregation/Habeas Corpus

Brown v. Plaut, 131 F.3d 163 (D.C.Cir. 1997), *cert. denied*, 118 S.Ct. 2346 (1998). The plaintiff's challenge to his placement in administrative segregation need not be brought via habeas. *Edwards v. Balisok* applies only to cases involving loss of good time credits, not placement in segregation. *Heck*'s rationale for the favorable-termination requirement is not applicable here. At 168:

> Brown's action may not properly be analogized to a suit for malicious prosecution, as the decision he is challenging bears little resemblance to a judicial proceeding. Decisions to place inmates in administrative segregation are subject to greatly relaxed procedural requirements, and the Court has recognized that they are often made fairly informally, on the basis of "subjective" and "intuitive" considerations. Indeed, the administrative proceeding before the Housing Board entailed so little process that it would almost certainly be accorded no collateral estoppel effect. One of the Court's principal concerns in *Heck* was to limit collateral attacks on final judgments; but a proceeding that is incapable of giving rise to collateral estoppel hardly needs to be insulated from collateral attack.

If this plaintiff were required to proceed via habeas, so would prisoners with complaints about other conditions of confinement, extending *Preiser* far beyond the "core" of habeas corpus.

The court explicitly acknowledges (168 n. 5) a conflict with the Seventh Circuit on this point; as noted, the Supreme Court denied review.

The court notes that application of the *Sandin* atypical and significant standard is hampered by ambiguity about the proper standard of comparison; the District argued that because the Attorney General can put D.C. prisoners anywhere, the proper standard was the most rigorous prison in the country. It notes other difficult questions in applying *Sandin* and moves on to address--but not actually decide--whether the plaintiff received the process due. Even though he was segregated for assaulting an officer, he did not establish that his confinement was disciplinary rather than administrative, so *Wolff* does not apply. On remand, the court should determine under *Helms* whether the plaintiff received notice that his appearance before the Housing Board was the only opportunity that he would receive to contest his segregation, and it is not clear that he had any notice that the alleged assault should be addressed at that hearing. (At 171 n. 9: *Helms* does not require advance notice, merely "some notice." Noncompliance with a local rule requiring advance notice does not violate the Constitution.) At 172: "If Brown was not provided an accurate picture of what was at stake in the hearing, then he was not given his due process."

Procedural Due Process--Administrative Segregation

Neal v. District of Columbia, 131 F.3d 172 (D.C.Cir. 1997). The plaintiff asked to be put in voluntary protective custody, which was supposed to be reviewed every 30 days under prison regulations, but wasn't. After six months he asked for a review, was reclassified for general population, but was not moved. After another several months he complained some more but was not returned to GP for another three months.

The district court erred in its apparent assumption that if a state law does not create a private cause of action it cannot support a § 1983 claim that it creates a liberty interest.

The plaintiff's confinement was not atypical and significant. He was out of his cell for periods ranging from five to nine hours every day and eight hours a week of outdoor exercise. At 175: "His placement in administrative segregation thus cost him approximately half of his out-of-cell time, eliminated his access to employment, and restricted his access to prison facilities, all over a six-month period." The deprivation in *Sandin* was shorter but more severe.

Federal Officials and Prisons/Work Assignments

Bagola v. Kindt, 131 F.3d

632 (7th Cir. 1997). The plaintiff lost a hand in a machine while working at his Federal Prison Industries job. Theoretically he was not permitted in the area where the machines were installed, but he testified that he was in fact required to do so. There was evidence of failure to remedy safety violations identified by OSHA.

18 U.S.C. § 4126, the workers' compensation program for federal prisoners, does not preclude his constitutional *Bivens* claim. In those cases where an alternative remedial scheme was held pre-emptive, there was a significant opportunity to expose allegedly unconstitutional conduct, and that opportunity is absent from the compensation scheme.

The claim is rejected on the merits because the record demonstrates no more than simple negligence. The defendants took measures that they thought were reliable and effective and continued to correspond with OSHA and discuss further safety measures rather than defying it. There is no evidence that the defendants knew the plaintiff was required to work in an area that he was theoretically supposed to stay out of.

Homosexuals and Transsexuals/Medical Care--Serious Medical Needs/Mental Health Care

Maggert v. Hanks, 131 F.3d 670 (7th Cir. 1997). The plaintiff complained of failure to provide estrogen therapy for gender dysphoria. The prison's psychiatrist refused to prescribe estrogen because he did not believe the plaintiff actually suffered from gender dysphoria, and the plaintiff (proceeding *pro se*) failed to submit a contrary affidavit by a qualified expert.

Having decided summary judgment is appropriate on this narrow ground, Judge Posner continues to address the "broader issue" of prisoners' gender dysphoria litigation. Even though "[s]omeone eager to undergo this mutilation [transsexual surgery] is plainly suffering from a profound psychiatric disorder," prison officials are not obliged to provide the hormonal and surgical procedures necessary to "cure" it. They are protracted and expensive. At 671: "A prison is not required by the Eighth Amendment to give a prisoner medical care that is as good as he would receive if he were a free person, let alone an affluent free person. He is entitled only to minimum care." At 672: "Withholding from a prisoner an esoteric medical treatment that only the wealthy can afford does not strike us as a form of cruel and unusual punishment. [W]e cannot see what is cruel about refusing a benefit to a person who could not have obtained the benefit if he had refrained from committing crimes." *Id.*:

> It is not the cost per se that drives this conclusion. For life-threatening or crippling conditions, Medicaid and other public-aid, insurance, and charity programs authorize treatments that often exceed $100,000. Gender dysphoria is not, at least not yet, generally considered a severe enough condition to warrant expensive treatment at the expense of others. That being so, making the treatment a constitutional duty of prisons would give prisoners a degree of medical care that they could not obtain if they obeyed the law.
>
> We conclude that, except in special circumstances that we do not at present foresee, the Eighth Amendment does not entitle a prison inmate to curative treatment for his gender dysphoria.

Hazardous Conditions and Substances/Federal Officials and Prisons/Work Assignments

Rish v. Johnson, 131 F.3d 1092 (4th Cir. 1997). The plaintiffs worked as orderlies in a prison hospital and complained that they were not provided with adequate protective clothing (i.e., clothing consistent with universal precautions) to protect them from the risk of infectious disease.

The defendants are entitled to qualified immunity. At 1095-96: "In determining whether the legal right is clearly established, it is critically important to avoid defining the applicable right at too abstract a level." There is no case law establishing that universal precautions are constitutionally required. There is insufficient evidence to show that prison officials knew that exposure to

the body fluids of other prisoners posed a substantial risk of harm to the inmates. An expert affidavit indicating that universal precautions have been the norm for years where workers may be exposed to body fluids is insufficient, since it also indicates that the risk of disease transmission from the kind of work the inmates were doing (e.g., handling laundry, not being exposed to puncture wounds or splashing blood) is negligible.

PLRA--Three Strikes, Filing Fees, Screening/Magistrates/Law Libraries and Law Books

Hains v. Washington, 131 F.3d 1248 (7th Cir. 1997). The prisoner plaintiff signed a limited consent authorizing the magistrate judge to conduct any and all further proceedings; this authorized the magistrate judge to conduct PLRA screening and dismiss without the opportunity for *de novo* review by the district judge.

Women/Medical Care/Discovery/Mootness/Summary Judgment/Class Actions--Certification of Classes/Medical Care--Standards of Liability--Deliberate Indifference

Dulany v. Carnahan, 132 F.3d 1234 (8th Cir. 1997). This case is an instructive model of how intelligent defendants respond to a medical care case pled as a class action.

The 20 named plaintiffs brought suit alleging inadequate medical care. The defendants moved to dismiss or for summary judgment, supported by physician affidavits, institutional policies, and medical records responsive to the allegations in the complaint. They provided all of the plaintiffs' medical records to their attorneys. They moved to stay further discovery pending decision of their motion, which was granted. The district court then granted summary judgment on the ground that 19 of 20 named plaintiffs failed to demonstrate issues of material fact concerning deliberate indifference to their medical needs.

The district court did not abuse its discretion in denying further discovery. The plaintiffs did not move under Rule 56(f), Fed.R.Civ.P., articulating their specific need for further discovery (making this point only in a footnote in their district court papers), and defendants produced a lot of material which plaintiffs did not assert was inadequate. In their opposition to a stay of discovery, they argued only a generalized need for discovery. At 1238: "The plaintiffs said that they sought 'to discover critical facts,' . . . but they did not articulate what particular critical facts they needed to develop or hoped to unveil." The district court did not abuse its discretion in concluding that the case was ripe for summary judgment on the extensive record that was made. Because the named plaintiffs could not demonstrate deliberate indifference, the district court denied class certification.

The district court did not make improper factual findings concerning state of mind even though it acknowledged that some of the plaintiffs had serious medical needs. It found that defendants had provided care, and if defendants respond reasonably to a risk, they are not deliberately indifferent. At 1240: "In the face of medical records indicating that treatment was provided and physician affidavits indicating that the care provided was adequate, an inmate cannot create a question of fact by merely stating that she did not feel she received adequate treatment."

One named plaintiff complained of failure to follow the recommendations of outside consultants, "but a prison doctor remains free to exercise his or her independent professional judgment and an inmate is not entitled to any particular course of treatment." (1240) Plaintiffs' expert's opinion that a plaintiff's record "raises questions about the adequacy" of her care but does not "express an opinion that the care provided was grossly inadequate or resulted in any serious harm" does not raise a factual issue sufficient to bar summary judgment. (1241) Another expert's opinion that based on a plaintiff's records defendants' tuberculosis control is not adequate, without stating a basis for that conclusion, does not raise a material factual issue. A statement that a plaintiff's hearing loss "may or may not" have been averted by an alternative course of treatment raises no material factual issue where prison

officials tried but failed to treat the problem.

Failure on some occasions to provide necessary supplies does not show deliberate indifference where the record showed that they "were generally ordered properly." (1243)

At 1244:

> . . .The district court did not consider the affidavits of inmates who are not named as plaintiffs. We, too, decline to consider the affidavits and claims of persons who are not listed as plaintiffs. Unless at least one named plaintiff can demonstrate an actual or imminent injury in fact stemming from the deliberate indifference of prison officials, we have no basis on which to consider either system wide problems or on which to grant system wide relief. *Lewis v. Casey*.

At 1245:

> . . . A number of individual and isolated incidences [sic] of medical malpractice or negligence do not amount to deliberate indifference without some specific threat of harm from a related system wide deficiency, which is not present in this case. We are unable to find a single plaintiff who has been injured or is threatened with an imminent threat of harm by a negligent medical policy, procedure, or treatment recklessly offered or omitted by the defendants.

Procedural Due Process--Disciplinary Proceedings/Summary Judgment

Wright v. Coughlin, 132 F.3d 133 (2d Cir. 1998). The plaintiff was accused of breaking at least 50 windows and starting a large fire in the course of a riot in the yard. He won an Article 78 proceeding on the ground that the hearing officer had not viewed relevant videotapes. A second hearing was judicially reversed on the ground that the hearing officer did not conduct it impartially and that the plaintiff was denied his right to call witnesses (he was allowed one of three requested). He served 168 days in SHU and 120 days in keeplock.

The district court erred in finding that the plaintiff's confinement was not atypical and significant. It failed to consider the length of the plaintiff's confinement (which it found of "little import"). It failed to consider the distinctions between administrative and disciplinary segregation (concluding that the existence of the former meant that disciplinary segregation was not atypical and significant). However, periodic review differentiates them. The court reiterates its prior statements that careful fact-finding is necessary to determine *Sandin*'s applicability.

The district court erred by crediting the defendants' version of conditions in the SHU, which the plaintiff disputed.

Law Libraries and Law Books/Trial/Evidentiary Questions

McDonald v. Steward, 132 F.3d 225 (5th Cir. 1998). The plaintiff was denied access to the law library on several occasions. He was denied a jury trial even though he put a demand in his complaint. He did not consent to a bench trial by consenting to allow the magistrate judge to enter final judgment. His failure to assert his right at the trial itself did not constitute a waiver because he had made his request abundantly clear earlier.

The denial of jury trial was harmless error because the case was not triable. The plaintiff was excluded from the law library because he failed to fill out the request form completely. He also failed to show actual injury; he said he had been forced to withdraw several cases but admitted that he did not try to refile them. He failed to adduce any evidence of retaliation.

The magistrate judge erred in excluding an inmate witness's testimony as cumulative, but the error was harmless because some of the testimony is hearsay (this seems wrong; he alleged a conspiracy, and the witness overheard remarks by a member of the conspiracy).

Intake/Municipalities

Henry v. County of Shasta, 132 F.3d 512 (9th Cir. 1997). The plaintiff was arrested for refusing to sign a traffic ticket and insisting on being taken immediately before a magistrate, as state law provides. When he refused to sign papers at the jail, he was put in a urine-stained padded cell without his clothes.

The district court erred in

holding that there was no evidence of a municipal policy. Affidavits of two other persons who said they had had similar experiences involving a number of county personnel support the claim of policy. Post-event evidence can support a finding of municipal policy. In fact, it is "highly probative" evidence when it involves similar incidents that took place after the plaintiff put the county on notice of what happened to him by suing.

Statutes of Limitations/PLRA--Three Strikes Provision

Lucien v. Jockisch, 133 F.3d 464 (7th Cir. 1998). The plaintiff alleged that he was transferred in retaliation for filing lawsuits. His claim is not time-barred; he alleged a pattern of transfers, and the limitations period is measured from the last of the transfers.

The district court ruled that the plaintiff was barred from proceeding IFP by the three strikes provision. The complaint was sent to the clerk's office before the PLRA but was not formally filed until after IFP proceedings and therefore after the PLRA's passage. The plaintiff's PLRA liability for fees is determined by the date of filing, but for complaints as well as appeals that straddle the PLRA's passage in this way, the district court should give the litigant an opportunity to decide whether he wishes to go forward. The plaintiff's challenge to the three strikes provision is therefore not ripe.

PLRA--Mental or Emotional Injury/Hazardous Conditions and Substances

Zehner v. Trigg, 133 F.3d 459 (7th Cir. 1997). The plaintiffs complained of exposure to asbestos but had no current medical problems. Their claim is barred by the "mental or emotional injury" provision of the PLRA.

The district court correctly held that this provision is constitutional because "it left the courts with power to enforce constitutional guarantees through remedies other than damages." (461) The existence of qualified and absolute immunities means that damages are already unavailable for some constitutional violations. Congress created the § 1983 remedy and it can take it away. Section 5 of the Fourteenth Amendment "grants Congress broad power to determine how to enforce those provisions, and the courts are circumscribed in their power to interfere." (462) The district court held that there is a point beyond which constitutional remedies may not be restricted, but here other remedies, such as injunctive relief backed up with contempt sanctions, exist and save the statute from unconstitutionality. At 462: "As a legal conclusion, this point is unassailable." Prisoners currently being exposed to asbestos may obtain injunctions. If these plaintiffs develop asbestos-related illnesses, they will then be able to sue for damages.

The mental or emotional injury provision does not deny equal protection. Prisoners are not a suspect class. The statute does not "burden" or "impinge on" the fundamental right of court access because it only limits the relief available. Prisoners still have what the Constitution requires: "a reasonably adequate opportunity to present claimed violations of fundamental rights to the courts." (463, *quoting Lewis v. Casey*) Therefore rational basis scrutiny applies, and all it requires is "that Congress rationally perceived a propensity among prisoners to file frivolous lawsuits and reacted to that perception in a reasonable way. The statute need not be the best possible reaction to the perception, nor does the perception itself need to be heavily buttressed by evidentiary support. It is enough that the perceived problem is not obviously implausible and the solution is rationally suited to address that problem." (463) The court notes that the Supreme Court in *Metro-North Commuter R.R. v. Buckley* construed a statute to impose the same restriction on a group of non-prisoners. *Romer v. Evans* is distinguished on the ground that this statute "imposes no such across the board restriction on access to government assistance" and therefore does not raise the same "inevitable inference" of animus.

The statute does not violate separation of powers by directing the outcome of constitutional cases. Every statute establishing

a cause of action requires courts to determine whether the elements of the claim exist, and that doesn't prescribe a rule of decision.

Visiting

Bazzetta v. McGinnis, 133 F.3d 382 (6th Cir. 1998). In a prior decision, the court upheld limitations on visiting which the defendants had asserted applied only to contact visits. Now the defendants inform the court that they apply to all visits. The court makes clear that its decision did not apply to non-contact visits.

Personal Property/Procedural Due Process--Property

Parrish v. Mallinger, 133 F.3d 612 (8th Cir. 1998). Prison officials seized funds sent by a prisoner to his wife after he received them from his mother (they stopped payment on the check) and applied them to his obligations under the Iowa Victim Restitution Act.

At 614: "Defendants concede, as they must, that Parrish has a property interest in the money his mother sent him that is protected by the Due Process Clause of the Fourteenth Amendment."

The seizure did not deny substantive due process, even though the statutorily mandated payment plan did not authorize such a large seizure. At 615: "However, this is nothing more than an assertion that defendants acted contrary to state law. . . ."

The defendants are entitled to qualified immunity as to procedural due process because there was no clearly established right to predeprivation notice and hearing, even though subsequent decisions supported such a right.

Mental Health Care/Mental Health Care--Restraints/Qualified Immunity

Buckley v. Rogerson, 133 F.3d 1125 (8th Cir. 1998). The plaintiff alleged that he was repeatedly placed in restraints and segregation without medical approval during his confinement in a prison mental hospital. Evidence showed that correction officers were allowed to develop "treatment plans" and that "treatment" also included depriving the plaintiff of clothing, blankets, bed and mattress in segregation. His treating doctor checked on him every 90 days.

There is a constitutional right to medical approval of placement of in restraints or segregation. Under *Youngberg*, "the freedom from bodily restraint is at the core of the liberty interest protected by the due process clause." (1129) The right was clearly established by 1987. (This case was tried twice before the present appeal.) This court has taken a "broad view" of what is clearly established, looking to "all available decisional law" in the absence of binding precedent, and it cites local district court cases and cases from other circuits here.

PLRA--Judgment Termination

Hadix v. Johnson, 133 F.3d 940 (6th Cir. 1998). The court upholds the termination provisions of PLRA in a remarkably perfunctory opinion. The provision does not require reopening of a final judgment but "merely alter the prospective application of orders requiring injunctive relief." (942) The provision does not prescribe a rule of decision but "only prescribes the standard for authorizing a remedy in any given case." (943)

The court says it would also reject the due process and equal protection arguments if they were before it (943 n. 3).

PLRA--Entry of Relief/Religion--Practices--Diet

Oluwa v. Gomez, 133 F.3d 1237 (9th Cir. 1998). The plaintiff said he is a "Nazarite Disciple" of Jesus Christ Messiah, prohibited by the Bible from eating anything containing "dairy products, animal flesh, things that grow on vines (grapes or raisins, melons, cucumbers, squash, etc.), and poultry products." He was denied his diet because when asked who else adhered to his religion, he said "Adam and Eve." Later he said he was a Rastafarian. The court granted him summary judgment and injunctive relief *sua sponte*, holding that his Nazarite and Rastafarian beliefs were not mutually exclusive, that he was sincere, and that Rasta is protected by the First Amendment.

Since defendants had no prior notice of the plaintiff's claim of Rastafarianism, it was error to

grant summary judgment *sua sponte* against them.

It was error to grant injunctive relief without making the findings required by the PLRA. Congress expressly prescribed the reach of 18 U.S.C. § 3626 and indicated that it was to apply to pending cases. The court does not engage in harmless error analysis because it is reversing for other reasons.

Drug Dependency Treatment/Federal Officials and Prisons

Love v. Tippy, 133 F.3d 1066 (8th Cir. 1998). The petitioners completed drug treatment programs in order to qualify for early release but were denied on the ground that they had been convicted of firearms offenses and the authorizing statute made only persons convicted of "nonviolent offenses" eligible for the reduction. The Bureau of Prisons could properly construe "nonviolent offenses" to exclude offenses that Congress had labeled "crimes of violence" in another statute.

Martin v. Gerlinski, 133 F.3d 1076 (8th Cir. 1998). The petitioners completed drug treatment programs in order to qualify for early release but were denied on the ground that their sentences had been enhanced for possession of dangerous weapons. The use of sentencing factors by the Bureau of Prisons was contrary to the authorizing statute, which referred only to the offense of which the prisoner had been convicted.

Use of Force

Stanley v. Hejirika, 134 F.3d 629 (4th Cir. 1998). After a disturbance in a segregation unit, the plaintiff was extracted from his cell and his cell was searched. After he was back in his cell he incited inmates to set fires and began hitting his cell door; he was removed again and moved to another unit. Force was used against him, resulting in bruising of his arm, jaw, wrists and back, and a loosened tooth. The district judge found the defendants liable based on a videotape.

As a matter of law, the Eighth Amendment was not violated. At 635: "We too have viewed the tape and thus have had the same opportunity as the magistrate judge had to evaluate this non-testimonial evidence." Therefore they need not defer to his findings. They find no malicious or sadistic conduct, but a "rational reaction and measured response," though at times he was "treated roughly."

At 634 (emphasis supplied): [indent] In short, for an inmate to prove an excessive force claim, he must satisfy not only the subjective component that the correctional officers acted with a sufficiently culpable state of mind, but also the objective component that his alleged injury was sufficiently serious *in relation to the need for force* to establish constitutionally excessive force.

The plaintiff's injuries, as a matter of law, were insufficient to support liability, given that the incident followed a disturbance by inmates with disciplinary problems, threats against officers had been made, and the plaintiff was resisting. At 636: "If a punch or a kick did occur during these events, we cannot conclude 'in retrospect that the degree of force authorized or applied for security purposes was unreasonable, and hence unnecessary in the strict sense.'" The injuries, while comparable to those in *Hudson v. McMillian*, were inflicted in a very different context.

Medical Care--Standards of Liability--Serious Medical Needs, Deliberate Indifference/In Forma Pauperis/Disabled

Hemmings v. Gorczyk, 134 F.3d 104 (2d Cir. 1998). The plaintiff sustained a ruptured tendon during a basketball game, which prison medical staff diagnosed as a sprain; they then refused for two months to refer him to a specialist even though he had accurately diagnosed himself, and one defendant allegedly took away his crutches.

"Fanciful allegations" of "wide-ranging conspiracies" by the defendants can be dismissed in this *in forma pauperis* case.

The plaintiff's medical care claims are not barred by the fact that he received some care, though they are weakened. He has alleged facts that could show "that his condition was sufficiently painful to satisfy the objective prong of the deliberate indifference standard of the Eighth Amendment" and that the defendants willfully disregarded it

for two months before sending him to a specialist who allegedly described his symptoms as "classic" and expressed shock at the failure to treat it. The allegation of deprivation of crutches was also not subject to dismissal.

PLRA--Judgment Termination/Appeal

United States v. State of Michigan, 134 F.3d 745 (6th Cir. 1998). The defendants moved to terminate consent decrees and the district court entered an order granting the United States access to facilities, staff and documents for discovery purposes. It also postponed decision on the merits of the termination motion, though opining that recent hearings suggested a current or ongoing violation with respect to mental health care.

The court lacks appellate jurisdiction. Defendants' argument that the district court was permitting the creation of an evidentiary record not contemplated by the PLRA is not a jurisdictional argument. While the grant of discovery denies the dissolution of injunctive relief at least temporarily, this is true of any action that defers a termination motion.

Medical Care/Medication/Pre-Trial Detainees/Refusal of Treatment

Johnson v. Meltzer, 134 F.3d 1393 (9th Cir. 1998). The plaintiff stole a car and had a collision in it, sustaining head injuries. The defendant doctors used a drug not approved by the FDA while he was unconscious and without his consent. The district court dismissed his claim after construing it as a medical care claim. The appeals court construes his *pro se* complaint liberally to state a claim for violation of his constitutionally protected liberty interest in bodily integrity. *Washington v. Harper* and *Riggins v. Nevada* "demonstrate that due process requires that if a doctor gives a drug to an inmate without his consent, the drug must be medically appropriate." If the doctors gave the drug for the plaintiff's benefit, they did not violate his rights. If they used it for research purposes, they did violate his rights. Since the form they filled out while he was unconscious is labeled Consent for Participation in a Research Project and says there is likely to be no direct benefit to the patient, there is a material factual question on this point.

A police officer did not violate the plaintiff's rights by taking his photograph and fingerprints while he was unconscious.

The plaintiff alleged that police officers woke him from his medically induced coma to interrogate him. They denied it, but since there is police documentation indicating an interview took place on that date and naming one officer, there is a material factual question.

Appointment of Counsel/Procedural, Jurisdictional and Litigation Questions

Dunphy v. McKee, 134 F.3d 1297 (7th Cir. 1998). The plaintiff's court-appointed lawyer consistently failed to comply with scheduling and case management orders and the case was ultimately dismissed for lack of prosecution. The standards for such dismissals are no different for cases involving appointed *pro bono* counsel than they are for cases with retained counsel; the court has discretion to take into account all relevant factors under that standard, though they may be weighed differently. Here the district court dismissed in a one-line order that does not inform the appeals court whether it considered the efficacy of a less severe sanction or tried to devise a measure that would punish the lawyer rather than the client, or what it thought of the merits of the case. The three-month delay the plaintiff had requested appears reasonable enough to have warranted an explicit rejection if not granted. The case is remanded for further proceedings.

Use of Force/Habeas Corpus/Privacy

Jackson v. Suffolk County Homicide Bureau, 135 F.3d 254 (2d Cir. 1998). The plaintiff, convicted of robbery and murder, complained of excessive force following arrest and the taking of nude photographs without his consent during his post-arrest interrogation, which photographs were displayed at his trial.

The district court erred in

dismissing under *Heck v. Humphrey*, which does not require dismissal of claims whose adjudication in the plaintiff's favor would not necessarily invalidate his conviction. The claims about the photographs, which plaintiff objected to on religious and privacy grounds, would not invalidate the conviction. The excessive force claims would also not invalidate his conviction, even though he is arguing on appeal that his confession was coerced, because the state court might find that the confessions did not result from the use of force or that the failure to suppress them was harmless error. However, they would "impact" the conviction. Since they have already accrued and the limitations period is running, the court should stay them pending the outcome of the appeal.

The claims about the taking of the photographs are probably barred by the statute of limitations, since they were not asserted in the first, timely complaint. They do not relate back to the filing of that complaint because they do not arise from the same conduct as the excessive force claim raised in that complaint. The claims about the photographs' use at trial may be within the limitations period.

PLRA--In Forma Pauperis Provisions--Applicability--Persons

LaFontant v. United States, 135 F.3d 158 (D.C.Cir.1998). An immigration detainee held for deportation is not a prisoner for purposes of the filing fee provisions of the PLRA. He ceased being a prisoner when he was released on parole, even though he actually remained incarcerated.

PLRA--Judgment Termination/Pre-Trial Detainees/PLRA--Prisoner Release Orders/Crowding

Tyler v. Murphy, 135 F.3d 594 (8th Cir. 1998). The plaintiffs prevailed at trial in a jail conditions case in the 1970s; in 1993-94, the court issued injunctive orders establishing various population ceilings, which the appeals court remanded for reconsideration in light of the Helms Amendment. The court then granted a separate motion to establish a cap of 20 on technical probation violators at the jail. The Sheriff moved to dissolve that injunction and the motion was denied. That order is appealable. The Sheriff need not have appealed at the time the injunction was entered because it did not affect him until he tried to place more than 20 technical probation violators there.

The order limiting the technical probation violator population violated the PLRA because it lacked the requisite findings, and the motion to dissolve it was denied in violation of the PLRA because the court failed to make the necessary findings at that point too. In addition, the order is clearly a prisoner release order, and the court did not make the findings necessary for such an order under the PLRA.

The PLRA's termination provision is constitutional for all the reasons stated in *Gavin v. Branstad*. A findings requirement does not cripple the court's remedial powers, and the statute permits continuation of relief when necessary. At 597: "Thus, the statute preserves a court's ability to remedy a current violation of federal rights."

Given the lack of the proper findings, the Sheriff need not wait two years to move to terminate; the immediate termination procedure is designed for cases that lack the findings.

The district court is directed on remand to consider the Sheriff's motion to dissolve the technical probation violator population cap and his subsequent motion to terminate all prospective relief. At 598: ". . . [P]laintiffs, who now face the termination of prospective relief, are entitled to seek new or extended prospective relief under the standards set forth in § 3626(a)." If they seek a prisoner release order, a three-judge court must be provided. At 598: "What is less clear from the statute's text is whether the § 3626(b)(3) findings that will avoid termination of an existing injunction must in all cases be made by a three-judge court if the injunction includes a prisoner release order." If the plaintiffs argue for both retention of old relief and entry of new relief, the prisoner release aspects of both should be referred to the three-judge court for efficiency's sake.

If new relief is not sought, it would be more efficient to have all findings made by the single judge. However, the court does not actually rule on the relationship between the two parts of the statute.

PLRA--Filing Fees

Chachere v. Barerra, 135 F.3d 950 (5th Cir. 1998). The plaintiff refused to execute the authorization forms for withdrawal of court fees from his account, arguing that the forms violate the PLRA because they do not recite that no money will be withdrawn when the account balance is below $10.00. However, the PLRA does not mandate use of any authorization form, or prescribe the contents of any form that is used, and there is no evidence that prison officials will not comply with the $10.00 limit. The motion to proceed on appeal is denied, and the case is remanded to permit the plaintiff an opportunity to execute the form.

Suicide Prevention

Williams v. Mehra, 135 F.3d 1105 (6th Cir. 1998). The decedent committed suicide in a state prison. He had a significant psychiatric history with a record of attempted suicide and suicidal ideation in jail, which was communicated to prison authorities. He had tried to commit suicide with an overdose of pills and his medication had been changed to liquid. He continued to express suicidal thoughts to prison mental health staff. Nonetheless, his medication was changed back to pills, and he killed himself with an overdose.

The right at issue is the right to receive necessary psychiatric care, not the right to be screened for suicidal tendencies--the decedent had been screened and was found to have them. This right is clearly established.

A psychiatrist who did not have complete information on the decedent's mental health and suicide-related history was not deliberately indifferent for prescribing tablet medication and a follow-up in 30 days; he had no further contact with the decedent.

Treating psychiatrists who saw the decedent on two and three occasions and had more complete information on his prior history could be found deliberately indifferent for not administering his medication in liquid form.

Use of Force/Jury Instructions and Special Verdicts

Parkus v. Delo, 135 F.3d 1232 (8th Cir. 1995). The plaintiff complained that he was beaten in retaliation after he attacked, choked, sexually assaulted, and injured a prison psychologist.

The district court, in charging the jury on the malicious and sadistic standard, defined "sadistic" as "extreme or excessive cruelty or delighting in cruelty" as opposed to "regular cruelty." The district court did not abuse its discretion; this appeals court has used similar language in its holdings, as have other courts.

The plaintiff had no due process claim arising from the use of force; a hearing need not be held before applying force to quell a disturbance. The plaintiff was resisting vigorously. At 1235: "Without doubt, Parkus was punched, dropped, and pushed into walls and door frames, leaving the jury to decide whether the Eighth Amendment was violated."

The findings of a state administrative board that one of the officers had been properly fired for the force he used against the plaintiff did not collaterally estop the officer from giving contradictory testimony at this trial. Although administrative findings can have collateral estoppel effect in Missouri, the administrative tribunal did not unambiguously decide the same issues as those in the litigation. State rules on the use of force are different from the constitutional standard.

PLRA--Three Strikes Provision

Garcia v. Silbert, 141 F.3d 1415 (10th Cir. 1998). The three strikes provision of the PLRA does not apply to complaints filed before the PLRA was enacted. However, it does apply to post-PLRA appeals in such cases. The court reaffirms *Green v. Nottingham*'s holding that pre-PLRA dismissals may be considered as strikes.

This plaintiff should not have been permitted to proceed IFP because he has three strikes. The statute is not jurisdictional, and

the court elects to reach the merits. The plaintiff is ordered to remit the entire balance of the filing fee to the court.

Mapp v. Dovala, 138 F.3d 1335 (10th Cir. 1998). The plaintiff brought three cases *in forma pauperis*, of which two were dismissed for failure to state a claim and one was dismissed for failure to exhaust. He had previously brought another case that was dismissed for failure to state a claim. In light of these dismissals for failure to state a claim, the plaintiff is not entitled to appeal without prepayment of costs and fees. In any cases the appeals would be without merit. The court directs dismissal unless the plaintiff pays the fees within 90 days, but says that going forward "may not be a fruitful course of action." Implicitly, then, the plaintiff can decide not to pay, unlike the case with filing fees for prisoners not barred by the three strikes rule.

Patton v. Jefferson County Correctional Center, 136 F.3d 458 (5th Cir. 1998). Pre-PLRA "strikes" count. Unappealed dismissals count as strikes.

Actions that are brought under § 1983, but are dismissed for failure to exhaust because they seek habeas relief, are strikes. At 464: "Although the dismissal without prejudice of the habeas claim does not equate to a finding of frivolousness, it more closely parallels such a conclusion than it does a determination of non-frivolousness. It is a considered judgment that Patton asserted in his § 1983 suit a habeas claim that was premature as a matter of law." Id.: "It is more faithful to the intent of the PLRA to classify these dispositions as strikes." To hold otherwise would permit litigious prisoners to circumvent the statute by "creative joinder of actions." (Of course, the actions in question were pre-PLRA, so this reasoning makes no sense except as a manifestation of the reigning principle "Any excuse to get rid of a prisoner case.")

A dismissal as frivolous that is affirmed is a strike, even if modified to be without prejudice, and even if done on different grounds from those relied on by the district court.

PLRA--Screening and Dismissal

Bazrowx v. Scott, 136 F.3d 1053 (5th Cir. 1998). Dismissals under 42 U.S.C. § 1997e(c) should be reviewed *de novo* on appeal. At 1054 (footnote omitted): "Generally a district court errs in dismissing a *pro se* complaint for failure to state a claim under Rule 12(b)(6) without giving the plaintiff an opportunity to amend." However, such error can be ameliorated "if the plaintiff has alleged his best case, or if the dismissal was without prejudice." Id. (footnotes omitted). Here, the dismissal was harmless error because it was without prejudice.

Federal Officials and Prisons/Drug Dependency Treatment/Ex Post Facto Laws/Equal Protection

Wottlin v. Fleming, 136 F.3d 1032 (5th Cir. 1998). A 1994 statute made prisoners convicted of nonviolent offenses who complete substance abuse programs eligible for early release. The exclusion by Bureau of Prisoner regulation of persons with prior convictions for rape, homicide, robbery or aggravated assault is not an abuse of discretion; the authorizing statute leaves BOP discretion to make this kind of omission. The exclusion does not deny due process; the mandatory language in the policy relates to procedures, not substantive criteria, and therefore does not create a liberty interest. It does not deny equal protection; since there is no right to be discharged early, the rational basis test applies, and categorizing by criminal record is rationally related to preventing the early release of potentially violent persons. The exclusion does not violate the Ex Post Facto Clause. Although the plaintiff was eligible for early release for a few months between the passage of the statute and the promulgation of the regulations, his eligibility was always subject to BOP discretion.

Hazardous Substances and Conditions/Discovery/Food/Qualified Immunity/Summary Judgment

LaBounty v. Coughlin, 137 F.3d 68 (2d Cir. 1998). The plaintiff complained of chemical contamination in the prison's

drinking water and exposure to friable asbestos in the air.

The plaintiff served interrogatories and asked that documents responsive to them be produced as well. As a result of the failure to produce them, he was unable to name the chemicals placed in the water and was precluded from offering evidence to resist defendants' summary judgment motion. Absent any evidence that the documents were produced, the court holds that the district court should determine whether he received the documents and if not, see that he gets them and is able to oppose summary judgment.

Competing allegations by the plaintiff that friable asbestos was constantly exposed and getting into the air and by the defendants that any such damage is quickly repaired, neither supported by documentary evidence, raise a genuine issue of fact as to whether the plaintiff was exposed to friable asbestos. The plaintiff's claims that he constantly complained, and the defendants' lack of denial that he complained orally, raised an issue of fact as to deliberate indifference.

The defendants are not entitled to qualified immunity. It is important to define the right at issue neither too narrowly nor too broadly. It was too narrow to describe it as "the right to be free from crumbling asbestos." The challenged conduct is encompassed by "the right to be free from deliberate indifference to serious medical needs." (74) A rational jury could conclude that it was unreasonable for defendants to believe that exposing the plaintiff to friable asbestos did not violate the Eighth Amendment, given the state of knowledge in 1991-92 about asbestos.

Modification of Judgments/Remedial Principles

Harris v. City of Philadelphia, 137 F.3d 209 (3d Cir. 1998). A 1991 consent judgment in a crowding case provided that the defendants would develop a Management Information System to carry out the requirements of the order. Five years later, the court entered a supplementary order setting deadlines for getting parts of the job done.

The order is appealable because it modifies an injunction.

The order is reversed because the defendants never agreed to implement the MIS plan by a date certain under penalty of fines. The consent decree "does not provide the authority for the district court to proceed in this manner." (213) None of the deadlines in the original order had been violated. There is no indication that the procedures provided in the judgment for enforcement of the judgment's terms was utilized, no indication of lack of substantial compliance, and no contempt hearing.

Federal Officials and Prisons/Procedural Due Process--Property

Weng v. United States, 137 F.3d 709 (2d Cir. 1998). At 713: "Courts have several times commented on the obligation on government, when it seeks to give notice of forfeiture to one it knows to be in its custody, to take the trouble to ascertain the place of confinement." At 714: "Absent special justifying circumstances, the least that can be asked of a federal government agency seeking forfeiture of the property of a federal detainee is that it determine where the claimant is detained and send the notice to the right institution." Id. "We do not agree that a federal agency's mailing of a notice of forfeiture to a federal correctional institution where the property owner is detained constitutes adequate notification of the forfeiture if the notice is not in fact delivered to the prisoner-owner."

Protection from Inmate Assault

Oetken v. Ault, 137 F.3d 613 (8th Cir. 1998). The plaintiff was placed in the same cell as an inmate who had been in a fight; a few days later, that inmate attacked the plaintiff after an argument. The plaintiff said he told an officer that he was afraid of the other inmate, and that the officer did not intervene promptly when the fight started. The court credited the officer's contrary testimony, as was its prerogative and ruled against the plaintiff at trial. Testimony showed that after an inmate is in a fight, he may be double celled, but not with someone with whom he has a history of problems.

Soto v. Johansen, 137 F.3d 980 (7th Cir. 1998). The district court properly found for the defendant in an inmate assault case based on his credibility judgment that the defendant was not the person the plaintiff informed of the risk, and on his conclusion that the plaintiff did not provide enough information about his situation to require action. (The plaintiff was assaulted for refusing to pay "cell rent" to gang members; the defendant testified that he received lots of requests for cell changes and the mere mention of cell rent did not justify one.)

Use of Force--Chemical Agents

Baldwin v. Stalder, 137 F.3d 836 (5th Cir. 1998). The plaintiff was "subdued" after protesting the treatment of another prisoner in the yard. The next day, he and other inmates were put shackled on a bus for transfer, and some of the prisoners created a disturbance on the bus. The main defendant "fired a two second burst of pepper mace down the middle of the bus." The inmates were not allowed to wash the mace off until the end of the bus ride three hours later. The district court found for the defendants on the yard incident but for the plaintiff on the bus incident. It labelled his injuries "minor" and did not award damages; instead, the main defendant was ordered to attend excessive force training and the Secretary of Corrections, who was no longer a defendant, was ordered to place a reprimand in his file and make sure he got the training.

The finding for the plaintiff was clearly erroneous. The finding of *de minimis* injury does not compel a finding of *de minimis* force; "minor" is not *de minimis*. But it was clearly erroneous to find that the defendant's actions were not a good faith effort to maintain or restore discipline, since the prisoners involved had been involved in the yard incident and the bus was in an unfenced area. Even accepting that only one or two inmates were involved in the disturbance, the force was not excessive. The reason for not letting the inmates off to wash off the mace was "more than reasonable": the defendant was afraid that inmates would engage in further disruptions and disturbance, and no one requested medical assistance. Air movement is an approved way of ameliorating the effect of mace, and they left the bus windows open during the trip. "[P]erhaps most importantly," the finding of minor injury confirms the reasonableness of that decision.

Discovery

In re Wilkinson, 137 F.3d 911 (6th Cir. 1998). Prison officials' general policy forbidding prisoners from attending depositions conducted by counsel in their civil actions is upheld. The policy's justifications are "(1) maintaining staff authority; (2) preventing the aggrandizement of inmates; (3) avoiding unnecessary tension; (4) protecting staff morale; (5) preserving limited resources." (913) (Note that these justifications would permit barring prisoner litigation entirely.) Prisoners have no constitutional right to attend any stage of their litigation. Defendants made arrangements for consultation with counsel before, after, and (telephonically) during depositions.

A federal court has the authority to require production of a prisoner at a deposition based on a "demonstration that his physical presence will contribute significantly to a fair adjudication of his claim." (915) The court enumerates factors to be weighed in deciding such claims. The prisoner has the burden of producing of showing need. The court grants a writ of mandamus vacating the district court's order to produce the plaintiff, subject to his making the required specialized showing of need.

Sexual Abuse

Berryhill v. Schriro, 137 F.3d 1073 (8th Cir. 1998). Several civilian maintenance workers grabbed the plaintiff's buttocks briefly. This conduct did not violate the Eighth Amendment because there is no evidence that the plaintiff suffered anything more than a brief unwanted touch. The plaintiff submits no evidence except his own characterization to show that it was a sexual assault. No objectively serious injury, physical or psychological, was shown to have resulted.

At 1076: "Certainly, sexual

or other assaults are not a legitimate part of a prisoner's punishment, and the substantial physical and emotional harm suffered by a victim of such abuse are compensable injuries."

Correspondence--Legal and Official

Weiler v. Purkett, 137 F.3d 1047 (8th Cir. 1998) (en banc). The defendants refused to deliver a package of legal materials sent by the plaintiff's son; regulations permitted such packages to be received only from judges, attorneys and public officials.

The regulation is not unconstitutional on its face under *Turner*. Nor is it unconstitutional as applied. The fact that ten other inmates filed affidavits saying that they had been permitted to receive similar packages did not matter; "after all, they might have received contraband through them." (1050) At 1051: "A prison policy that obstructs privileged inmate mail can violate inmates' right of access to the courts." However, legal mail is not at issue because the regulation defines legal mail as correspondence from an attorney, judge, or public official. Therefore there is no court access claim.

There is no substantive due process claim because receipt of packages from family members is not "a right 'rooted in the traditions and conscience of our people.'" (1051) Nobody's conscience is shocked.

Differential enforcement of the package policy did not deny equal protection because the plaintiff submitted no evidence of any classification by which defendants decided who could receive nonconforming packages and who could not.

The dissenters argue that one way to show an exaggerated response under the *Turner* standard is to show that officials have not found it necessary to impose the restriction on other prisoners. Evidence of arbitrary enforcement is sufficient to withstand summary judgment. At 1053: "If the rule is not enforced as written but is occasionally invoked, one can infer that it is enforced according to some other less neutral principle than that stated."

Municipalities/Pre-Trial Detainees

Turquitt v. Jefferson County, Ala., 137 F.3d 1285 (11th Cir. 1998) (en banc). A county cannot be held liable under § 1983 for injuries to a jail inmate arising from the sheriff's management of the jail because under Alabama law the sheriff is a state official and not a county official. While counties have some duties with respect to jails, they are limited to funding and providing facilities and do not include jail operations or supervision of inmates. There is no evidence that this provision was passed to avoid liability, since it predates *Monell* by decades. *Parker v. Williams* is overruled to the extent that it inconsistent with this holding.

The purpose of the relevant state constitutional provision (a 1901 amendment) was to "guarantee the political rights of prisoners" based on concerns that county courts were failing to punish sheriffs who allowed lynch mobs to take prisoners and kill them.

Food/State Officials and Agencies/In Forma Pauperis

Talib v. Gilley, 138 F.3d 211 (5th Cir. 1998). The plaintiff complained that his meals were withheld on about 50 occasions while he was confined to his cell during lockdown periods. The reason is that he refused to kneel with his hands behind his back before being served.

At 213: "To aid in the determination of whether an IFP complaint is frivolous, this court has approved the use of questionnaires or an evidentiary hearing. . . . Responses to such an inquiry become part of the plaintiff's pleadings."

At 214 n. 3: The court questions whether the plaintiff has alleged a harm cognizable under the Eighth Amendment. Missing one out of nine meals is hardly more than many working citizens miss over the same period. (Evidence? Forget it.) He also lost 15 pounds.

The kneeling requirement is upheld as being reasonably related to legitimate penological interests. The lack of a written policy is immaterial. At 215: "A policy is a policy--the question is simply whether the record supports a finding that a policy exists." The

policy was affirmed in writing on each of the plaintiff's grievances. In any case the same standard is used in dealing with the actions of an individual officer and with prison-wide policies. The court is using the language of the *Turner* reasonableness test even though this is an Eighth Amendment case.

The plaintiff also complained of the service of "Vita-Pro," a soy-based product occasionally used as a meat substitute. He conceded that it was nutritionally and calorically adequate. The district court dismissed as frivolous and the claim is abandoned on appeal.

The Texas Department of Criminal Justice, Institutional Division, is a state agency immune from liability under the Eleventh Amendment.

PLRA--Attorneys' Fees/Judicial Disengagement/Contempt/Women/Education and Training/Law Libraries and Law Books/Attorneys' Fees and Costs/Equal Protection

Glover v. Johnson, 138 F.3d 229 (6th Cir. 1997). The plaintiffs in the late 1970s successfully challenged gender inequalities in treatment programs and law library facilities. The district court was unable over the subsequent period to obtain constitutional compliance and to terminate federal court supervision. The reason is largely (at 233):

[indent]the court's loss of proper perception regarding its role. Very substantially because of unfocused and misdirected advocacy by both sides in this litigation, and particularly because of the recalcitrant defendants' foot-dragging, the district court has been preoccupied with attempting to force the defendants to comply with the details, even the minutiae, of the intermediate methodologies the court has devised for remedying the constitutional deficiencies it found in 1979. The court has lost sight of the forest for its long-time attention to the trees.

The defendants made a motion to terminate before the PLRA, and the district court noted noncompliance with various plans which had not actually been entered as court orders, but did not consider whether the program opportunities *then* being offered to women were constitutionally equal to those *then* being offered to men. The court imposed contempt fines for noncompliance with requirements concerning court access, vocational programming, and apprenticeship programs of $500 a day for each area, with increases to $15,000 a day after two and a half months.

Remedial plans that were never approved and adopted by the court and to which plaintiffs objected are not "consent decrees" that could hold the defendants to a higher standard than constitutionally mandated. Accordingly, the binding order is the 1981 Final Order, entered after a trial, and the relevant question is whether the constitutional violations found at that time still exist. Although the court had to develop a specific methodology to remedy constitutional violations, those intermediate steps have become the focus of attention. There have been "monumental changes in circumstances." Compliance "has become a moving target." (242) There is much additional rhetoric stating that the proper focus is constitutional compliance and termination of the litigation. However, even if defendants have complied with the Constitution, they may still be liable in contempt for violating court orders.

The court directs the district court to conduct hearings and receive evidence and stipulations within 120 days concerning the program opportunities available to male and female inmates, and then to make particularized findings and conclusions as to their compliance with the Equal Protection Clause, with findings to be filed with the appeals court within 150 days. The court is to do the same with respect to the alleged denial of access to court. The court is to terminate jurisdiction as to matters in constitutional compliance. The PLRA is not mentioned here; the termination motion and all proceedings in the district court occurred before the PLRA.

Contempt findings for failure to comply with remedial plans that the court had not adopted are reversed, since there was no "definite and specific order" that had been disobeyed. Even if it

adopted them when it denied defendants' termination motion, it could not retroactively impose contempt sanctions. Nor could defendants be held in contempt for violating "long-standing commitments" or an order in which the court said it was "strongly urging" the defendants to take certain actions. The court also "engag[ed] in judicial micromanagement" and "exceed[ed] its authority" in entering an order requiring the defendants actively to recruit prisoners for apprenticeships.

The PLRA's attorneys' fees provisions lack the clear statutory directive that is necessary to support a statute's retroactive application. Their effect would be retroactive, where plaintiffs' attorneys have conducted themselves in conformity with the pre-existing law. Applying the PLRA would result in "attaching significant new legal burdens to the completed work, and . . . impairing rights acquired under preexisting law." (250) The court does not address post-PLRA fees.

Fees for an appeal abandoned by the defendants should be awarded, both because the plaintiffs *de facto* prevailed and because fees for monitoring are proper. However, plaintiffs should not receive fees for interceding for class members on individual issues unless it can be shown that this work was related to the litigation, e.g., on a retaliation theory.

The court observes that no federal appeals court has ever adopted the "parity" requirement imposed by the district court, which it says is of "dubious validity," but the defendants never appealed it.

Procedural Due Process--Disciplinary Proceedings

Scott v. Albury, 138 F.3d 474 (2d Cir. 1998) (per curiam). The plaintiff was sentenced to 60 days of keeplock and was placed in SHU for about seven weeks.

Under *Sandin*, the actual penalty assessed and not the potential penalty the prisoner faces is the measure of the liberty deprivation. Courts should consider the "degree and duration" of the sentence actually imposed. (479)

In determining whether defendants had discretion to place prisoners in SHU for non-punitive reasons, the court should have looked to the regulations as of the time of the plaintiff's deprivation (1987) and not as of the time of the court's decision, which did not contain a catchall provision for SHU admission or a provision for general "administrative segregation."

Communication with Media/Standing

California First Amendment Coalition v. Calderon, 138 F.3d 1298 (9th Cir. 1998). The district court entered an injunction requiring prison officials to allow witnesses to view execution by lethal injection from the time the inmate is secured to the gurney to just after the pronouncement of death. State regulations permitted viewing only after the condemned has been strapped to the gurney and an IV saline solution is running. Formerly, when different methods of execution were used, witnesses were permitted to watch the whole show.

The court upholds the regulations and reverses the judgment. Execution by lethal injection involves as much as 20 minutes of preparation, compared to about one minute of viewing of lethal gas executions, and that length of exposure to witnesses would increase the likelihood of identification of execution team members and consequent harassment of them and their families.

The press has no constitutional right of access to prisons or prisoners beyond that afforded the general public. The court rejects the district court's distinction of *Pell*, *Houchins* and *Saxbe* on the ground that they dealt with the everyday workings of the prison, while execution is more similar to a governmental proceeding like a trial or hearing. The court also cites--without any clear statement whether it believes it is still good law--an 1890 Supreme Court decision that upheld a ban on publishing any account of the details of an execution beyond the fact that a particular convict was executed on a particular day. At 1303: "We stress that we are not holding that the public and the press do not have First Amendment rights to view executions." (Footnote omitted)

Here there is no evidence of an exaggerated response.

The plaintiff association had standing to sue.

Drug Dependency Treatment/PLRA--Mental or Emotional Injury

Kerr v. Puckett, 138 F.3d 321 (7th Cir. 1998). The plaintiff alleged that drug treatment programs constituted "brainwashing" in violation of his constitutional rights. The action is not barred by the PLRA's mental or emotional injury provision because the plaintiff filed after he was released. A "prisoner" is not an "ex-prisoner" for the statute's purposes. This distinction makes "a modicum of sense: Congress deemed prisoners to be pestiferous litigants because they have so much free time on their hands and there are few costs to filing suit. Opportunity costs of litigation rise following release, diminishing the need for special precautions against weak suits." (323)

The defendants are entitled to qualified immunity because no court has held that programs designed to change people's values are unconstitutional, and the details of the program he complained about are common to AA, military basic training, and prison boot camp programs. They do not violate the Eighth Amendment.

PLRA--Filing Fees/Appeal

Thompson v. Drewry, 136 F.3d 984 (5th Cir. 1998). The plaintiff was ordered to pay an initial filing fee of $1.80, but did not; the court decided that he had shown good cause for failing and directed that he pay the full fee in installments. The plaintiff appealed.

The order requiring payment of the fee is not appealable until entry of a final judgment. Before the PLRA, an order denying IFP status was an appealable final order, but an order to pay in installments is not appealable as a final judgment because it does not end the litigation on the merits and does not close the courthouse door on the plaintiff. Nor is it an appealable collateral order because there is no risk of important and irreparable loss.

Procedural Due Process--Administrative Segregation/Access to Courts--Confiscation and Destruction of Legal Materials

Arce v. Walker, 139 F.3d 329 (2d Cir. 1998). At 334: A prison inmate is now required to meet a two-part test to establish the existence of a liberty interest arising under a state statute or regulation: the inmate must establish that his confinement or restraint (1) creates an "atypical and significant hardship . . . in relation to the ordinary incidents of prison life," *Sandin*, and (2) that "the state has granted its inmates, by regulation or by statute, a protected liberty interest in remaining free from that confinement or restraint," *Frazier v. Coughlin*.

Sandin is not limited to punitive segregation; the argument is meritless. At 335: "*Sandin* dispensed with mechanical distinctions such as the one Arce offers and instead established an analysis under which the degree and duration of an inmate's restraint are the key considerations to determine the existence of a state-created liberty interest."

The district court sufficiently examined the circumstances of the plaintiff's 18-day segregation, mentioning the deprivation of exercise and verbal harassment as well as the confinement itself. The deprivations he suffered were not more onerous than those sanctioned in *Sandin*. The court mentions his sentence of 25 years to life and notes that he was permitted to leave his cell to shower and use the telephone.

The district court improperly granted summary judgment on the plaintiff's claim that he was denied court access by destruction of his legal documents and by other abusive actions in retaliation for his litigation, since the defendants did not show the lack of material factual issues.

Habeas Corpus

Buchanan v. Gilmore, 139 F.3d 982 (4th Cir. 1998). The plaintiff, scheduled for execution, complained that the Governor who passed on his clemency application was the Attorney General at the time of prior proceedings in his case. Since his underlying claim in the clemency application concerned error at trial, the relief he sought (stay of execution until his clemency

petition could be considered by someone else) was really habeas relief that could not be obtained under § 1983, and was also a successive habeas motion barred by statute since the Supreme Court had rejected his claims.

Pre-Trial Detainees/Use of Force--Restraints

Gutierrez v. City of San Antonio, 139 F.3d 441 (5th Cir. 1998). The decedent was arrested in an irrational state, saying that he had "shot some bad coke." He was too violent for EMS to take him to the hospital, so the police hog-tied him in the back of their car and drove to the hospital. He was DOA. The medical examiner said the hog-tying contributed to his death.

The defendants were not entitled to qualified immunity based on the lack of case law holding that hog-tying is unconstitutional. At 446: "Whether a seizure is reasonable under the Fourth Amendment depends not only upon whether the seizure itself is unreasonable, but also upon how the police seize the individual or item . . . . The Fourth Amendment's prohibition of the use of excessive force by the police against seized persons had thus been clearly established prior to November 1994." Since there are studies from before that time indicating that hog-tying is a contributor to "Sudden Custody Death Syndrome," there was evidence that hog-tying is deadly force, subject to the "threat of serious harm" requirement of *Tennessee v. Garner*. The defendants failed to show that there was no material issue of fact as to the objective reasonableness of their conduct.

At 452: "Although the point at which an arrest ends and pretrial detainment begins is not always clear, . . . we have held that the Fifth or Fourteenth Amendments begin to protect persons '*after* the incidents of arrest are completed, *after* the plaintiff has been released from the arresting officer's custody, and *after* the plaintiff has been in detention awaiting trial for a significant period of time.'" (Emphasis in original) The Fourth Amendment applies here because the hog-tying was done by the arresting officers near the scene of the arrest.

Privacy/Pregnancy, Childbirth and Abortion/Procedural, Jurisdictional and Litigation Questions

M.M. v. Zavaras, 139 F.3d 798 (10th Cir. 1998). The plaintiff alleged that prison officials had denied her funds for transportation and medical expenses for abortion, and she requested leave to proceed pseudonymously. The district court denied the motion, which violated the court's procedural rules including the obligation to confer with the adversary. The district court struck the complaint and dismissed the action when the plaintiff did not comply with the court's order that she ratify the complaint by disclosing her name.

The court has appellate jurisdiction since the entire action was dismissed and the court did not specify that it was dismissed without prejudice.

The district court's action was not an abuse of discretion. The court exercised "informed discretion" and weighed the claimed right to privacy against the countervailing public interest, noting that the plaintiff's identity was already known to the state agency and staff, and there is prejudice to the public in not knowing how public funds are being spent.

Hazardous Substances and Conditions/Negligence, Deliberate Indifference and Intent/Mootness

Scott v. District of Columbia, 139 F.3d 940 (D.C.Cir. 1998). The district court enjoined the defendants to provide the plaintiffs a smoke-free environment at Lorton. The case was not certified as a class action and the plaintiffs have either been released or transferred to a private prison in Ohio pursuant to the National Capital Revitalization and Self-Government Improvement Act of 1997. At 941: "Normally, a prisoner's transfer or release from a prison moots any claim he might have for equitable relief arising out of the conditions of his confinement in that prison . . . . The cases do not distinguish between intra- and inter-jurisdiction transfers of inmates." (Footnote omitted.) The court does not buy the "capable of repetition, yet evading review"

doctrine in this instance because nothing supports the likelihood of the transferred plaintiffs returning to Lorton. However, the injunction applies to them no matter where they are, so long as they are under the District's jurisdiction, so the case is not moot.

The appeals court characterizes the district court as holding that "involuntary exposure to any level of second-hand tobacco smoke in prison violates the Eighth Amendment." (942) There is no such *per se* rule in *Helling*. The plaintiff's case lacked evidence to satisfy *Helling*'s standard, consisting entirely of anecdotal evidence and containing no "objective evidence of the level of second-hand smoke," except for the defendants' measures that showed them to be within OSHA and American Society of Heating, Refrigerating, and Air Conditioning Engineers standards. Although they presented an expert who testified that second-hand smoke would aggravate the plaintiffs' alleged health problems, one plaintiff identified no specific medical conditions, and the other (who had asthma and a history of thyroid cancer) presented no evidence of causal relationship between his condition and an increased risk of harm from second-hand smoke. The expert, who testified that risks of harm varied tremendously with the individual, did not examine the plaintiffs.

There is also no showing of deliberate indifference, since there was no evidence of an "objectively intolerable risk." At 944: "It makes no sense to charge someone with improperly ignoring a danger that never existed." *Id.*: "Besides, it is hard to see how imperfect enforcement of a nonsmoking policy can, alone, satisfy Helling's subjective element. That the District even has such a policy militates against a finding of deliberate indifference." (944) There was, in fact, considerable evidence of enforcement of the policy.

PLRA--Exhaustion of Administrative Remedies

Brown v. Toombs, 139 F.3d 1102 (6th Cir. 1998). At 1104: [indent]In light of the plain mandatory language of the statute regarding exhaustion of remedies, the legislative purpose underlying the plain language, and the sound policy on which it is based, this court will henceforth require that prisoners filing § 1983 cases involving prison conditions must allege and show that they have exhausted all available state administrative remedies. A prisoner should attach to his § 1983 complaint the administrative decision, if it is available, showing the administrative disposition of his complaint. Exhaustion applies only to cases filed on or after April 26, 1996, the effective date of the Prison Litigation Reform Act.

This requirement should be enforced *sua sponte*. This case should be dismissed without prejudice. Absent a record showing exhaustion, the appeals court will dismiss appeals without prejudice.

Judicial Disengagement

Cody v. Hillard, 139 F.3d 1197 (8th Cir. 1998). The defendants moved to dissolve a long-standing consent decree, alleging substantial compliance, the district court granted the motion over the plaintiffs' objections. The motion was filed 10 days before the PLRA was passed, and the PLRA is not mentioned in this opinion.

Terminating jurisdiction over a consent decree rests in the discretion of the district court, which should weigh specific terms governing continuation or supervision; the decree's underlying goals; whether there has been compliance with orders; whether defendants made a good faith effort to comply; the age of the decree; and the continuing efficacy of its enforcement. Here, there was evidence of past failure to comply with the decree and supplemental orders and of some remaining violations of the decree. The district court's order does not indicate whether he ignored this evidence or considered it inconsequential. At 1199: "Moreover, the ultimate question of whether the defendants are likely to comply with the Constitution in the absence of court supervision is a question of fact, *see Dowell . . .*, for which the district court made no finding." The court does not determine whether Rule 52, Fed.R.Civ.P., requires findings of

fact and conclusions of law on motions to dissolve an injunction; the court can remand for findings and conclusions if its review would be hindered without them. The necessity of an evidentiary hearing depends on whether there are disputed factual questions, which is the case here; the district court should either hold such a hearing or articulate the rationale that would make it superfluous.

Prison Records/Judicial Immunity/Injunctive Relief

Hill v. Sciarrota, 140 F.3d 210 (2d Cir. 1998). The plaintiff alleged that probation personnel included in their report erroneous information that hurt his chances of getting parole and excluded him from temporary release programs.

State law provides a procedure for challenging allegedly erroneous information in the criminal proceeding. In addition (at 214): "In a suit against custodial officials, an inmate has a constitutional right to challenge the accuracy of the information contained in his PSR and in his prison records." (The state court case cited as authority cites *Paine v. Baker*.) There is a right to review the PSR for parole hearings and challenges to parole denials. In light of these procedures, probation officials enjoy absolute immunity from damage liability for preparing and furnishing such reports to the court. (The reasoning is not spelled out.)

The plaintiff is not entitled to an injunction against the probation personnel on the ground that their report is causing him problems in prison and with parole. His remedy is to sue probation and parole personnel if they are using erroneous information.

The court mentions that § 1983 was amended in 1996 to preclude injunctions against judicial officers for judicial acts unless a declaratory judgment was first violated, or was unavailable. Pub.L. No. 104-317, § 309(c), 110 Stat. 3847, 3853.

Protection from Inmate Assault

Jackson v. Everett, 140 F.3d 1149 (8th Cir. 1998). The defendant got an anonymous note that another inmate would kill the plaintiff. He investigated, both inmates denied any problems; the night passed without incident; and he reported the incident when his shift ended the next morning. The plaintiff was stabbed by the same inmate later that day.

The defendant was not deliberately indifferent. There was a known risk and he took steps to protect the plaintiff; when the risk did not materialize, he reported the incident and went off duty, and had no knowledge of any risk subsequent to that. The district judge's conclusion that it was "unreasonable" for the defendant not to search the two men for weapons immediately does not suffice to avoid summary judgment; reasonableness is a negligence standard. (The court ignores the fact that it is also the language of *Farmer v. Brennan*).

Procedural Due Process--Disciplinary Proceedings/Habeas Corpus

Sylvester v. Hanks, 140 F.3d 713 (7th Cir. 1998). The petitioner was sentenced to three years in punitive segregation for inciting a riot based on the view that he was the "Baye" referred to in an intercepted letter.

The court expresses doubt whether this case should proceed under 28 U.S.C. § 2254, which permits attacks on the fact or duration of "custody." *Sandin*, by implying that the difference between segregation and general population is not a deprivation of liberty, indicates that it can't be "custody" either. This makes a difference for procedural reasons such as the need for a certificate of appealability and the applicability of PLRA. The court notes that recent Seventh Circuit precedent holding that *Balisok* precludes use of § 1983 to challenge segregation may require use of § 2254--though that case did not attempt to reconcile its holding with *Sandin* and the fact that few states afford collateral review of prison disciplinary decisions. The court cites *Spencer v. Kemna* and notes the new majority to treat *Heck/Balisok* as inapplicable when collateral review is unavailable. The court concludes it need not decide the issue.

The "some evidence" standard--and its concomitant scrutiny of the record of prison disciplinary proceedings--may not apply to discipline short of good time deprivation. The letter, the

fact that the petitioner is called "Baye," and the fact that he had been heard to talk about a demonstration were "some evidence."

The issues on this petition are supposed to be circumscribed by the habeas certificate of appealability. The court ignores other issues raised by the petitioner, except for one that has "potential merit" but is not "close enough" to call for a response by the defendants.

Due process was not denied by the failure of prison officials to do anything more when two of the requested inmate witnesses declined to give written statements. Defendants were not obligated to make them appear in person or elicit reasons for their refusal. The court distinguishes prior precedent (*Forbes v. Trigg*) on the ground that it involved good time. At 715: "When the sanction is less onerous, the Constitution requires less . . . ." When only "custody status" is at issue (at 716): "A prisoner is entitled to some kind of hearing, but an opportunity to present his own testimony, documentary evidence, and the testimony of *willing* witnesses is constitutionally sufficient for interests of this kind (if, to repeat, any process at all is due)."

It is unclear why the court did not address whether *Sandin* eliminates any due process rights; defendants argued the question.

PLRA--Filing Fees, Three Strikes/Access to Courts--Punishment and Retaliation

Lucien v. DeTella, 141 F.3d 773 (7th Cir. 1998). An allegation that the plaintiff was classified as an escape risk because of his litigation makes out a constitutional claim.

The plaintiff was assessed a partial filing fee of $18, refused to pay though he had the money, and the district court refused to file the complaint. At 774: "That some of the income in the trust fund came from family members is irrelevant. Gifts become the property of the recipient." Because the complaint was never filed, the plaintiff owes nothing to the district court.

The plaintiff probably has three strikes. In the future, district courts should determine whether the prisoner is eligible for partial and installment payments before calculating the payments.

The district court is affirmed. The plaintiff cannot recover what he has paid of the appellate fee. At 775: "All the partial-prepayment and periodic-payment provisions in the amended § 1915 do is provide a means to collect from prison trust accounts sums that prisoners owe independently of § 1915 . . . ."

The filing fee provisions are not unconstitutional.

The court notes that the prison has not remitted the correct amount from the plaintiff's prison account and describes what it has done as "inexplicable." Since the fee should have been paid in full, all monies from whatever source should be remitted to the court until it is paid. The prisoner is responsible to make sure that enough money to cover the 20% of income requirement remains in his account, and also to notice prisons' mistakes and keep enough money on hand to cover them too. At 776: "Lurking in the background is the question whether the prison itself may be liable if it fails to comply with a judicial order under the PLRA."

Searches--Person--Convicts/Women

Peckham v. Wisconsin Dept. of Correction, 141 F.3d 694 (7th Cir. 1998). The female plaintiff complained of numerous strip searches. The court holds that prisoners retain "some rights under the Fourth Amendment" (696-97 and n. 2), but it is difficult to imagine many real-life scenarios where strip searches would be unreasonable under the Fourth Amendment, and the ones in this case were not unreasonable. At 697: "More importantly, regardless of how one views the Fourth Amendment in this context, it is the Eighth Amendment that is more properly posed to protect inmates from unconstitutional strip searches, notably when their aim is punishment, not legitimate institutional concerns." Here there is no evidence that the searches were for harassing or punishing purposes.

The court politely rejects Judge Easterbrook's assertion in *Johnson v. Phelan* that prisoners have no reasonable expectations of privacy, which he arrived at by pretending that *Hudson v. Palmer*

addresses bodily privacy. Judge Easterbrook defends *Johnson* in his concurrence.

Among the strip searches complained of are "adjustment time" searches, which are done when a prisoner in segregation receives additional segregation time, even if she doesn't leave the unit. No explanation for this practice appears in the opinion.

Drug Dependency Treatment/Federal Officials and Prisons/Ex Post Facto Laws

Royal v. Tombone, 141 F.3d 596 (5th Cir. 1998). The petitioner was denied sentence reduction notwithstanding his completion of a drug abuse program in custody. The Bureau of Prisons had discretion under the statute to declare bank robbery a crime of violence excluded from the sentence reduction program. The previous policy, under which the petitioner might have received a sentence reduction, conflicted with the underlying statute and was erroneous as a matter of law. Application of the revised policy to the petitioner did not violate the Ex Post Facto Clause.

NON-PRISON CASES

Pleading

Stevens v. Umsted, 131 F.3d 697 (7th Cir. 1997). A complaint that fails to specify the capacity in which the defendants are sued is usually construed to be against them in their official capacities, but that fact is not conclusive. Where the parties have operated under the assumption that it is an individual capacity suit and the defendants have raised qualified immunity, it should be treated as an individual capacity case.

Pro Se Litigation

Murray v. Archambo, 132 F.3d 609 (10th Cir. 1998). The *pro se* plaintiff should not have had his case dismissed, with the court deeming defendants' summary judgment motion confessed, for missing by one day a 15-day deadline for responding to the motion. The court failed to consider the required factors of actual prejudice, amount of interference with the judicial process, and the culpability of the litigant.

Disabled

Autio v. AFSCME, Local 3139, 140 F.3d 802 (8th Cir. 1998). The Americans with Disabilities Act does not violate the Eleventh Amendment. Unlike the Religious Freedom Restoration Act, it is "plainly adapted" as a remedial measure even if it prohibits conduct that may or may not be unconstitutional. Its remedies are not so sweeping that they exceed the harm they were created to redress. Congress in *Cleburne* recognized that legislation providing special treatment for the disabled serves equal protection and that such decisions are peculiarly the legislature's province.

Coolbaugh v. State of Louisiana, 136 F.3d 430 (5th Cir. 1998). The ADA is a permissible exercise of Congress' authority under the Fourteenth Amendment to override the Eleventh Amendment. Under *City of Boerne*, the court must assess whether there is "congruence and proportionality" between the injury to be remedied and the means adopted. That standard is met here given the record in Congress. The court should defer to Congress on such questions, especially in dealing with disabled people, since the Supreme Court in *Cleburne* said that Congress was the "ideal governmental branch" to address their legal treatment. (The *City of Boerne* inquiry is not an Eleventh Amendment question; it is a question about the constitutionality of the statute as applied to any non-federal instrumentality. However, the court treats it as part of the *Seminole Tribe* inquiry, one prong of which is whether Congress acted "pursuant to a valid exercise of power.")

Religion

In re Young, 141 F.3d 854 (8th Cir. 1998). The Religious Freedom Restoration Act continues to apply to the federal Bankruptcy Code, and as so applied does not violate the separation of powers, since the Constitution gives Congress power over bankruptcy and the Necessary and Proper Clause gives it broad authority to legislate concerning bankruptcy. RFRA does not violate the

Establishment Clause.

District Court Cases

Parties Defendant/Medical Care/Use of Force/Pro Se Litigation/Sanitation/Administrative Segregation/Appointment of Counsel

Arnold v. Moore, 980 F.Supp. 28 (D.D.C. 1997). The plaintiff alleged that he was trying to help an officer injured in a disturbance when other officers misinterpreted his actions and beat him badly even though he did not resist. He was placed for several days in a feces-infested cell without heat, running water, and with garbage and urine on the floor, without bedding, a jumpsuit, and eating utensils. He was denied medical care for days.

At 33: " . . . [T]he Court has a special responsibility to allow ample opportunity for amending *pro se* complaints . . . ." The court treats affidavits submitted by the plaintiff as amendments rather than matters outside the pleadings.

The D.C. Department of Corrections is not a suable entity.

The alleged conditions of confinement "may be sufficient to show a denial of the minimal civilized measures of life's necessities." (35) However, there is no evidence of the Warden and Commissioner's knowledge of them, and in fact the Department investigated and removed the plaintiff after his complaints to Eleanor Holmes Norton.

At 37: "The plaintiff's allegations that he was beaten until he lost consciousness meet the objective component of this inquiry." Allegations that the defendants beat him in retaliation for the stabbing of the injured corrections officer, not in order to preserve order (sic), would if true establish malicious and sadistic intent. The case is "more than one of mistaken identity."

The plaintiff's failure to identify the officers who beat him did not require dismissal of his complaint; he should have an opportunity for discovery.

The court directs the appointment of counsel.

PLRA--Filing Fees

Copley v. Henderson, 980 F.Supp. 322 (D.Neb. 1997). The plaintiff voluntarily dismissed his action without prejudice and moved to stop collection of the partial filing fee, based on the magistrate judge's statement that this is permissible. The court is not authorized to stop collecting a fee once the complaint is filed. Because the plaintiff dismissed based on this incorrect advice, the district judge construes the motion as one for relief from judgment under Rule 60(b), Fed.R.Civ.P., and reinstates the action to give the plaintiff the chance to decide if he wants to go forward.

Federal Officials and Prisons/PLRA--Screening and Dismissal/Medical Care/Work Assignments/Personal Involvement and Supervisory Liability

Johnstone v. United States, 980 F.Supp. 148 (E.D.Pa. 1997). The screening and dismissal provisions of the PLRA apply to complaints filed before the statute's passage because they are merely procedural changes.

Bivens claims may only be brought against federal officers; claims against the United States or its agencies are barred by sovereign immunity.

Bivens claims may not be predicated on *respondeat superior* liability. (151, collecting cases) At 152: " . . . [T]he law of *Bivens* actions has closely tracked developments in the law governing civil rights actions under § 1983."

The plaintiff's medical care claim is supported by no allegations of deliberate indifference.

The allegation that an officer assigned the plaintiff to a work assignment inconsistent with his medical condition, despite medical records stating that he should be restricted to light-duty work because of his heart condition, is not "facially inconsistent" with deliberate indifference, but is time-barred. Claims can be dismissed under Rule 12(b)(6) based on the statute of limitations, and the PLRA permits *sua sponte* dismissals under that rule, but there is a question of procedural fairness in doing so. The court resolves it against the prisoner without qualm.

Mootness/Disabled/Procedural Due Process--Classification, Disciplinary Proceedings/Equal Protection/Pendent and Supplemental Claims; State Law in Federal Courts

Randolph v. Rodgers, 980 F.Supp. 1051 (E.D.Mo. 1997). The claims of the hearing-impaired plaintiff were not mooted by his transfer from one prison to another because his claims are capable of repetition. At 1057: "Neither plaintiff's deafness nor his life sentence . . . is at all likely to change. If relief were denied as moot, defendants could simply transfer plaintiff back and forth . . . to evade review of these issues by any Court."

The failure to provide a sign language interpreter at disciplinary hearings, resulting in two 30-day terms of segregation and reclassification, did not deny due process because the consequences were not atypical and significant under *Sandin*.

Disabled people are not a suspect class. The plaintiff was not treated differently from similarly situated persons; his complaint is that he was treated the same. Therefore equal protection is not violated.

The ADA and the Rehabilitation Act apply to state prisoners. However, the individual defendants are not the proper defendants. It is discrimination by the "public entity" that is forbidden, and the state Department of Correction is the only proper defendant. Alternatively, the defendants are entitled to qualified immunity, since there was no binding authority that the statutes apply to prisoners.

The plaintiff's failure to ask for an interpreter each time he sought medical care and each time he received a conduct violation does not disqualify him from relief; he asked often enough, and was refused. The plaintiff is disabled and is otherwise qualified for such benefits as medical care, educational training, and participation in disciplinary and classification proceedings, and has not received the full benefit of them. Written communications and patience on the part of medical providers and teachers are not sufficient accommodation. The accommodation sought is not excessively burdensome; the plaintiff does not seek round-the-clock service, and all the activities at issue (educational programs, disciplinary and classification hearings, and non-emergency medical care) can be scheduled in advance. No factual question is presented because these services are required by state statute; thus, the legislature "has determined that providing such services in the limited circumstances sought by plaintiff is not unduly burdensome. It is, after all, the state legislature that controls the defendants' budget, and the Missouri Department of Corrections should not be able to argue to this Court that the state legislature's determination is factually incorrect." (1062)

Defendants are also liable under a state statute providing for interpreters in prison. A private right of action will be implied where the legislature has failed to provide for any other form of enforcement. *Pennhurst* is not mentioned.

The plaintiff is granted summary judgment on his injunctive claims.

Rights of Staff

Weicherding v. Riegel, 981 F.Supp. 1143 (C.D.Ill. 1997). An officer's Ku Klux Klan activities, which included a rally at his house and the distribution of Klan literature, involved a matter of public concern, but it was not clearly established that his First Amendment rights outweighed prison officials' interests in maintaining racial harmony. The defendants are therefore entitled to qualified immunity for firing him.

Pre-Trial Detainees/Protection from Inmate Assault/Municipalities/PLRA--Mental or Emotional Injury/Law Libraries and Law Books

Heisler v. Kralik, 981 F.Supp. 830 (S.D.N.Y. 1997). The plaintiff, charged with sexual assault on a minor, was held in jail in New Jersey and was transferred to a New York jail, where he was assaulted and suffered contusions and swelling. He was placed in protective custody until his transfer to state prison.

Defendants' position that prison officials are liable for failure to protect only if a serious

physical injury results is inconsistent with *Farmer v. Brennan*. At 837: "In sum, prison officials have a constitutional duty to act reasonably to ensure a safe environment for a prisoner when they are aware that there is a significant risk of serious injury to that prisoner. . . . [T]he focus of inquiry must be, not the extent of the physical injuries sustained in an attack, but rather the existence of a 'substantial risk of serious harm.'" (837) Even in medical care cases, deliberate indifference to a substantial risk of future harm is actionable.

Defendants' argument that warnings passed to the New York jail from the New Jersey jail established only that he was at risk in New Jersey is rejected, since the danger stemmed from his crime and the likely reaction of other prisoners.

In 1994, it was clearly established that "intentional or reckless failure to take reasonable measures to protect a prisoner from threatened violence, even in the absence of a prior act of violence directed at that inmate, can create liability" (839), and that the risk of injury is actionable.

The PLRA's mental or emotional injury provision does not apply retroactively to cases filed before PLRA's enactment.

The plaintiff's complaints of denial of access to showers and recreation and the ability to clean his cell stated a claim against an officer who was alleged to have denied these items every time that he was on duty for a four-month period.

Allegations of denial of law library access are dismissed absent allegations of harm; the plaintiff said he pled guilty to escape conditions in the New Jersey jail and doesn't say how not going to the law library caused this result.

The allegation that the Sheriff is a policymaker for the County on inmate security supports a claim of municipal liability.

Protection from Inmate Assault/Verbal Abuse/Summary Judgment

Watson v. McGinnis, 981 F.Supp. 815 (S.D.N.Y. 1997). Intentionally calling a prisoner a snitch in order to do him harm states an Eighth Amendment excessive force claim. However, the officer is entitled to summary judgment because the plaintiff had no admissible evidence that he had done this; it was all hearsay from other inmates.

Searches--Prison/Pendent and Supplemental Claims; State Law in Federal Courts

Thomas v. Irvin, 981 F.Supp. 794 (W.D.N.Y. 1997). The plaintiff was placed on "drug watch" for seven days in a dry cell.

At 798: ". . . [A] prison inmate does not have a viable claim based solely on prison officials' failure to adhere to the requirements of prison regulations, directives or policy statements."

Placement in drug watch did not deny due process because it was not atypical and significant under *Sandin*. The room the plaintiff was kept in was larger than the average cell, was equipped with all essential items for rest and hygiene, he was allowed to exercise and smoke, and he received regular meals and daily medical attention. Defendants also have a substantial penological justification: stopping the drug trade.

Drug watch did not violate the Eighth Amendment because of the alleged lack of ventilation; the plaintiff was not placed at a substantial risk of serious harm and did not have any symptoms of respiratory problems, and defendants paid enough attention to him not to be deliberately indifferent.

PLRA--Exhaustion of Administrative Remedies/Procedural Due Process--Disciplinary Proceedings, Transfers/Mootness/PLRA--Mental or Emotional Injury

Evans v. Allen, 981 F.Supp. 1102 (N.D.Ill. 1997). A plaintiff who alleged that he used the grievance system, without a specific statement that he exhausted, alleged sufficient facts that he might prove exhaustion; the court directs him, since he has to file an amended complaint anyway, to allege exhaustion more specifically.

The plaintiff's complaints of 218 days in segregation, being restrained in cuffs and chains at visits, being subjected to racial

abuse, having bodily fluids thrown on him, and being so stressed that he attempted suicide do not establish that conditions were significantly more harsh than in the general prison population. He was not denied a liberty interest under the Sandin "atypical and significant" standard.

Denial of a transfer did not deny due process.

The filing of false disciplinary charges does not deny due process.

Prisoners may be required to request witnesses in advance at disciplinary hearings. Day-of-hearing requests may be summarily denied.

A transfer from one prison to another moots injunctive claims arising from the first prison unless the plaintiff can demonstrate he is likely to be transferred back.

The plaintiff's claims are barred by the PLRA mental or emotional injury provision since he alleges no physical harm; the claim that bodily fluids were thrown on him does not satisfy the statute.

Sexual Abuse/Discovery

Giron v. Corrections Corp. of America, 981 F.Supp. 1406 (D.N.M. 1997). The plaintiff alleged that she was raped by a correctional officer at a private prison. The defendant demanded that she list all her sexual contacts starting five years before the alleged rape, and provide manner, type, date, location, and "all persons present" during each sexual contact.

Under Rule 412, Fed.R.Ev., as amended in 1994, evidence of sexual behavior or predisposition is admissible only if the proponent demonstrates its admissibility and shows that its evidentiary value *substantially* outweighs the dangers, including harm to the victim as well as prejudice to the parties. At 1407: "Although Rule 412 controls the admissibility of evidence rather than its discoverability, it must inform that proper scope of discovery in this case."

The defendant argued that the plaintiff had put her mental and emotional condition in issue and that he needed to speak to her former sexual partners to learn her pre-existing condition. The court observes that this information would be outside their expertise. As to her mental condition, the court holds that the evidence is relevant only to the extent that such sexual contact caused pain and suffering, i.e. "were violent or damaging to her in any way."

Procedural Due Process--Disciplinary Proceedings

Howard v. Pierce, 981 F.Supp. 190 (W.D.N.Y. 1997). The plaintiff was found guilty in a disciplinary proceeding of murdering another inmate and was sentenced to 5 years in SHU. A state court reversed and ordered the conviction expunged on the ground that the wrong date appeared in the misbehavior report. The prisoner was then judicially convicted of murder. The next year--but before the appellate proceedings were completed--a second disciplinary charge was filed based on the criminal conviction itself. The plaintiff was convicted and sentenced to seven years in SHU, reduced on administrative appeal back to five years. The state courts reversed and ordered expungement again, holding that the new sanction was contrary to the prior order requiring expungement. The plaintiff had spent two years in SHU.

The plaintiff asserted substantive, not procedural, due process, thereby subjecting himself to a standard of "arbitrary, conscience-shocking, or oppressive in a constitutional sense" (194, citation omitted). Bringing a second disciplinary proceeding doesn't meet this standard, though it may have been "incorrect or ill-advised." In any case the defendants enjoy qualified immunity. Although there might be a clearly established right not to be confined after a favorable judicial decision, it was not so clear that the second disciplinary proceeding was barred based on the state court proceedings here when the prisoner had been subsequently convicted in criminal court.

The defendants did not dispute, and the court accepts for the sake of argument, that the segregation time here was atypical and significant under *Sandin*.

Husbands v. McClellan, 990 F.Supp. 214 (W.D.N.Y. 1998).

The plaintiff was sentenced to a year in SHU with a recommendation of a year's loss of good time; he obtained administrative reversal after serving about six months.

The court had previously dismissed on the ground that there was no liberty deprivation under *Sandin*. *Miller v. Selsky* does not change this result; the loss of privileges, the never-implemented loss of good time, and the six months' confinement are not atypical and significant. The court cites evidence that many of the inmates in SHU had such sentences. The conditions are not "dramatically different" from those in general population, and prisoners could be placed in similar circumstances in administrative segregation at will.

Whitlock v. Johnson, 982 F.Supp. 615 (N.D.Ill. 1997). The prison Adjustment Committee barred all in-person witness testimony, "calling" witnesses only by written statements generated from ex parte interviews by unsworn hearing investigators. Although prison officials have a great deal of discretion in determining whether witnesses can be called, they must exercise that judgment case by case. At 619: The defendants' practice "does not merely qualify an inmate's right to call witnesses--it eviscerates it." Summary judgment is granted to the plaintiffs and the parties are directed to confer on the form of a final judgment.

Heating and Ventilation/Verbal Abuse/Access to Courts--Punishment and Retaliation

Jones v. Bishop, 981 F.Supp. 290 (S.D.N.Y. 1997). The plaintiff's complaint of a cold cell resulting from windows being open did not meet the objective prong of the Eighth Amendment, since other inmates remedied the cold by wearing sweats or long johns, and the only harm was depression. Nor did he show deliberate indifference, since he did not complain to anyone.

Verbal abuse (here, being called "super-rape-po" and "tree jumper," whatever that is) does not state a § 1983 claim.

Seizure of the plaintiff's indictment and delay in giving him access to law books did not deny access to courts in the absence of proof of injury.

Access to Courts--Punishment and Retaliation

Davis v. Kelly, 981 F.Supp. 178 (W.D.N.Y. 1997). Transfers may not be done in retaliation for a prisoner's exercise of constitutional rights. The plaintiff must show that the conduct at issue was constitutionally protected and was a substantial motivating factor in the decision to transfer; the defendants must then show that the prisoner would have been transferred anyway. The claim is rejected on the facts. The supposed reason for the transfer was that "plaintiff had been incarcerated at Attica for ten years and had become too familiar with facility staff and procedures." (182)

Suicide Prevention/Res Judicata and Collateral Estoppel/Class Actions--Effect of Judgments and Pending Litigation/Pendent and Supplemental Claims; State Law in Federal Courts/Survival of Actions and Wrongful Death Litigation/Color of Law/Qualified Immunity

McDuffie v. Hopper, 982 F.Supp. 817 (M.D.Ala. 1997). The decedent had a long and well-known history of suicidal tendencies, but when he got to a prison with medical services provided by Correctional Medical Services, his psychotropic medications were stopped and he was put in isolation, where he hanged himself.

Medical personnel who worked for a private provider are not entitled to qualified immunity; contrary Eleventh Circuit authority has been undermined by *Richardson v. Knight*. The court also raises, but does not decide, whether the corporation itself--since it is treated like a municipality for purposes of the policy requirement in establishing liability--should also be treated like a municipality and denied qualified immunity on that ground as well.

The court recites the Eleventh Circuit boilerplate on prison suicide. The court notes the utility of expert testimony in a case of this nature. Liability is supported here by testimony that it is a "serious departure from contemporary standards of psychiatric care" to terminate a large dose of medication without

considering alternatives and not to contact the patient's previous physicians, and that putting him in isolation worsened the problem. Solitary confinement is not treatment. The corporation had a policy of reducing medications without a clear rationale and without a system for monitoring the consequences. Another expert testified that defendants' view that the decedent was faking his symptoms was "markedly erroneous" in view of his history and that the defendant doctor inappropriately brought punishment factors into his treatment. The fact that the decision to take a person off suicide watch is a professional decision does not settle whether defendants were exercising professional judgment when the decedent died.

A pending class action concerning mental health conditions does not preclude this case. Since there is no final judgment, there is no *res judicata* issue, and since nothing has been found factually, there is no collateral estoppel.

The plaintiff's claims do not abate under a state statute which has been interpreted to mean that unfiled tort claims do not survive the plaintiff's death. At 830: "As is demanded by logic, the statute has been held not to abate actions for wrongful death." Claims for personal injury damages to the plaintiff himself before death do abate.

Lighting/Length of Stay/Cruel and Unusual Punishment--Proof of Harm

Shepherd v. Ault, 982 F.Supp. 643 (N.D.Iowa 1997). The plaintiffs alleged that their cells were illuminated 24 hours a day by a 60-watt light bulb which they were forbidden to cover.

Cases challenging continuous illumination have yielded mixed results because such cases are fact-driven. Here, the plaintiffs alleged that the lighting made it very difficult to sleep. The court finds that an inference of psychological harm arises from the length of time (283 nights and 550 nights respectively) to which the plaintiffs were subjected to "lighting so far removed from natural conditions." (648) Id.: "There can be little doubt that subjecting prisoners to continuous *darkness* would at least raise a constitutional question. . . . What is in question here, continuous *lighting*, which is just as foreign a condition as continuous darkness, should at least raise an inference of a constitutional violation. Similarly, the effectiveness of sleep deprivation as a tool of torture has long been recognized." (Citing 1930 report of ABA Committee on Lawless Enforcement of Law.)

Summary judgment is denied because there are triable issues both on the question whether the objective prong of the Eighth Amendment standard are met and on the question whether it is penologically necessary for surveillance to leave the lights on all the time.

Publications

Snelling v. Riveland, 983 F.Supp. 930 (E.D.Wash. 1997). The plaintiff complained that letters and copies of *Genesis* magazine were rejected under the prison system's prohibition on "sexually explicit" materials, which is itself explicit and detailed. The record showed that 24% of the prison population is incarcerated for sex crimes, there is an ongoing problem of sexual assaults, consensual sexual behavior, and sexual harassment of female staff, and a "significant number" of inmates are infected with HIV or hepatitis. There were around 70 rule infractions for sexual or "sexually-related" misconduct a year including several for rape. Defendants' policy requires review of each publication or piece of correspondence individually, with notification to other facilities when a particular item is found to violate policy. Over two million publications are made available to state prisoners through the Washington State Library and the prisons' own collections.

The policy is upheld under the *Turner* standard based on evidence that "inmates exposed to pornography become desensitized and require more and more graphic material which may ultimately result in acting out sexual fantasies. Because of the lack of physical relationships of choice in prison," the result is an increased possibility of homosexual acts that may spread disease. Aggressive and predatory behavior that may result endangers the lives and

safety of staff and inmates. Material that is degrading to women leads to disrespect for female staff. The defendants submitted studies supporting these claims, which the plaintiff (proceeding *pro se*) did not refute. The policy serves security and rehabilitation objectives. The plaintiffs have alternative means of exercising their First Amendment rights because they can read things not prohibited by the policy. The defendants cannot control the distribution of materials once they enter the prison and cannot keep them from being read by sex offenders. The fact that some sexually explicit materials have been obtained through the library does not undermine the policy; these are simply mistakes.

Disabled/Good Time/Habeas Corpus/Class Actions--Certification of Classes

Raines v. State of Florida, 983 F.Supp. 1362 (N.D.Fla. 1997). The plaintiffs challenged restrictions on the award of "incentive gain-time" to disabled prisoners. A regulation that had provided for the award of gain time for "positive activities" other than work was amended and made more restrictive.

The plaintiffs' allegations do not support an Eighth Amendment claim. Liberty is not a "basic human need" and its denial does not implicate the Eighth Amendment. *Contra*, *Sample v. Diecks*, 885 F.2d 1099, 1108 (3d Cir. 1989). Nor is there any evidence that the regulation at issue was adopted with the subjective intent to punish prisoners because they are disabled. (What happened to deliberate indifference?) A disincentive to malinger is "penal in nature," but not cruel.

The ADA applies to state prisons.

Prisoners in three subclasses (inmates unable to engage in any work, recreational or training activities because of physical or mental impairment; inmates receiving mental health treatment, and inmates housed at a reception and medical center for treatment) are "otherwise qualified" under the authorizing statute, which provides for gain time for a prisoner who "works diligently, participates in training, uses time constructively, or otherwise engages in positive activities." The "program," for ADA purposes, is defined by the statute and not the regulations promulgated under it. A regulation that "fragments" the opportunity to earn the maximum gain time by separating the four statutorily defined activities, allowing healthy prisoners to earn the maximum but denying that opportunity to disabled prisoners who cannot engage in all four activities, violates ADA. The court rejects the argument that prisoners who are not "routinely available for work" are not otherwise qualified. At 1374: "Plaintiffs seek no accommodation," since anybody can "use time constructively" or engage in "positive activities." Therefore the question whether an accommodation is reasonable, and the financial and administrative burdens on the defendants, need not be considered. (The court thus defines a revision in defendants' regulations as not being an "accommodation" despite defendants' claim that the reason for their policies is to discourage malingering and false or exaggerated claims of disability.)

The court raises the question of whether the subclass of persons at reception centers--usually there for specialty consultations--are appropriately class-certified, and directs the parties to address the question at trial.

Defendants are entitled to summary judgment as to the fourth subclass, which apparently consists of prisoners with some ability to work, who alleged that their disabilities weren't taken into account in allocating gain time. Defendants' policy is to the contrary, the statistical differences between this subclass and non-disabled prisoners are slight, and the existence of anecdotal evidence of individual disparities does not justify class relief.

Damage claims for failure to award gain time are not within the court's jurisdiction under *Heck v. Humphrey*. At 1376: "The reasoning of *Heck* applies whether a claimant is in or out of custody." That is probably wrong under *Spencer v. Kemna* (U.S. 1998).

PLRA--Filing Fees/Habeas Corpus

Smith v. Coyne, 984 F.Supp. 1186 (N.D.Ill. 1998). The plaintiff's claims are barred by *Heck v. Humphrey*, but the court imposes the PLRA filing fees despite the fact that the case should have been brought as a habeas petition after exhaustion of state remedies.

Procedural Due Process--Disciplinary Proceedings/Access to Courts/Habeas Corpus

Barone v. Hatcher, 984 F.Supp. 1304 (D.Nev. 1997). The plaintiff's claim based on a disciplinary proceeding that resulted only in segregation is barred by *Edwards v. Balisok*. The court thinks it is compelled by Ninth Circuit precedent to read *Balisok* broadly. At 1308 n. 1: Relief from conditions of confinement is available via habeas corpus in the Ninth Circuit.

Balisok bars only claims that if accepted would invalidate the punishment, so the plaintiff's complaint that he was not given a statement of reasons and evidence is not barred. However, disciplinary segregation does not constitute an atypical and significant deprivation absent evidence that segregation conditions violate the Eighth Amendment or would extend the plaintiff's sentence, or that it is different from administrative segregation, even though the plaintiff was in it for a year. However, the restitution order of $33.48 deprived him of a property interest, so the court awards summary judgment on his statement of reasons claim. The plaintiff is directed to show that he should be awarded judgment in an amount greater than $1.00.

The plaintiff's unspecified court access claim is dismissed for lack of evidence that being able to file an opposition to the motion to dismiss his habeas petition would have made any difference.

Procedural Due Process--Disciplinary Proceedings/Accidents/Food

Warren v. Irvin, 985 F.Supp. 350 (W.D.N.Y. 1997). The plaintiff's disciplinary conviction was reversed administratively, but he was not released from SHU pending rehearing. After 16 days, he was given a new hearing and found guilty and given the same penalty. The decision was reversed because the second hearing was not timely, and the conviction was expunged.

The 161 days the plaintiff spent in SHU is not atypical and significant under *Sandin*. The temporary loss of privileges fell "within the expected parameters of the sentence imposed by a court of law" (354, citation omitted). The loss of good time credits does not deprive a prisoner of liberty if they are completely restored before they affect the plaintiff's sentence. Lengthy disciplinary confinement is a "normal element of the New York prison regime" according to data on the sentences of persons in SHU on a particular date. The conditions of life in SHU "are not dramatically different from those experienced in the general population." (355)

Deprivation of water for three days because the plaintiff was flooding his cell and deprivation of one meal because he refused to return his tray and cup from the previous meal did not violate the Eighth Amendment.

The plaintiff's allegation that he was injured because defendants made him store his property on the floor and the lights were off in his cell is dismissed because he did not explain who turned his lights off and he used the word "negligent" rather than alleging deliberate indifference.

PLRA--Exhaustion of Administrative Remedies

Alexandroai v. California Dept. of Corrections, 985 F.Supp. 968 (S.D.Cal. 1997). The plaintiff checked a box on the court's form complaint indicating that he had exhausted his remedies, but failed to attach the documentation required by the form or to give any detail of his exhaustion in the complaint. The defendants submitted evidence that he had not exhausted. The court dismisses his complaint without prejudice.

PLRA--Exhaustion of Administrative Remedies/Exhaustion of Remedies/State Officials and Agencies/Medical Care--Standards of Liability--Deliberate Indifference/Pleading/Personal Involvement and Supervisory

Liability

Barry v. Ratelle, 985 F.Supp. 1225 (S.D.Cal. 1997). The plaintiff alleged that doctors recommended and state officials approved hernia surgery but he never received it, and he also never received a truss promised by the prison physicians.

The plaintiff had exhausted his administrative remedies; he pursued each level of review and did not receive responses to his appeals. He is not required to comply with the exhaustion requirements of the California Tort Claims Act to pursue his federal claim, although he would have to do so for a pendent state law claim. The legislative history of the PLRA refers only to prison grievance procedures, not tort claim procedures, and there is no indication Congress intended to overrule *Felder v. Casey*.

In the Ninth Circuit, plaintiffs with claims in which subjective intent is an element must satisfy a heightened pleading standard by stating in their complaints "nonconclusory allegations setting forth evidence of unlawful intent . . . specific and concrete enough to enable Defendants to prepare a response. . . ." (1239, citation omitted). Circumstantial evidence will suffice. The allegations of knowledge and failure to act, supported by correspondence, appeal forms, etc., indicated that defendants had the necessary notice.

The complaint does not state a claim against the prison warden for denial of medical care because there are no allegations of personal involvement. At 1239: "A supervisor may be liable for constitutional violations of subordinates, however, if the supervisor participated in, directed, or knew of the violations and failed to act to prevent them." The plaintiff had written several times to the prison medical director, so there was sufficient allegation of his liability.

The plaintiff's allegation that defendants allowed him "to remain in pain for nearly two years without even giving him a truss once the need for surgery was identified" sufficiently alleges deliberate indifference to a serious medical need.

The plaintiff's failure to indicate that the defendants were sued in their individual capacities is a pleading defect requiring dismissal, but the court grants leave to amend.

Use of Force/Procedural Due Process--Disciplinary Proceedings/Damages--Punitive/Evidentiary Questions/Pre-Trial Detainees/Unsentenced Convicts and Convicts Held in Jails

Wilson v. Philadelphia Detention Center, 986 F.Supp. 282 (E.D.Pa. 1997). The plaintiff, a federal prisoner awaiting sentencing, got into a fight with another inmate, was struck twice by an officer after he was in handcuffs, was given a disciplinary charge, and spent ten days in segregation before being found not guilty and returned to population. A jury awarded compensatory damages of $3,500 and punitive damages totalling $10,001. The special verdict form did not separate the claims.

The court applies the *Wolfish* standard to this unsentenced convict; defendants failed to argue that *Wolfish* does not apply until after the trial and the filing of post-trial motions. In any case (289 n. 12), the Third Circuit has held that unsentenced persons are to be treated like pre-trial detainees.

The record supported the conclusion that the ten-day period of segregation was punitive in nature; the court cites the contradictory justifications for the delay in the hearing. At 289 n. 12: defendants' reliance on *Sandin v. Conner* is inappropriate in the case of an unsentenced prisoner.

Punitive damages of $5,000 each against the officials who participated in the disciplinary process and $1 against the officer who beat the plaintiff are upheld. The record supports a finding of recklessness based on the failure to provide a timely hearing, and the amounts do not shock the conscience.

The officer who beat the plaintiff was absent from the jurisdiction at the time of trial taking a training course for another job. The court sustained an objection to use of his discovery deposition at trial but permitted defense counsel to present a trial deposition; however, it excluded the portions concerning the reasons for his absence from trial, since he had

voluntarily made himself unavailable and had had ample time to inform the court of his schedule conflict. The exclusion does not warrant a new trial.

Restraints/Pre-Trial Detainees/Intake

Casaburro v. Giuliani, 986 F.Supp. 176 (S.D.N.Y. 1997). The plaintiff was arrested for soliciting a prostitute. He was variously handcuffed behind his back, handcuffed to a hook 12 inches above the floor, and then handcuffed to the front of the cell in a standing position, despite his repeated complaints of a prior medical problem of his back and neck.

Keeping a prisoner handcuffed for over seven hours inside a holding cell may be an exaggerated response under *Wolfish*. At 180: "Although there may be a legitimate reason for doing so, it is not apparent at this stage of the litigation." The court applies Eighth Amendment analysis to this detainee case and seems to think that the *Hudson* malicious/sadistic test governs.

Medical Care--Examinations, Quarantine/Use of Force

Hasenmeier-McCarthy v. Rose, 986 F.Supp. 464 (S.D.Ohio 1998). State prison policy requires annual PPDs of all prisoners. After submitting four times, the plaintiff refused her fifth PPD as violating her religion's prohibition against admitting artificial substances into her body. She was put in respiratory isolation for several weeks and then the test was forcibly administered.

Under the *Turner* standard, the annual PPD policy is upheld. X-rays are not an alternative because they identify only those persons with active TB and not those exposed, for whom additional monitoring and INH therapy are required.

Placement in respiratory isolation was not cruel and unusual punishment. Deprivation of communication, clean bedding, clean clothing and hot food do not deny basic human needs. Nor did the plaintiff show deliberate indifference, since the policy of isolation and monitoring does not wantonly inflict pain. (Of course, the question is really whether the *conditions* of isolation inflict pain.)

The videotape of the forcible administration of the test shows that staff did not act with malicious and sadistic intent. The (unspecified) severity of the plaintiff's wounds did not sufficiently support her claim.

PLRA--In Forma Pauperis Provisions--Applicability/Equal Protection/Personal Property/Mental Health Treatment

West v. Macht, 986 F.Supp. 1141 (W.D.Wis. 1997). The plaintiff, detained after the completion of his prison sentence pursuant to a state "sexual predator" law, was not a "prisoner" for purposes of the PLRA. (Defendants agreed.)

The prisoner's complaint that he, unlike all other similarly situated persons, was denied his release money from his prisoner savings at the Department of Corrections, is an equal protection claim that is not without basis in law or fact.

Protection from Inmate Assault/Evidentiary Questions/Personal Involvement and Supervisory Liability

Payne v. Collins, 986 F.Supp. 1036 (E.D.Tex. 1997). The white plaintiff was allegedly kicked to death by inmates of other races wearing steel-toed boots.

The prison's "chief administrative supervisor" could not be held liable because there was no evidence that he was responsible for the issuance of steel-toed boots or the policy permitting inmates access to housing units other than their own. The concession that he was "ultimately responsible for inmate housing decisions" (1059) could establish nothing more than *respondeat superior* liability. His approval of a "geographic housing policy" (all prisoners from the same geographic area housed together) did not support liability because he did not appreciate its deleterious effect on prison security and therefore did not know of the resulting risks. Although he did decide not to impose experience and competency requirements for officers in close custody areas higher than those established by prison system as a whole, comparison with similar cases

shows that this is not "the kind of official nonfeasance constituting an Eighth Amendment violation." (1060)

The officer on duty is not entitled to summary judgment based on evidence that an officer stationed where she was would have seen the violence involving the plaintiff at an earlier point than she acknowledged. Though she may not be obliged to intervene physically and put herself in danger, or to leave her post contrary to prison regulations, she was required to take some action to stop the violence. However, summary judgment is appropriate on plaintiff's theory that the officer broke prison regulations by failing to report observations of "suspicious prison activity"; breach of prison regulations is not an Eighth Amendment violation.

The court overrules defendants' objections to a correctional expert's affidavit; his "extensive training and education in prison operations" qualified him to testify about maximum security institutions, including those in Texas, despite his lack of direct familiarity with the particular institutions. The court similarly overrules objections to particular opinions about what staff knew or saw.

A prison report produced by defendants as part of their initial disclosure under the Federal Rules is admissible; defendants' production of it in discovery is sufficient authentication of it. A hearsay objection to the report is overruled because the report is an admission by a defendant. An Operational Review Report done after the incident at issue (but apparently not prompted by that incident) is admissible as a business record because all the hearsay in it was from persons acting in the regular course of business.

Medical Care--Standards of Liability--Serious Medical Needs/Disabled

Miller v. Michigan Dept. of Corrections, 986 F.Supp. 1073 (W.D.Mich. 1997). The plaintiff suffers from bowel and bladder incontinence and must wear "adult undergarments, or 'Attends.'" Defendants intermittently failed to provide these over a four-day period with the predictable consequences.

At 1080: "The court accepts that incontinence of bowel and bladder may be characterized as a serious medical condition." However, the relevant question is whether the plaintiff's need for treatment was serious. *Id.*: "The seriousness of the unmet medical need can only be evaluated in light of the effect of these delays." Here, the plaintiff failed to show "unnecessary infliction of pain or a worsening of his incontinence condition." (1081) At worst, he suffered indignity and discomfort, which nobody but a few staff members saw because he was in segregation. At 1081: "In reaching this conclusion, the Court recognizes that serious or permanent physical injury is not prerequisite to recovery for deliberate indifference to serious medical needs. Pain, suffering and mental anguish caused by delay in care may be actionable as well."

Contempt/Financial Resources

Carty v. Schneider, 986 F.Supp. 933 (D.V.I. 1997). The defendants were held in contempt in an earlier opinion for massive violations of a consent judgment. The defendants have taken sufficient measures, mainly alleviation of crowding (which the court terms the "bad seed" of many constitutional violations) to the point of compliance with the consent judgment's population cap, that the court declines to impose monetary sanctions. At 939: ". . . [T]he court should select the least intrusive sanction that the court determines will coerce the contemnor to comply." *Id.*: ". . . [C]ognizant of the socioeconomic and sociopolitical factors pertaining to the Virgin Islands, the court finds that monetary contempt sanctions would affect drastically the public interest and, perhaps more importantly, would impede progress and thwart the defendants' continuing efforts to remedy the conditions of confinement at the CJC." The court warns that failure to continue making progress may lead to a different result in the future.

At 938: "a lack of funding does not serve as an acceptable excuse for defendants' non-compliance, especially since many of the problems which the defendants face do not require

inordinate financial expenditures."

Visiting/Searches--Person--Visitors and Staff

Laughter v. Kay, 986 F.Supp. 1362 (D.Utah 1997). The wife of a prisoner had her visits suspended because syringes were found in her (borrowed) car trunk. After her privileges were reinstated a few days later, prison personnel obtained a warrant to search all her and her children's body cavities for drugs, based on information relating to a completely different inmate and his wife. The plaintiff, who was six months pregnant, and her two-year-old son, were searched. Nothing was found, but her visits were suspended anyway for almost a year. The obstetrician found that her vaginal wall had been torn and put her on bed rest.

There was no probable cause here because there was no connection in the affidavit on which the warrant was based between the information about drugs and the plaintiff and her husband or child. No reasonably competent officer could have believed there was probable cause, so defendants are not entitled to qualified immunity. Additional information allegedly presented orally to the judge who issued the warrant did not sufficiently establish probable cause either.

Defendants' good faith belief that they had probable cause is irrelevant.

Prison visitor searches must generally be supported by reasonable suspicion. However, a manual body cavity search, because it is more intrusive, must be supported by probable cause. In addition, the purpose of a prison visitor search is to prevent contraband from entering the prison. Here, defendants did not let the plaintiff visit even after passing the search, so the search was not justified by legitimate security concerns; it was no more than a search for evidence in a criminal investigation.

Defendants' claim of exigent circumstances is frivolous, given that they obtained a search warrant and did so the day before the visit.

The plaintiff's consent does not legalize a search that was based on an invalid warrant.

Procedural Due Process--Disciplinary Proceedings/Equal Protection/Habeas Corpus/Discovery

Henard v. Newkirk, 987 F.Supp. 691 (N.D.Ind. 1997). One year in segregation is not atypical and significant under *Sandin*. Conditions in disciplinary segregation at the plaintiff's prison are not substantially more restrictive than restrictions in the state's most secure prison.

Failure to follow internal procedures is of no significance in establishing atypical and significant hardship.

The plaintiff alleged that he and another black inmate were sentenced more harshly than four white inmates charged with the same offense, and submitted affidavits from three of them. Defendants' argument that plaintiff has not shown he was convicted because of his race is beside the point; the court grants additional time for the defendants to make the right argument.

Discovery is available in a habeas proceeding only for "good cause," which the plaintiff has not shown.

Medical Care--Standards of Liability--Serious Medical Needs/Medical Care--Standards of Liability--Deliberate Indifference/Medical Care--Special Diets/Disabled

Rouse v. Plantier, 987 F.Supp. 302 (D.N.J. 1997). The plaintiffs sued on behalf of all insulin-diabetic prisoners in the Adult Diagnostic and Treatment Center in New Jersey.

Under the deliberate indifference standard, "a plaintiff need not trace a harm to one specific act or omission," since conditions "alone or in combination" can violate the Eighth Amendment (307). Defendants do not seriously dispute that the medical needs of diabetics are serious.

Defendants are not entitled to summary judgment on the claim of inadequate diets, given plaintiffs' expert's report showing lack of portion control, unavailability of diabetes-appropriate meals, snacks, or low-sugar foods, and failure to individualize diets, as well as evidence that diet meals were sometimes spoiled, otherwise inedible, or unavailable. Defendants alleged that the

plaintiffs refused diet meals but plaintiffs showed that the "refusal" evidence was subject to interpretation. The fact that plaintiffs may have on occasion bought food from the commissary is not a defense given the prison's inadequate program.

On plaintiffs' medical care claim, the court rejects the argument that all of plaintiffs' expert evidence is merely disagreement with doctors' professional judgment. Expert testimony may be helpful in understanding the prevailing norms against which conditions are to be evaluated, particularly where the issue is medical care and not prison security. There is sufficient evidence to conclude that the risks of inadequate treatment were obvious and that defendants were aware of them.

The Commissioner is not shown to have been deliberately indifferent by the service on him five years previously of interrogatories. There is unspecified but sufficient evidence as to the mental state of the other defendants.

The defendants are not entitled to qualified immunity on the Eighth Amendment claims; the right to medical care was clearly established, and their claim that they acted objectively reasonably is refuted by the same evidence that supports liability (for example, evidence that they knew that glucose should be tested no less often than once a day, and for some of the plaintiffs it was tested fewer than 20 times a year). At 313 n. 10: The court rejects defendants' attempt to characterize the right asserted as the right to have blood sugar tested up to four times a day, etc.

The defendants are entitled to qualified immunity on the ADA claim because it was not established in the Third Circuit that the statute applied to prisoners until 1997.

The court notes that because the named plaintiffs are no longer confined at the institution, and one of them is no longer insulin-dependent, they may not be adequate class representatives for purposes of injunctive relief, and plans to address the question at a conference. The absence of current class representatives does not moot the case but shifts the focus from justiciability to the suitability of the representative plaintiffs.

Voting/Classification--Race

Farrakhan v. Locke, 987 F.Supp. 1304 (E.D.Wash. 1997). The plaintiffs challenged Washington's felon disenfranchisement scheme on the ground that it was racially discriminatory under the Constitution and results in vote denial and dilution under the Voting Rights Act.

The "plain statement rule" does not apply to the Voting Rights Act; that statute does not alter the usual constitutional balance between federal government and states because that was already done by the Civil War Amendments. Nor does the "results test" of the Voting Rights Act, as amended in 1982 to eliminate the intent requirement, violate § 2 of the Fourteenth Amendment. Although felon disenfranchisement is not *per se* unconstitutional, Congress can prevent the states from using it to discriminate based on race. The Voting Rights Act is not unconstitutional under *City of Boerne* as so interpreted.

The plaintiffs state a claim for vote denial under the Voting Rights Act based on their allegation that African, Hispanic and Native Americans are targeted for prosecution of serious crimes and are over represented in the prison population.

The court rejects the view that the case should be dismissed because of policy considerations favoring felon disenfranchisement or that fact that plaintiffs' own illegal behavior has played a role in their disenfranchisement.

Plaintiffs' vote dilution claim is dismissed; such a claim requires more than an allegation of disparate impact.

Plaintiffs' Fourteenth Amendment claim is dismissed because discriminatory intent must be shown and "neither the Complaint nor the Court's own research reveal any circumstantial or direct evidence that would tend to support this claim." (1314) (Evidence? On a motion to dismiss?)

Law Libraries and Law Books

United States v. Beckwith, 987 F.Supp. 1345 (D.Utah 1997). A defendant proceeding *pro se* was entitled to access to the law

library in the federal courthouse for two hours a day for five consecutive days, and for two hours a day three days a week thereafter. At 1348: "trial courts must be allowed reasonable and flexible discretion to implement the right to self representation in the context of pretrial preparation by detainees." Usually, where a defendant has standby counsel, personal access to a library is not required.

At 1348: "A pretrial detainee representing himself, who is indigent must be afforded unlimited mail access to the court, standby counsel, and the prosecution, unless abused at which point it may be restricted."

Federal Officials and Prisons/Procedural Due Process--Property/Procedural Due Process--Work Assignments

Del Raine v. Bureau of Prisons, 989 F.Supp. 1373 (D.Kan. 1997). A federal prisoner denied "longevity pay" by the Federal Industries Program for unsatisfactory work performance was not denied due process because the relevant regulations did not create a property interest in such pay. Bureau of Prisons regulations characterize longevity pay as an addition to regular pay that is only available to those who have not been declared ineligible. This interpretation is reasonable and deserves deference. (The court completely misses the point under standard property interest analysis. The regulations say that the pay *shall* be added unless the inmate is declared ineligible, which may be done because of "unsatisfactory work performance." This language should create a property interest analysis in the same manner as statutes saying that public employees may be fired "for cause.")

Juveniles/Color of Law/Psychotropic Medication

Lemoine v. New Horizons Ranch and Center, 990 F.Supp. 498 (N.D.Tex. 1998). The decedent died at age 12 in an institution "designed to treat wayward or troubled youth in a rugged, rural setting through work-hardening programs." It had no on-site medical staff and was 30 miles from the nearest medical facility. The decedent was taking Ritalin, Mellaril, and Tegretol. They apparently didn't work very well. As punishment for "prior inappropriate behavior," he was assigned to build a rock wall outdoors on a day when the temperature reached 103 degrees. He died of heat stroke (his temperature measured at 108 degrees shortly before death) and was also found to have many bruises, contusions and blisters on his body.

A doctor employed by a private juvenile institution to which a state has delegated 24-hour care of troubled juveniles is a state actor, by analogy to private prisons. The court applies the public function test of state action. A private physician contracting with such a facility is a state actor under *West v. Atkins*.

PLRA--Exhaustion of Administrative Remedies/Summary Judgment/Medical Records/Evidentiary Questions

Russo v. Palmer, 990 F.Supp. 1047 (N.D.Ill. 1998). The plaintiff alleged that he filed a grievance twice but every time he sent it to the grievance officer it was returned to him unsigned and unfiled. The court held a hearing and finds the allegation incredible, though it admits (1049 n. 1) that if a prisoner were prevented from exhausting, the court could "overlook" the prohibition. However, the failure to exhaust bars only his injunctive claim, since the grievance process does not provide for money damages.

At 1050 n. 4: If the plaintiff were afraid the limitations period would run while he exhausted, he could file the complaint and ask that its injunctive aspects be stayed pending exhaustion. This appears inconsistent with the statutory language which suggests that exhaustion must precede filing the complaint.

The plaintiffs' medical records do not support the defendants' motion for summary judgment on the plaintiff's medical care claim. They are inadmissible hearsay because there is no underlying affidavit, deposition testimony, or anything else establishing a foundation for them. The court also finds most of them "indecipherable."

PLRA--Exhaustion of

Administrative Remedies

Lacey v. C.S.P. Solano Medical Staff, 990 F.Supp. 1199 (E.D.Cal. 1997). The PLRA exhaustion requirement is not jurisdictional. This conclusion is supported both by Supreme Court law and (at 1203 n. 4) by the screening provisions of the PLRA, which provide for dismissal as frivolous or malicious or as not stating a claim regardless of whether remedies have been exhausted. The court couldn't do that if it didn't have jurisdiction.

At 1204 n. 6: The court construes "prison conditions" in the exhaustion provision to have as broad a meaning as suggested by the statutory definition of "civil action with respect to prison conditions," including both ongoing practices and specific acts of alleged misconduct.

The prison grievance process is not an "available" remedy to a prisoner with a damage claim because it does not provide for monetary relief. This view is consistent with the long-standing recognition that inadequate administrative remedies need not be exhausted.

The state Tort Claims Act need not be exhausted under the PLRA exhaustion provision. The legislative history both of the current provision and of its predecessor indicate that Congress was concerned with grievance systems and not with tort claims procedures.

Pre-Trial Detainees/Searches--Person--Arrestees/Municipalities

Magill v. Lee County, 990 F.Supp. 1382 (M.D.Ala. 1998). The jail's policy was to strip search everybody before they were put into a cell (including holding cells). These searches supposedly involved only the removal of "outer garments" (i.e., not panties or brassiere for women). Persons who have obtained a bond or are obtaining one at the time of booking are supposedly not searched. One plaintiff testified that she removed all her clothes during the search and that the search was conducted while her husband was trying to bond her out.

The policy is constitutional. Since the only defendants are the Sheriff and the county, only the policy is at issue, and there is no evidence that the defendants condoned violations of their policy. The court relies on *Bell v. Wolfish* and an 11th Circuit case in which there was reasonable suspicion; it ignores the large amount of case law from other jurisdictions holding that reasonable suspicion is required up to the point where the prisoner is to be admitted to the jail's general population.

At 1387: The court notes that it remains an open question whether an Alabama sheriff is a county or state official when jail policies are at issue.

Homosexuals and Transsexuals/Federal Officials and Prisons/Mootness/Procedural, Jurisdictional and Litigation Questions/Medical Care--Standards of Liability--Serious Medical Needs/Equal Protection/Personal Involvement and Supervisory Liability

Farmer v. Hawk, 991 F.Supp. 19 (D.D.C. 1998). The plaintiff is a pre-operative transsexual who has not been provided with hormone therapy although alleges she had been taking female hormones for years before incarceration. She alleges she received no psychotherapy until six years after incarceration, after she tried to sever her scrotum with a razor, and has received none since 1996. These allegations are disputed.

This action is not precluded by the pendency of another action, at a prison from which the plaintiff has been transferred, challenging inadequate care there. This suit challenges the treatment of transsexuals throughout the federal prison system. There is a third case that is more similar to this one, but this one was filed earlier.

This complaint is not mooted by the plaintiff's transfer, since it is system wide and not directed toward a particular prison.

Transsexualism is a serious medical condition for which prisoners have a right to receive treatment. The right was clearly established based on the decisions of four other circuits (at least one of which the plaintiff has been in). Bureau of Prisons policy to provide care that is either "medically mandatory" or "presently medically necessary"

also calls for treatment for transsexualism. Therefore the system's medical director cannot be found liable for failure to promulgate a new policy. However, his responses to her complaints acknowledging and sanctioning the withholding of any treatment could constitute deliberate indifference. The argument that the director is not responsible for the day-to-day care of particular prisoners is rejected because Bureau of Prisons policy calls for hormone therapy for transsexuals to be authorized by the medical director, and because his response in her case ensured that care would not be provided. The medical director is therefore not entitled to qualified immunity.

At 29: "The right to treatment does not include the right to a specific mode of treatment." There is a factual dispute as to whether the plaintiff is receiving any treatment.

Prisoners who suffer from mental illness other than transsexualism are not required to document their receipt of treatment before incarceration, as transsexuals are with respect to hormone treatment. (The court rejects defendants' attempt to deny what their policy says.) The court denies summary judgment on the plaintiff's equal protection claim because the record does not provide sufficiently expert evidence to determine whether transsexual inmates are similarly situated with other mental illnesses, or transsexuals with AIDS similarly situated to those not infected.

Disabled/Medication/AIDS/Special Diets

Callaway v. Smith County, 991 F.Supp. 801 (E.D.Tex. 1998). The plaintiff, prescribed AZT and Crixivan, got no Crixivan for five days and then half-doses for the next 15 days. When he saw a doctor after 19 days, his dosage was promptly increased. He was not able to get a high-protein, high-calorie diet. His viral load, formerly undetectable, increased to a measurable level by the time he left the jail, though it had decreased by the time of the hearing. The plaintiff was kept in a "side cell" like other inmates with communicable diseases and then placed in lockdown.

The ADA and Rehabilitation Act do not apply to prisons and jails. (Wrong.)

The failure to provide the plaintiff with medication, and to do it in the right amounts. was merely negligent.

Suit against the University of Texas Health Center, the medical care provider, was barred by the Eleventh Amendment.

The failure to see a doctor for 19 days or to see the head doctor for 56 days is not proof of deliberate indifference since the plaintiff saw nurses and went to the clinic numerous times.

The plaintiff's segregation was not unconstitutional; classification of inmates is typically relegated to the broad discretion of prison officials. No abuse of discretion was shown.

The failure to provide a better diet was not unconstitutional; when he finally saw the chief doctor, the doctor ordered that he get double portions of food. It took a week for this order to get to the kitchen, and the plaintiff was released a week later.

The case is dismissed as frivolous and for failure to state a claim *after an evidentiary hearing*.

Intake/Disabled

Hanson v. Sangamon County Sheriff's Dept., 991 F.Supp. 1059 (C.D.Ill. 1998). The deaf plaintiff was arrested for possession of cannabis; no attempt was made to communicate with him by the investigating officers, he was not told his bail amount, and a telephone device for the deaf was not provided. As a result he spent 13 hours in jail whereas everyone arrested with him was out in four hours.

The county jail is a public entity and the ADA is applicable to it, and the plaintiff has sufficiently alleged that he was denied services and activities because of his disability, i.e., an opportunity to post bond and to make a telephone call. The absence of a case in point does not entitle the Sheriff to qualified immunity.

Medical Care--Standards of Liability--Deliberate Indifference/Medication/Qualified Immunity/Color of Law/Municipalities/Monitoring /Pendent and Supplemental Claims; State Law in Federal

Courts

Nelson v. Prison Health Services, Inc., 991 F.Supp. 1452 (M.D.Fla. 1997). The decedent died in jail of a myocardial infarction without a doctor's ever having been called. One nurse was fired, two were put on probation, and one resigned to take another job.

The sheriff was entitled to qualified immunity because he was not involved in the decision to withhold medical treatment.

The defendant nurses, employees of Prison Health Services, are not entitled to qualified immunity under *Richardson v. McKnight*, which by its terms applies to "major lengthy administrative tasks" such as providing medical care to a jail.

Private medical providers are state actors.

Evidence that nurses did not verify the decedent's medications, resulting in her going 36 hours without it, could support liability. At 1463: "Delays such as this may in and of themselves amount to 'deliberate indifference.'" Responding to chest pain by giving the decedent nitroglycerine and telling her to self-medicate, rather than following the jail's own protocol and giving her an EKG and calling the physician on duty, was "treatment so cursory as to amount to deliberate indifference." (1464) One nurse who chose to remain in the dining hall to finish her breakfast rather than respond to the third complaint of chest pain, and then delayed seeing her, accused her of "theatrics," failed to call a doctor, and did not call an emergency response team until she had stopped breathing, could be held liable. At 1464: "Jackson's dogged refusal to provide medical care was clearly tantamount to deliberate indifference."

Evidence of a custom "longstanding and widespread" enough to be a county policy of deliberate indifference is provided by reports of a court monitor who found "pervasive and deep-seated failures" including staff's "unwillingness to respond to inmates' request for treatment, especially requests by female inmates," a pattern corroborated by PHS's own memoranda chastising the nurses. This evidence may also support liability of the corporation.

The county sheriff could not be held liable under state law for malpractice. Neither the county nor the sheriff in his official capacity were "health care providers" who could be held liable for medical malpractice under state law. The nurses' conduct could subject them to liability for malpractice.

Publications/Appointment of Counsel

Powell v. Riveland, 991 F.Supp. 1249 (W.D.Wash. 1997). The prison system's policy prohibiting much sexually explicit material is upheld under the *Turner* standard based on evidence that sexual assault and consensual sex are a problem at the prison and that viewing pornography leads to aggressive and predatory behavior. The defendants cite a "four-factor syndrome" common to men who view pornography: addiction, escalation, desensitization, and a tendency to act out the behaviors viewed in the pornography. The court specifically upholds the censorship of magazines called *Swank* and *Fox*.

The court reiterates its refusal to appoint counsel in this case.

NON-PRISON CASES

Municipalities

White-Ruiz v. City of New York, 983 F.Supp. 365 (S.D.N.Y. 1997). The plaintiff police officer is found after trial to have been subject to retaliation by unidentified police officers for having reported a corrupt act by another officer to departmental officials. The court concludes that the City is liable because the violation of the plaintiff's rights was caused by an unwritten Department policy "that sanctioned a 'custom or usage' by lower level officials and officers (1) to discourage reporting of corrupt acts by police officers and (2) to retaliate against officers who did bring such misconduct to the attention of Department authorities." (391) The court relies mainly on the Mollen Commission report.

Use of Force/Personal Involvement and Supervisory Liability

Cunningham v. Gates, 989 F.Supp. 1256 (C.D.Cal. 1997). At 1261: The court does not regard the law to be settled that,

by falsifying police reports and giving perjured corroborating testimony regarding the use of excessive force by others, officers become liable for the use of force itself. The court also does not consider it to be settled law that such acts can make the officer liable to the plaintiffs for denial of the right to a fair trial, or for other deprivation of due process, until the trial is over, and the plaintiff has not prevailed.

It is settled law, however, that if a group of officers agree that if and when some of them knowingly commit unlawful acts others will falsify records and testify falsely to cover up the truth of the relevant events, all of those involved are liable for the unlawful acts. An official is liable in his individual capacity if he "set[s] in motion a series of acts by others, or knowingly refused to terminate a series of acts by others, which he kn[e]w or reasonably should [have] know[n], would cause others to inflict constitutional injury."

The allegation in this case is that members of the Special Investigative Services of the LAPD would identify criminals by *modus operandi*, establish a stakeout, let them commit crimes despite having probable cause to arrest them beforehand, and then kill them.

Use of Force/Indemnification

Cunningham v. Gates, 989 F.Supp. 1262 (C.D.Cal. 1997). The court dismisses on qualified immunity grounds claims against the Mayor, but not against other defendants including police supervisory officials, city attorneys, and members of the City Council, for the alleged continuing refusal to do anything about the police "code of silence," and for the policy of accepting officers' versions of excessive force incidents despite more credible evidence to the contrary. The allegations against the attorney defendants include the failure to use information generated in the course of civil rights litigation for disciplinary and other purposes and their insulation of officers from punitive damage awards by settling cases where such damages have been awarded or by advocating that the City Council pay the awards. The allegations against the Council members are of a policy of indemnification that perpetuates the use of excessive force.

Service of Process

Slavov v. Marriott International, Inc., 990 F.Supp. 566 (N.D.Ill. 1998). A *pro se* litigant is entitled to rely on the U.S. Marshals to serve process, and the fact that the Marshals took ten months to tell him that he needed to fill out another form constituted good cause for failure timely to serve process.

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