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# National Prison Project Celebrates 30 Years

## NPP Director Reflects on Protecting Prisoners' Rights

By Elizabeth Alexander

When I arrived at the National Prison Project in 1981, my first major assignment was to sue the Mecklenburg Correctional Center, a "supermax" prison recently opened in Virginia. That prison epitomizes the depths of despair and the irrationality that a toxic prison can produce, harming both prisoners and staff. Official videotapes documented patterns of abuse and excessive force against prisoners. The facility's "Special Management Unit" had floors covered with so much human waste that our corrections expert Vince Nathan and I had to throw out our shoes after we toured the unit. In large part, the disgusting and unhealthy conditions in the unit resulted from an ongoing power struggle between staff and prisoners that neither side could win. Prisoners were deprived of all property and all ordinary privileges. Only the bare minimum necessary to keep alive was provided. Having nothing to lose, prisoners fought against staff with their own feces. The warden's response to the problem was to order the prison doctor to stop prescribing laxatives.

While at Mecklenburg I met a prisoner whose story exemplifies how prisons damage individuals and leave them more likely to commit criminal acts. Wendell, who was mentally retarded and had difficulty responding to frustration, entered the criminal justice system at 17 when he was sentenced to six months in jail for trespassing. Once in jail, he was unable to avoid fights with staff. At the time I met him, several years later, he had never left prison and was serving an eight-year

## In the Beginning. . . .

By Alvin J. Bronstein[1]

The National Prison Project's roots developed during the civil rights movement of the 1960s. The NAACP Legal Defense and Education Fund (LDF), an old-line civil rights legal program, began handling some prisoners' rights lawsuits in New York and San Francisco. At about the same time in Virginia, Philip Hirschkop, a civil rights lawyer, began to take-on prisoners' rights cases arising out of conditions at the Virginia State Penitentiary. Herman Schwartz, a law professor at the State University of New York in Buffalo, also began suing on behalf of prisoners coming from the New York State Penitentiary at Attica. The only other prisoners' rights program in the country at the time was the Prisoners' Rights Project of the New York City Legal Aid Society which also began in the late 1960s. Lawyers, who had been active in the civil rights struggle of the 60s, saw prisoners as the next powerless segment of society in America.

*Continued on page 9*

sentence for assault on a correctional officer.

The lessons of Mecklenburg provide a real-world counterpart to the famous Stanford University experiment conducted by Professor Philip G. Zimbardo. The experiment used psychologically healthy college undergraduates to simulate the prison experience. Nine students were randomly assigned to play guards, and nine others played prisoners at a facility on the Stanford University campus. Guards were told that they should do whatever was necessary to maintain law and order. As the experiment progressed, the guards began to use their power to inflict serious psychological abuse on their wards and prisoners struggled to resist. In fact, the experiment prematurely ended after six days because four of the prisoners had suffered emotional breakdowns. The guards were escalating their abuse of fellow students in the middle of the night when they thought no one was watching.[1]

The lesson from the Stanford University experiment is enormously chilling. Prisons by their inherent nature create an ever-present threat of abuse. When that potential for abuse is realized, as it was at Mecklenburg, the staff and the prisoners can become locked in a downward spiral of violence. At Mecklenburg, that spiral ended only after a prison riot and a separate incident in which six Death Row prisoners escaped from the facility.

To control abuse and to prevent prisons from becoming locked into the "Mecklenburg dynamic" of escalating repression and rebellion, there must be an external authority with both the will and the power to maintain civilized values. Since the birth of the National Prison Project 30 years ago, the federal courts have been the only effective source of authority to assure that the nation's prisons do not descend into savagery. Indeed, there is substantial evidence that prison litigation has been critical in achieving and maintaining prisons that comply with the Constitution.[2]

Now, external restraint on the abuse of prisoners is under attack. Just as too many politicians have used "three strikes" legislation and its variants as political tools, politicians have also engaged in demagoguery with regard to protection of the constitutional rights of prisoners. The peak of that demagoguery occurred with the passage in 1996 of the Prison Litigation Reform Act (PLRA). PLRA places multiple barriers in the path of prisoners who attempt to challenge their conditions of confinement through litigation. It makes it substantially more difficult for prisoners to obtain lawyers for these challenges, and it directly limits the power of the federal courts to provide remedies for violations of constitutional rights. As a result, there has been a significant decrease in the numbers of cases that prisoners file regarding their conditions of confinement, and many court orders attempting to protect the rights of prisoners have been terminated. If the effects of the PLRA are allowed to go unchallenged, prisoners will once again be defenseless because no agency other than the federal courts has the will and power to protect prisoners from official abuse.

Therefore, notwithstanding the obstacles of the PLRA, we have no choice but to continue to engage in litigation to defend the constitutional rights of prisoners. If we do not do so, prisoners will suffer abuse, some will die, and others will be broken in body or spirit. There have already been

*Continued on page 4*

**The NPP *JOURNAL***

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# Ignored by Officials, TX Prisoner Secretly Collected DNA Evidence of Guard Who Raped Him

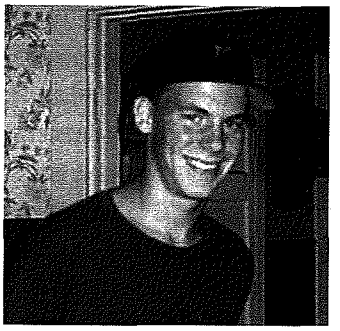
The American Civil Liberties Union filed in October its second lawsuit in recent months over prisoner rape in Texas, charging that a guard who repeatedly raped a 22-year-old man was not punished until after the prisoner provided DNA evidence of the assaults.

After the first attack in October 2001, Nathan Essary secretly collected the guard's semen on a handkerchief and mailed it to the United States Attorney in Houston. Texas Prison Prosecutor Kelly Weeks confirmed publicly in June that testing conducted on the sample linked Correctional Officer Michael Chaney to the assaults.

"Despite the repeated sexual attacks and warnings of deadly retaliation if he told, Nathan Essary summoned the courage to report Officer Chaney's criminal behavior to prison officials,"said Margaret Winter, Associate Director of the ACLU's National Prison Project. "Unfortunately, the response of prison officials was disastrous. Essary was told to return to work in the prison laundry with the guard who assaulted him, where he was sexually assaulted again."

According to the ACLU lawsuit, Essary, a past victim of a prison gang-rape, was ordered to masturbate and perform oral sex on Officer Chaney on multiple occasions in October 2001. The ACLU complaint describes how the assaults on Essary escalated along with the threats. His attempts to refuse Officer Chaney's demands for sex were met with warnings that Chaney would make his life a "living hell" and would even pay prison gangs to have him killed.

Melinda Essary, Nathan's mother, said the attacks on her son filled her with despair. "My son may not be perfect, but he doesn't deserve to be raped in prison," she said. "I thought the people who worked in prisons were supposed to prevent attacks, not cause them. What is going on in Texas prisons that lets this kind of thing happen to my boy?" Texas was identified as the worst state in the nation for prisoner rape in Human Rights Watch's 2001 book-length report, No Escape: Male Rape in U.S. Prisons.



**Nathan Essary, the ACLU's 22 year old client, secretly collected DNA evidence on the prison guard who raped him.**

"Without lawyers to carry their most serious problems to a federal judge, prisoners are dependent on prison administrators and supervisors to protect them," said Meredith Martin Rountree, director of the ACLU of Texas's Prison and Jail Accountability Project. "Meaningful investigation of prisoners' complaints and requests for help is essential to replacing federal oversight with internal monitoring and management,"added Rountree, who was involved in the settlement of the case of David Ruiz, a Texas inmate whose 1972 prison conditions lawsuit ushered in two decades of federal oversight of the Texas prison system. That oversight recently ended in June.

In January 2002, Officer Chaney resigned from his post at the Department of Criminal Justice's Luther Unit after being arrested for raping Essary. This past May he was indicted for the attacks. The ACLU lawsuit seeks unspecified punitive and compensatory damages on Essary's behalf as well as court monitoring of the prison's responses to prisoner complaints, particularly as they relate to prison staff at the Luther Unit within the Texas Department of Criminal Justice, where Essary was attacked.

In April, the ACLU's National Prison Project filed a lawsuit on behalf of another Texas prisoner, Roderick Johnson. Over the course of 18 months, Johnson was sexually enslaved and repeatedly raped by Texas prison gangs. His multiple pleas to prison administrators to protect him from the attacks were ignored and the allegations of rape were never seriously investigated.

Available data on the prevalence of prisoner rape, particularly rape committed by

guards with male victims, is limited. Legislation introduced in Congress this year by Senators Edward Kennedy (D-MA) and Jeff Sessions (R-AL), authorized the Justice Department to conduct annual reviews and collect statistics on prisoner rape. [See article below.] The widely supported bill failed to be passed during the waning days of the 107th Congressional session. Reintroduction of the act is expected next year.

The lawsuit, Nathan Essary v. Michael Chaney, et al., was filed in U.S. District Court for the Southern District of Texas by Winter, Amy Fettig and Craig Cowie of the ACLU's National Prison Project and Rountree of the ACLU of Texas.

## Prison Rape Reduction Bill Positive Step, But Needs to Protect Current Victims

The American Civil Liberties Union in July gave its qualified support to a prison rape reduction bill, saying that the problem needs more comprehensive reform.

"The ACLU is thankful that members of Congress recognize the overwhelming pain victims of prison rape experience, but the solution for ending their suffering must be a comprehensive effort for reform," said Rachel King, an ACLU Legislative Counsel. "While the legislation may some day significantly reduce rapes, it does little for the current victims of this epidemic. Congress should allow these victims full access to redress in the courts."

The legislation, called the Prison Rape Reduction Act of 2002, would establish a commission to study the harmful effects of prison rape and examine its prevalence in America's correctional facilities. The commission would also distribute recommendations and other information necessary to help protect inmates from prison rape. The bipartisan legislation was introduced by Sens. Edward Kennedy (D-MA) and Jeff Sessions (R-AL) and was the subject of a hearing in July before the full Senate Judiciary Committee.

While it is heartening to see Congress paying attention to the serious problem of prison rape, the ACLU said, the legislation does little to immediately alleviate the problem. Under current law, victims cannot ask the courts for protections from repeated attacks until they exhaust the prison's administrative complaint procedures, a process that frequently takes up to six months and makes the victim vulnerable to further rapes and retaliation. As a result, many victims simply do not report the crimes.

## Director Reflects

*Continued from page 2*

far too many Wendells who have suffered permanent damage rather than rehabilitation as a result of imprisonment.

This battle has been fought for thirty years. Our litigation has resulted in reduced crowding, improved medical care and better environmental conditions in jails and prisons in most states and has established valuable case law. Indeed, since 1991 we have argued five cases in the United States Supreme Court on behalf of prisoners. We have litigated tirelessly against the PLRA, and we intend to continue that litigation. Among our new and planned initiatives are offensives against prisoner rape, our campaign for treatment of prisoners with HIV and Hepatitis C infections, and our focus on assuring mental health care for prisoners. Highlights from a few of our recent cases are listed below to provide you with more information about the National Prison Project's litigation efforts.

***Joslyn v. Armstrong***: The NPP sued Connecticut, charging that it was allowing its prisoners to be abused and subjected to cruel and unusual punishment by housing them in a Virginia "supermax" prison where they were subjected to the use of five-point restraints and stun guns. The NPP negotiated a settlement under which Connecticut agreed to stop using the supermax.

***Jones-El v. Berge***: A district judge granted a preliminary injunction forcing the Department of Corrections to remove a number of mentally ill prisoners from a Wisconsin supermax because the prison was exacerbating their illness. The

defendants entered into a comprehensive settlement that will substantially ameliorate the dangerous conditions including those that produce sensory deprivation and tend to cause susceptible prisoners to develop mental illness.

***Moore v. Fordice***: At the request of prisoners in a segregated HIV unit, the NPP sought to intervene to represent prisoners who were being denied necessary medical care. The trial court found that the medical care being provided by the Mississippi Department of Corrections was grossly deficient, and it issued an injunction requiring the prison to provide HIV care consistent with federal guidelines. The district court, however, rejected the prisoners' request to make the NPP class counsel and prohibited the NPP from communicating with members of the class. The NPP appealed to the Fifth Circuit, which reversed the trial court and vacated the gag order. The Project was subsequently a moving force in an advocacy coalition that was successful in persuading the Commissioner of Corrections to integrate HIV-positive prisoners into prison programs. More recently, the district court, responding to staff retaliation against prisoners on the unit, granted an injunction barring retaliatory cell searching and tampering with lawyer-client mail.

***Carty v. Schneider***: The district court recently found that the defendants were in contempt of the court's orders addressing squalid conditions, deficient medical and mental health care, and physical plant and security problems that endangered the safety of prisoners in these Virgin Island facilities. Part of the remedy for the contempt involves funds to be deposited to a remedial fund to improve conditions in the facility.

***Duvall v. Glendening***: The NPP won a consent order protecting women in the Baltimore jail from being housed in portions of the jail that placed them at great risk of injury or death because of excessive heat and the lack of ventilation. As a result of the order, a number of areas of the jail were air-conditioned, and the jail began screening newly-arrived women for chronic diseases and pregnancy-related conditions and placing them in safe housing as necessary.

***Hadix v. Johnson***: The NPP recently won a ruling that the largest prison complex in Michigan had subjected prisoners to "persistent, widespread and terrible" violations of their constitutional rights. The order will require the defendants to fix problems with medical care, the accommodation of prisoners with disabilities, fire safety, ventilation, and the protection of chronically ill prisoners at high risk from heat injury.

***Caldwell v. District of Columbia***: The NPP obtained a jury verdict awarding the plaintiff $175,000 in compensatory and punitive damages because the defendants failed to treat his glaucoma and skin cancer and because he was confined in a sickening and disgusting mental health unit, even though the defendants admitted that he had never been mentally ill.

***Gomez v. Vernon***: The NPP won an order from the trial court that a number of Idaho prisoners had suffered retaliation from staff because they had sought to exercise their right to access to courts, and the court also sanctioned the defendants for secretly reading the plaintiffs' lawyer-client mail. The Ninth Circuit affirmed the trial court's rulings and the Supreme Court denied review.

***Heit v. Van Ochten***: In this statewide Michigan case, the NPP won a settlement agreement requiring the defendants to stop harassing hearing officers into finding prisoners guilty at disciplinary hearings and to abolish a secret quota on the percentage of prisoners who could be found not guilty. Now the hearing officers must make individual determinations of the relative credibility of staff and prisoners accused of misconduct.

1. A fascinating history of the experiment by Prof. Zimbardo can be found at www.prisonexp.org.

2. Sturm, S., "The Legacy and Future of Corrections Litigation," 142 *University of Pennsylvania Law Review* 641, 662-686, 691-697 (Dec. 1993).

# Citing Expert Reports on Inhumane Prison Conditions, ACLU Asks Court to Speed Review of MS Prison Case

The American Civil Liberties Union asked a federal court in September to speed review of a lawsuit over prison conditions at the Mississippi State Penitentiary in Parchman, citing reports by court-appointed experts detailing inhumane conditions that have directly contributed to psychiatric problems in the prison population.

The reports were submitted by the ACLU's National Prison Project as part of a lawsuit filed in July on behalf of six incarcerated men at Parchman. All four reports describe a similar picture of conditions so extreme that they seriously jeopardize the health and safety of the prisoners incarcerated in Unit 32, which houses Mississippi's death-row prisoners, its severely mentally ill prisoners, and prisoners being disciplined for rule violations.

"When we brought this case in July we knew that prison conditions were terrible," said Margaret Winter, Associate Director of the National Prison Project. "The expert reports we have now received are so disturbing that we are asking the court to move this case up on the docket before prisoners suffer further harm or even death."

According to the report of expert psychiatrist Terry A. Kupers, who toured the facilities in August, "the presence of severely psychotic prisoners who foul their cells, stop up their toilets, flood the tiers with excrement, and keep other prisoners awake all night with their incessant screams and shouts," are "virtually certain to cause medical illness and destruction of mental stability and functioning." Kupers said that conditions on the Unit include solitary confinement combined with "the extremes of heat and humidity, a grossly unsanitary environment, vermin, arbitrary and punitive disciplinary policies, and inadequate health and mental health care."

Dr. Susi Vassallo, an expert on heat-related illnesses, describes in her report the conditions she experienced in one death row prisoner's cell. "When I closed the Plexiglass door, it was like getting into a car parked in the hot Texas sun and sitting with the windows rolled up," she wrote. "I needed to breathe deeply just to feel that I was getting enough air. . . I could not understand how anyone could be locked up in that hot box for any length of time without losing control."

**View of conditions in prisoner's cell shows where shelves have been ripped off the wall and an exposed electrical outlet.**

In a civilized society, Winter said, "no one should be subjected to treatment like this. The state may be authorized to execute death-sentenced prisoners, but it may not torture prisoners to death while they are pursuing their rights to appeal their sentences."

Many of those appeals will succeed, Winter added. Of 183 death sentences imposed in Mississippi since 1976, the Mississippi Supreme Court has reversed the death penalty in 41 percent of the direct appeals it has ruled on. In fact, almost as many people have had their convictions reversed as have been executed.

Any relief will come too late for Tracy Alan Hansen. Hansen was a death row inmate on Unit 32 and named plaintiff in the lawsuit when he was executed on July 17th. Requests from ACLU attorneys and Hansen's defense attorneys to halt the scheduled execution so that he could testify in the conditions case were denied.

The reports by Kupers and Vassallo, as well as by environmental expert James Balsamo and corrections expert Vincent M. Nathan, were filed in U.S. District Court for the Northern District of Mississippi in connection with the ACLU lawsuit *Russell v. Johnson.* ACLU of Mississippi attorney Sandi Farrell, Stephen F. Hanlon of Holland & Knight and Jackson, and Mississippi civil rights attorney Robert McDuff are serving as co-counsel in the case.

## Hope Triumphs: Supreme Court Says Hitching Post for Alabama Prisoners is "Cruel and Unusual"

By Elizabeth Alexander

In an important victory for prisoners' rights, the Supreme Court in June ruled prison officials in Alabama have no right to handcuff prisoners to a hitching post in situations where no emergency exists. The High Court held that the Eighth Amendment's guarantee against "cruel and unusual" punishment was "clearly established" and had been violated in this particular case.
The American Civil Liberties Union applauds the decision for its recognition that acts of cruelty and degradation are beyond the pale of a civilized society. An instrument of torture was finally banished from Alabama, the last Department of Corrections to use it. It was a banishment that was long overdue.

Of particular importance, the Court was careful to provide a broad holding on the nature of the Eighth Amendment violation. Specifically, the Court noted that, while the violation in this case was exacerbated by the failure of guards to give inmate Larry Hope proper clothing, water, or bathroom breaks, it is the use of the hitching post itself in non-emergency situations that violates the Constitution. The June decision should be extremely helpful in litigation challenging various kinds of prisoner abuse, such as restraint chairs and other forms of physical restraint, when they are not used in emergency situations.

The 6-3 ruling in *Hope v. Pelzer, 01-309* , written by Justice John Paul Stevens, found the constitutional violation "obvious" and stated that Hope had been treated by prison staff in a manner that offended human dignity. This decision will allow Hope to take legal action against his jailers.

The Court also noted that Hope had been hitched to a post for an extended period of time in a painful position "under conditions that were both degrading and dangerous," saying that "this wanton treatment was not done of necessity, but as punishment for prior conduct."

Hope was attached to the hitching post in a manner that forced him to keep his arms above his shoulders. Whenever he tried to move, the handcuffs cut into his wrists, causing him pain. According to the legal complaint, guards took away Hope's shirt and left him exposed to the sun for seven hours with no bathroom breaks and only a few sips of water. When he asked for water, a guard first gave water to some dogs and then kicked the water cooler over, spilling its contents.

## ACLU Reaches Agreement with Maryland in Women's Jail Case

A settlement agreement providing immediate and long-term relief for women housed in Baltimore's antiquated and dangerously hot jail was reached in August between the American Civil Liberties Union and Maryland state officials. Under the agreement, special "heat emergency" procedures will be established to provide medical screening for all women within hours of entering the city's Women's Detention Center (WDC). In addition, women suffering from conditions exacerbated by excessive heat will have access to over 200 air- conditioned bed spaces in the facility. U.S. District Court Judge J. Frederick Motz entered the agreement as a consent order at an August hearing.

"We are pleased that women in the Baltimore Detention Center will be medically screened and appropriately housed to limit the risk that the scorching heat may cause," said Joseph H. Young of Hogan & Hartson, who serves as ACLU pro bono counsel in the case. "Although we have reached an important agreement, we will continue to monitor the facility to ensure the state complies."

Under the agreement, Maryland will implement a comprehensive medical protocol for screening all women in the facility to determine who is at-risk of heat-related injury. The protocol will be in place from May 1 through September 30 every year, and at all other times that state public

health officials determine that a "heat emergency" exists. In addition, the State will perform studies of the jail's physical plant to determine how to improve ventilation, excessive heat and air quality over the long-term, and evaluate the short-term feasibility of installing additional air-conditioning.

The ACLU first appeared in federal court regarding conditions at the women's jail after filing a preliminary injunction alleging that heat levels as high as 117 degrees violated an existing consent decree. U.S. District Judge Andre M. Davis issued an emergency order requiring state officials to immediately screen all women in the WDC for medical conditions that place them at heightened risk of heat-related injury or death and to provide them alternative housing.

At a subsequent hearing, Judge Motz said the conditions at the jail were so extreme and oppressive that they could not be allowed to continue. He gave attorneys representing the state and prisoners only a few days to reach a plan for improvements.

"We remain concerned about the health of the women inside the Women's Detention Center, but are hopeful that the relief Maryland has agreed to provide will help the situation considerably," said Raj Goyle, an attorney with the ACLU of Maryland. "We look forward to working with the state and the medical experts in the coming days and weeks to see that the judge's order is being followed vigilantly."

Plaintiffs are represented by Young, Frank Dunbaugh of Annapolis, Elizabeth Alexander of the ACLU National Prison Project and Deborah Jeon and Goyle of the ACLU of Maryland.

## ACLU Challenges Arizona Law That Censors Anti-Death Penalty Web Sites

Acting on behalf of anti-death penalty and other advocacy groups, the American Civil Liberties Union in July filed a lawsuit in Arizona federal district court seeking to invalidate a state law that bans all information about Arizona prisoners from the global Internet.

"It is extraordinary that Arizona prison officials believe they can tell international groups opposed to the death penalty what they can and cannot say online about prisoners in Arizona," said Eleanor Eisenberg, Executive Director of the ACLU of Arizona. "It is equally absurd that this law punishes prisoners even when they are not responsible for the posting of information about them on these outside websites," she added.

The lawsuit, *Canadian Coalition Against the Death Penalty v. Terry L. Stewart,* is brought on behalf of three prisoners' rights groups against the Arizona Department of Corrections which is responsible for enforcing this law. The broadly worded legislation (Arizona House Bill 2376) also bars prisoners from corresponding with a "communication service provider" or "remote computing service" and disciplines prisoners if any person outside prison walls accesses a provider or service website at a prisoner's request.

The ACLU's organizational clients are the Canadian Coalition Against the Death Penalty, which has information about 45 Arizona prisoners on its website; Stop Prisoner Rape, a group that seeks to end sexual violence against individuals in detention; and Citizens United for Alternatives to the Death Penalty, a group that organizes public education campaigns with the intention of abolishing the death penalty.

All of the ACLU's clients maintain websites with prisoner information. Recent department notices demand that prisoners have their names and case information removed from advocacy websites or face prison discipline and possible criminal prosecution. "Ironically, prisoners would be in violation of the statute simply by communicating with a service provider or website to have their information removed," Eisenberg noted.

The ACLU's complaint alleges that the legislation in question has the effect of suppressing the flow of information about prisoners to the outside world and stifles the advocacy efforts of the ACLU's clients and other anti-death penalty

and prisoner rights organizations. While the state's department of corrections maintains its own website offering prisoner information, the ACLU complaint charges that Arizona is gagging critics who challenge the state's version of the facts about prisoners, including evidence that may establish innocence. There has also been no evidence to suggest that the department of corrections has made any effort to remove Arizona prisoners' information posted on the websites of pro-death penalty groups and organizations that advocate harsher punishment of prisoners.

"Prisoners forfeit many rights when they are incarcerated, but they do not forfeit their freedom of speech," said David C. Fathi, staff counsel with the ACLU's National Prison Project. "These basic rights may be limited only to the extent necessary to maintain prison security, and that is clearly not the issue here."

Fathi of the ACLU's National Prison Project, Ann Beeson of the ACLU's Technology and Liberty Program and Alice Bendheim and Pamela K. Sutherland of the ACLU of Arizona are all serving as co-counsel in the case.

## Beginnings

*Continued from page 1*

The movement for prisoners' rights was fairly quiet in its early days. The federal courts just began to reexamine the "hands off" doctrine under which the courts had declined to review prison conditions or practices for many years. Then the Attica uprising in September of 1971 occurred, 43 prisoners and guards lost their lives and 80 others were wounded. The prisoners' rebellion and its aftermath served as an opening into the dark world of America's prisons and became the catalyst for the development of the modern prisoners' rights movement.

I had spent most of the 1960s in the south as the Chief Staff Counsel of the Lawyers Constitutional Defense Committee in Mississippi, Louisiana and Alabama. In the early 1970s I was continuing my civil rights work in New Orleans. A meeting was arranged in Washington in the Spring of 1972 where I met with the new national director of the ACLU, Aryeh Neier, Schwartz and Hirschkop. Neier believed that groups of civil liberties victims should be represented in one project, an "enclave" theory that he brought to the ACLU.

At that meeting in Washington it was decided to merge the Buffalo project and the Virginia project into one new "National Prison Project" to be directed by me and to be based in Washington. It was felt that one national project would be more effective than two local ones. The project opened its doors during the first week of June 1972. Two young lawyers, Nancy Crisman and Michael Milleman, who had been working in Hirschkop's office, a secretary and an office administrator joined me to form the first National Prison Project staff.

During its very early years the NPP replicated the work done by Schwartz and Hirschkop, bringing fairly narrow single issue prisoners' rights litigation. For example, we brought a suit against the US Parole Commission to require them to provide some procedural due process in the parole system. We brought some actions asking for due process hearings before a prisoner could be punitively transferred from one prison to another. There were cases involving the censorship of prisoner-lawyer mail and other single issue kinds of cases. After a few years and in consultation with Schwarz and Hirschkop, my growing staff and I realized that the real problem in prison was the unconstitutionality of prison life itself. We realized that winning narrow victories essentially changed nothing in what was going on in the dark, secret confines of America's prisons. We decided in 1974 to look for a case that would involve a broad-based assault on prison conditions and the totality of prison life and found such a case serendipitously in Alabama.

An elderly black prisoner in Alabama, Worley James, wrote a handwritten complaint to the Chief Judge of the Middle District of Alabama, Frank Johnson. It stated that he had been in and out of Alabama's prisons for most of his adult life and they didn't do anything for him. Judge Johnson who had seen many *pro se* complaints from the Alabama prison system finally decided

that he should probably take a look at what was going on in Alabama's prisons. He certified this case as a statewide class action and appointed a law professor at the University of Alabama, George P. Taylor, as counsel for the plaintiffs. Johnson suggested to Taylor that he get help by contacting the National Prison Project. That case was the birth of the "totality of conditions" concept in prison litigation.

I had appeared before Judge Johnson in a number of civil rights cases in the 1960s and knew he was a thoughtful and decent judge. After a series of meetings in Montgomery, Alabama with local lawyers and local ACLU officials, the staff of the NPP decided to enter into the case, *James v. Wallace*. It was then consolidated with two other cases, *Pugh v. Locke* and *Newman v. Alabama*. The state filed a motion to dismiss and we drafted the response for the team of plaintiffs' lawyers. In the fall of 1974, Judge Johnson issued an opinion denying the motion to dismiss. He also set the framework for the case, telling us that if we could prove that prison conditions in Alabama actually made the prisoners worse, then that might be an Eighth Amendment violation. Word of the pending case spread around the country and to our amazement a number of national experts volunteered to participate in the case. In fact, eight prominent experts in corrections, classification and mental and environmental health assisted the National Prison Project and the other plaintiffs' counsel and testified in the case. None of them charged a fee for their work because, for them, the case was of national importance.

The rest is history. In January of 1976 Judge Johnson issued a sweeping opinion declaring the entire state system unconstitutional because the totality of conditions actually made people worse off.[2] He entered a sweeping remedial decree.

This decision was the most significant catalyst for setting the agenda of the National Prison Project for the next decade and a half. Shortly after Alabama, the NPP, together with local counsel, brought similar totality of conditions cases in Rhode Island and Tennessee. By the end of 1987 the NPP had achieved similar victories and court ordered reform in 30 states, the District of Columbia and the U.S. Virgin Islands. It was truly a "National" Prison Project.

The Project staff grew, foundation support increased, and in the words of Herman Schwartz, one of the National Prison Project's founders, it became "the preeminent prisoners' rights organization in the country, and probably in the world."[3] I believe it is fair to say that the work of the National Prison Project over the past 30 years has eliminated 19th century dungeons in America. However, much work remains to deal with the serious problems in our 21st century institutions.

[1] Founding Director, The National Prison Project, 1972 – 1995. Currently a consultant to the ACLU National Legal Department; Board member and consultant for Penal Reform International.

[2] *Pugh v. Locke* and *James v. Wallace*, 406 F. Supp. 318 (M.D. Ala 1976).

[3] An article describing the early years of the NPP by Herman Schwartz. *The National Prison Project Journal*, 15th Anniversary issue, No. 13, Fall 1987, p. 5.

# Case Law Report: Highlights of Most Important Prison Cases

By John Boston
*Director, Prisoner Rights Project of NY Legal Aid Society*

## U.S. Court of Appeals Cases

**PLRA--Exhaustion of Administrative Remedies**

*Smith v. Zachary*, 255 F.3d 446 (7th Cir. 2001). Use of force claims are prison conditions cases requiring exhaustion under the PLRA. Note that this holding is now required by *Porter v. Nassle*, 122 S. Ct. 983 (2002).

The court rejects the notion that the only purpose of § 1997e(a) is to ferret our frivolous claims. It serves to give the prison system prompt notice of problems, which also gives them opportunity to address situations internally (e.g. by

relocating the prisoner, firing guards, hiring new ones, or providing additional training and supervision). It also helps develop the factual record. Deterring frivolous suits was not Congress's only goal in the PLRA, since it included provisions like attorneys' fees, telephonic hearings, and waivers.

This is a pre-PLRA case. Plaintiff says that by filing complaints he substantially complied with the exhaustion requirement. The court adopts the substantial compliance pseudo-retroactivity rule of the Sixth Circuit--in dictum, it seems, because it holds the argument waived, since the plaintiff argued below only that he was not required to exhaust.

**PLRA--Prospective Relief Restrictions--Entry of Relief/Access to Courts--Punishment and Retaliation/Correspondence--Legal and Official/Personal Involvement and Supervisory Liability/State Officials and Agencies/Injunctive Relief/Sanctions**

*Gomez v. Vernon*, 255 F.3d 1118 (9th Cir. 2001). At 1122: Prison officials engaged in a pattern of retaliation against several prisoners for their litigation activity and cut law library services drastically in order to prevent prisoners' access to courts. After they filed suit, they were required to keep their correspondence with class counsel and other case-related materials in binders in the law library. Prison employees read and made copies of some of these materials and provided them to the deputy attorney general defending the case, some of them at her request. Eight months after this started, the defense attorneys asked a state bar official about it and were told to stop doing it and turn the documents over to the court; but they didn't stop.

"The Department's failure to investigate or correct constitutional violations supports the district court's finding that there was a policy or custom [regarding retaliation] that led to violation of the inmates' rights."

Two things are significant here: the court equates the personal involvement requirement in official capacity cases with the *Monell* policy requirement, then it says that after-the-fact evidence can make the policy case by itself.

A prisoner who was subjected to repeated threats of transfer because of his complaints about the administration of the law library and who eventually quit his job stated a First Amendment claim based on the chilling effect of the conduct.

At 1129: "Although the PLRA significantly affects the type of prospective injunctive relief that may be awarded, it has not substantially changed the threshold findings and standards required to justify an injunction." The district court properly concluded that an injunction was necessary despite defendants' protestations that it wouldn't happen again.

> The district court properly limited its injunction to a combination of prospective and retrospective relief granted to just six inmates, denying class-wide injunctive relief. Three inmates received retrospective relief of expungement of record. Because the retrospective relief does not raise the same federalism concerns as a court's ongoing supervision in a prison's affairs, and because it was limited to remedying the prison's retaliatory acts, such relief passes constitutional muster. . . .
>
> Five inmates received prospective relief, such as enjoining the Department from adversely affecting pay levels and employment because of this lawsuit. None of these remedies requires the continuous supervision of the court, nor do they require judicial interference in the running of the prison system. . . . As required by the PLRA, the prospective relief focused specifically on those few actions necessary to correct violations of individual inmates' rights.
>
> In sum, the relief granted addressed only the harm caused each individual inmate. It did not

> apply to the prison system as a whole, or even to classes of prisoners. At most, the injunction affects a few isolated decisions over the course of these inmates' sentences. In the face of page after page of findings with regard to violation of the inmates' constitutional rights, the narrow injunction can only be characterized as minimal and virtually non-intrusive. Accordingly, the court did not abuse its discretion in granting such narrowly drawn injunctive relief.

The district court properly imposed sanctions on defense counsel. The communications were privileged (and the privilege wasn't waived by plaintiffs' obeying prison rules about where to keep them), and the court had inherent power to sanction counsel for bad faith conduct (their actions "do not pass even the most lenient ethical 'smell test'"). Sanctions were also appropriate under 28 U.S.C. § 1927, which refers to attorneys who "multipl[y] the proceedings in any case unreasonably and vexatiously." These counsel did so by moving for contempt based on their surreptitious reading and thereby evoking a counter-motion for sanctions.

**Searches--Urinalysis/Procedural Due Process--Disciplinary Proceedings/Grievances and Complaints about Prison/Transfers**

*Farver v. Schwartz*, 255 F.3d 473 (8th Cir. 2001). The plaintiff alleged that he was disciplined with loss of good time after a urine test done for retaliatory reasons. Under *Heck*, he can't challenge it under § 1983 without first getting the disciplinary conviction set aside. The claim of retaliation was also properly dismissed because there was evidence (a report from staff and test results) supporting the discipline.

It was error to dismiss claims of other retaliatory disciplinary charges that had been dismissed by prison officials, and to dismiss a retaliatory transfer claim based on a complaint about staff.

**Summary Judgment/Heating and Ventilation/Evidentiary Questions**

*Mays v. Rhodes*, 255 F.3d 644 (8th Cir. 2001). The decedent died of heat exhaustion on his first day on the hoe squad (on November 6, mid-afternoon temperature 72 degrees). Unsworn accounts in grievance forms filed by other prisoners contradicted the defendants' account, but those are inadmissible hearsay and the plaintiff did not obtain deposition testimony or affidavits from their authors. The defendants' account thus stands unchallenged, and there is no evidence from which any defendant could be found deliberately indifferent.

**Hazardous Conditions and Substances**

*Carroll v. DeTella*, 255 F.3d 470 (7th Cir. 2001). The plaintiff sued prison officials, the state Environmental Protection Agency, and two EPA employees alleging that the drinking water was contaminated by radium and lead.

The lead contamination is "remote from cruel and unusual punishment" because it results from corrosion in the pipes, which occurs only when the water is still, and prison officials had instructed prisoners to let the water run for a few minutes in the morning before drinking it.

The radium contamination "presents a more difficult question," since it is almost twice the maximum level set by the federal EPA, and prison officials (while telling the inmates the water was safe) began providing free bottled water to the staff. There is a 1/10,000 higher risk of cancer from ingesting the EPA standard's worth of radium for 70 years; the record doesn't say anything about ingesting twice that for a shorter period. At 472-73:

> Failing to provide a maximally safe environment, one completely free from pollution or safety hazards, is not . . .required by the Eighth Amendment. If the prison authorities are violating federal antipollution laws, the plaintiff may have a remedy under those laws. . . . His remedy is not under the Eighth Amendment.

The plaintiff's claim against the state EPA was dismissed because it is not a "person" under § 1983, and his claim against EPA employees was dismissed because they hadn't been served. The plaintiff is proceeding *pro se.*

**Pro Se Litigation/Conduct of Trial**

*Kulas v. Flores*, 255 F.3d 780 (9th Cir. 2001). A *pro se* prison plaintiff was removed from the courtroom during the trial after he persisted in disrupting the cross-examination of one of his witnesses (an adverse witness) with frivolous objections. "In a civil suit, the parties do not have a constitutional right to be personally present during the trial." However, there is a due process right for plaintiff *or* counsel to be present, which right applies to a *pro se* litigant who is both. Here the district court should have explored other options, such as holding him in contempt or postponing the proceedings, but removal was not an abuse of discretion under the circumstances.

**Access to Courts--Confiscation and Destruction of Legal Materials/Procedural Due Process--Property/Equal Protection/Personal Involvement and Supervisory Liability/Discovery/Correspondence**

*Jackson v. Burke*, 256 F.3d 93 (2d Cir. 2001). The plaintiff's mother sent him documents to use to challenge his conviction; they arrived at the prison but were sent back, arriving in a mutilated condition with some of the documents effectively destroyed. An official said he would investigate, but never completed the investigation because the plaintiff was transferred. The plaintiff missed various deadlines in challenging his conviction.

The district court granted summary judgment. The court assumes that the plaintiff states a claim for denial of access to the courts. He should be allowed additional discovery to identify the proper defendants (having served the wrong prison employee).

The plaintiff did not state a court access claim against the official who failed to investigate. The plaintiff had no due process claim for destruction of his papers because the state provides an adequate post-deprivation remedy, e.g., in the Court of Claims. The plaintiff's failure to file his claim because he thought he had to wait for the never-completed investigation does not alter this conclusion.

The plaintiff had no equal protection claim, even under the Supreme Court's decision authorizing "class of one" claims, because there was no evidence that the destruction of his mail was intentionally directed at him.

**Correspondence--Legal and Official/Access to Courts--Confiscation and Destruction of Legal Materials; Punishment and Retaliation/Typewriters**

*Cody v. Weber*, 256 F.3d 764 (8th Cir. 2001). The plaintiff, a frequent litigator, was allowed to have a word processor and then a computer, then the prison changed its policy to bar computers; the district court granted a TRO, then granted summary judgment to defendants and ordered that the plaintiff be given two weeks to print out any legal documents he needed before sending his computer out of the prison. The plaintiff now alleges that his legal papers and correspondence were read outside his presence and that he was punished in various ways for bringing lawsuits.

Defendants argued that the plaintiff couldn't show actual injury because he didn't specify what papers were read or how reading them affected any particular litigation. The court says he has sufficiently alleged injury. "He asserts that defendants have obtained an unfair advantage in defending themselves against his claims of constitutional denials and violations by reading his legal papers." An allegation of injury may not be sufficient to withstand summary judgment, but here defendants offered no evidence of a penological interest justifying the intrusion (they deny doing it).

The plaintiff's claim of retaliation should not have been dismissed. The plaintiff's allegations of numerous specific incidents claimed to be retaliatory, including recitation of one instance in which a prison employee told him he was transferred to a mental health unit to convince

him not to "use the system," created an issue of fact barring summary judgment.

**Recreation and Exercise/Emergency/Negligence, Deliberate Indifference and Intent**

*Delaney v. DeTella*, 256 F.3d 679 (7th Cir. 2001). The plaintiff alleged he had been denied all out-of-cell exercise opportunities for six months during a lock-down.

The court reiterates the old Seventh Circuit chestnut that deliberate indifference requires "*actual* knowledge of *impending* harm *easily* preventable," which suggests that "the officials actually want the prisoner to suffer the harm." This language is clearly wrong. See *Helling v. McKinney*, *Farmer v. Brennan*.

"Given current norms, exercise is no longer considered an optional form of recreation, but is instead a necessary requirement for physical and mental well-being." Short-term denials may be acceptable, but this deprivation was long-term and serious and no alternative arrangements were made to mitigate it (in-cell calisthenics don't rise to that level). "While there may in certain cases be legitimate penological reasons justifying an extended denial of exercise privileges, here none are presented." Expert testimony isn't necessary at this stage to show that the plaintiff's health was threatened by the denial, since this is a qualified immunity appeal, on which all the court does factually is consider whether plaintiff's allegations, if true, state a claim. The court also suggests that there may be "some interplay" between the severity of the deprivation and the required showing of injury, and notes that it has acknowledged the likelihood of psychological injury from lack of exercise. The defendants are wrong to claim that only physical injury meets the Eighth Amendment standard. The asserted right was clearly established by Seventh Circuit decisions going back to 1986.

**False Imprisonment**

*Campbell v. Peters*, 256 F.3d 695 (7th Cir. 2001). The plaintiff served too much prison time. He argued that "if through deliberate indifference to the requirements of state law the correctional officials kept him imprisoned too long, his Eighth Amendment rights were violated even if the additional time was not very long." The court says "he has articulated a constitutional right." (700) The defendants were entitled to qualified immunity. Even though the right not to be held beyond one's sentence is clearly established, it was not established that the kind of state law mistake that occurred here violated the Eighth Amendment. (In fact, some state courts had interpreted state law in a way adverse to the plaintiff's claim.)

**Sexual Abuse/Juveniles/Personal Involvement and Supervisory Liability/Damages--Assault and Injury/Negligence, Deliberate Indifference and Intent/Qualified Immunity**

*Beers-Capitol v. Whetzel*, 256 F.3d 120 (3d Cir. 2001). Two former residents of a detention facility for female juveniles alleged that they were sexually assaulted by a staff member, who was later convicted criminally. The supervisory defendants were dismissed; plaintiffs were awarded $200,000 in damages against the employee.

The court rejects plaintiffs' theory that since the supervisory defendants were all "trained experts in the area of juvenile detention, . . . they must have been aware of the excessive risks of harm to the plaintiffs. . . ." (134)

The plaintiffs alleged that defendants' policies were deficient in that they didn't require female staff members in all female units at all times; there was poor or no supervision of staff at night; there was no observation or surveillance system (so the staff member could take female residents to unobserved areas); private interactions between male staff and female residents were permitted; and unsupervised trips off-grounds with male staff were permitted. They alleged training was deficient.

The Executive Director was not shown to have been aware of a pattern of sexual assaults; two allegations don't meet that standard, and anyway they would only be a pattern of allegations, not of injuries. The failure to implement policies that are standard or recommended for juvenile facilities doesn't create "so great and so obvious" a

risk that the defendant must have known about it and have been indifferent to it.

The director of the housing unit cannot be held liable for similar reasons. Also, her failure to discipline a staff member for delaying reporting of one plaintiff's complaint, and for then mishandling the complaint, and for then botching the investigation, could not support liability because they occurred after the incident complained about, and because they did not show deliberate indifference to a subsequent risk to the other plaintiff.

The manager of the housing unit could not be held liable. He was aware of three allegations of abuse by the staff member, but there is no evidence that he believed they were likely to be true or the evidence was so strong he must have believed them likely to be true. He displayed a "subjective mindset of basic skepticism" which is inconsistent with deliberate indifference.

A counselor could be found deliberately indifferent based on evidence she had heard "general rumors from the residents" about the malefactor's activities, but did not investigate or report them (though she wrote them down "[t]o cover my behind, in case it were true"); had responded to another such report by setting up a meeting with the abuser without reporting it to supervisors; and had admitted that she "kind of knew" he was "messing with students." (141) There was some evidence that the rumors on which she based that conclusion had antedated the incidents of abuse.

"There is no question that the plaintiffs' constitutional right that was violated--the right not to be sexually abused by a state employee while in confinement--was clearly established" in 1994. "Conduct that is deliberately indifferent to an excessive risk . . . cannot be objectively reasonable conduct."

**AIDS/Privacy/Medical Records/Mootness/ PLRA-Mental or Emotional Injury**

*Doe v. Delie*, 257 F.3d 309 (3d Cir. 2001). The plaintiff's HIV-positive status was not kept confidential; jail staff informed medical escort officers of his condition, the door was left open during his medical appointments allowing inmates and staff to eavesdrop, and nurses announced his medication loudly enough for others to hear.

There is a right to privacy in one's medical information, which extends to prescription records, and is "particularly strong" in the case of HIV status. That right survives incarceration. ". . . [The] right to privacy in his medical information is completely different than the right extinguished in *Hudson [v. Palmer]*. . . . The [due process] right to nondisclosure of one's medical information emanates from a different source and protects different interests than the right to be free from unreasonable searches and seizures."

The right of medical privacy in prison is subject to the *Turner* standard. The defendants submitted no evidence about the justifications for their "open-door" examinations, disclosure of plaintiff's condition to officer escorts, and the loud announcement of the names of plaintiff's medications, so the court can't evaluate the *Turner* factors. (The news here is that defendants must submit "evidence" and not just assertion.)

The defendants are entitled to qualified immunity. The state HIV privacy statute doesn't defeat qualified immunity. By 1995, no federal appeals court, and only a handful of district courts, had held that prisoners retained a right of medical privacy.

> At 314 n. 3: The PLRA mental/emotional injury provision does not bar claims seeking nominal damages to vindicate constitutional rights, nor claims seeking punitive damages to deter or punish egregious violations of constitutional rights. Doe's claims for compensatory damage are barred by § 1997e(e). Moreover, to the extent that Doe's punitive damages claims stem solely from the violations of his right to medical privacy, and not from any emotional or mental distress suffered, those claims are not barred by § 1997e(e). . . .

**PLRA--Exhaustion of Administrative Remedies/Sanitation/Plumbing/Correspondence--Legal and Official/Pleading/Procedural Due Process--Property/Protection from Inmate**

**Assault/Food/Use of Force**

*Dellis v. Corrections Corporation of America*, 257 F.3d 508 (6th Cir. 2001). The court held this case pending resolution of *Booth*; it now remands for dismissal without prejudice of non-frivolous claims.

Claims that the plaintiff was deprived of a lower bunk, was subjected to a flooded cell, and was deprived of a working toilet, alleged only temporary inconveniences (doesn't say how long).

"[C]onclusory, unsupported" allegations that the plaintiff's legal mail was opened were insufficient to state a claim.

The plaintiff's allegation of assault by other prisoners might be shown to be "reasonably preventable," and the fact that he had refused protective custody a year earlier does not necessarily excuse a subsequent failure to protect.

An allegation that the prison's water supply was out for three days and the plaintiff received only two half pints of milk and one 16.5 ounce bottle of water during that time stated a constitutional claim.

**PLRA--Attorneys' Fees/Damages--Access to Courts/Grievances and Complaints about Prison/Special Verdicts and Jury Instructions**

*Walker v. Bain*, 257 F.3d 660 (6th Cir. 2001). The plaintiff alleged that in retaliation for his filing of grievances, officers arranged a shakedown of his cell and improperly confiscated documents and personal property and delayed providing him grievance forms. After a jury trial he was awarded $300 against one defendant and $125 against another.

The portion of 42 U.S.C. § 1997e(d)(2) that says "If the award of attorney's fees is not greater than 150 percent of the judgment, the excess shall be paid by the defendant" (excess over the plaintiff's 25%, that is) means that defendants are never liable for more attorneys' fees than 150% of the judgment. "We caution that if non-monetary relief is obtained, either with or without money damages, § 1997e(d)(2) would not apply."

The prior decision in *Hadix* upholding the PLRA fee rates is dispositive, since "we held that the twin goals of decreasing marginal lawsuits and protecting the public fisc are legitimate government interests, and that decreasing an attorney fee award in the context of prisoner civil rights litigation serves both of these interests."

The district court erred in instructing the jury that the plaintiff had to prove as an element of a First Amendment retaliation claim that defendants actions "shock the conscience," but that instruction didn't affect the result.

**Religion--Beards, Hair, Dress/Deference/Equal Protection**

*Taylor v. Johnson*, 257 F.3d 470 (5th Cir. 2001). The Muslim plaintiff challenged a prohibition on beards. His free exercise claim is foreclosed in the Fifth Circuit by *Green v. Polunsky*.

The district court abused its discretion in dismissing his equal protection claim as frivolous. The plaintiff alleged that he was similarly situated to persons who cannot shave for medical reasons. His claim is governed by a reasonableness standard, and not strict scrutiny, under *Turner* and *O'Lone*.

The court declines to consider the plaintiff's claim under the Religious Land Use and Institutionalized Persons Act (RLUIPA) because he didn't raise it except in a Rule 60 motion and then didn't separately appeal the motion's disposition, so the court lacks jurisdiction.

**Hazardous Conditions and Substances/ Plumbing/Negligence, Deliberate Indifference and Intent**

*Shannon v. Graves*, 257 F.3d 1164 (10th Cir. 2001). The plaintiff alleged that inmate workers had to handle quantities of sewage because of the deficiencies of the prison sewage system, and that she got some on her because her protective clothing was the wrong size and wasn't able to wash the sewage off immediately (though she showered later). There are also frequent sewage backups, which are cleaned up with blankets which are then given no more than standard laundering. Clothing also comes back from the laundry smelling bad.

Inmate exposure to sewage

> can constitute a serious risk to inmate health and safety and satisfy the objective component [of the Eighth Amendment]. . . . [E]xposure to the human waste of others carries a significant risk of contracting infectious diseases such as Hepatitis A, shigella, and others. . . . There is no requirement that an inmate suffer serious medical problems before the condition is actionable. . . .

Here, the plaintiff might satisfy the objective component or Eight Amendment violation, but she can't show deliberate indifference for a one-time exposure to sewage. She wasn't denied protective equipment; the complaint that the clothing was inadequate and she wasn't allowed to clean up immediately "at best" suggest negligence.

The alleged fecal contamination of blankets and clothing raises a material issue of fact as to the objective prong, but there is no evidence that prison officials knew about this before the plaintiff filed her complaint.

The sewage backups are "troubling," and evidence suggests that prison officials know that the existing sewage system is inadequate, yet there is not enough evidence of frequency and duration to create an Eighth Amendment issue. So the court affirms summary judgment against this litigant who was *pro se* in the district court, rather than remanding, even though it appointed counsel on appeal.

**Disabled/State Officials and Agencies/Damages-Punitive/Damages--Assault and Injury/Special Verdicts and Jury Instructions**

*Gorman v. Easley*, 257 F.3d 738 (8th Cir. 2001). The paraplegic, wheelchair-bound plaintiff was arrested and transported in a van without wheelchair locks; he was strapped to a bench and the unfolded wheelchair placed in the van with him. He fell off the bench and sustained permanent injuries and burst his urine bag (which the police had not let him empty); his wheelchair was damaged. A jury awarded actual damages of $1,034,817.33 and punitive damages of $1.2 million on his claims under the Rehabilitation Act and the ADA.

The local Police Board is not protected by the Eleventh Amendment.

The district court erred in holding that the disability statutes do not permit punitive damages; the court rejects the Sixth Circuit holding to the contrary.

The defendants' argument that the plaintiff is not a qualified person with a disability because his wheelchair is a corrective device that must be taken into account is given the short shrift that it deserves (it doesn't replace his legs and anyway the whole point is that he didn't have it in the police van).

The court affirms jury instructions that said making a reasonable accommodation meant modifying defendants' practices for transportation to transport him in a manner that was "safe and appropriate consistent with his disability." This doesn't mean that defendants had to hold the plaintiff harmless from anything that might happen, just that the defendants couldn't leave him helpless by reason of his disability.

**Use of Force/Verbal Abuse/Access to Courts--Punishment and Retaliation/Evidentiary Questions**

*Proctor v. Harmon*, 257 F.3d 867 (8th Cir. 2001). The plaintiff alleged (testifying at a pre-trial hearing) that an officer jumped on him, body-slammed him to the floor twice, stomped on his head and back, and kicked and punched him repeatedly, and that two other officers beat him with a flashlight and their fists, all while he was handcuffed. The district court should not have dismissed this claim. Nor should it have dismissed his claim of threats of physical harm by the officers, since he testified that they made reference to his newly filed lawsuits.

"Witnesses should not automatically be excluded as 'cumulative' merely because they will be testifying to the same events as the plaintiff himself. The jury might find that corroboration of this kind makes the plaintiff more believable."

**Standing/Religion--Services Within**

**Institution/PLRA--Prospective Relief Restrictions--Preliminary Injunctions/ Injunctive Relief- Preliminary/Deference**

*Mayweathers v. Newland*, 258 F.3d 930 (9th Cir. 2001). The named plaintiffs alleged that they were at risk of discipline or losing good time for going to Jumu'ah services rather than to work. They had standing. One plaintiff has a Friday work assignment and has received unexcused absences from work; others had either received unexcused absences or had missed services for fear of disciplinary proceedings, and although they do not presently work on Fridays, prison officials retain the power to change their assignments back.

The district court had power to grant a new preliminary injunction while the first one was being appealed. Although the district court generally loses jurisdiction when a notice of appeal is filed, it retains jurisdiction to preserve the status quo, and may grant an injunction pending appeal under Rule 62(c), Fed.R.Civ.P.

The PLRA did not preclude the district court from entering a second preliminary injunction after the first expired. At 936: "Nothing in the statute limits the number of times a court may enter preliminary relief." The PLRA does not limit courts' authority to order prison officials to violate state law to the grant of final relief.

The district court did not abuse its discretion in granting a preliminary injunction. *O'Lone* is distinguishable, because that case involved prisoners working outside the prison, and relief would have required reassigning Muslims to "preferential jobs." Here, all that was ordered was to stop disciplining prisoners for attending Jumu'ah services rather than working. Under the *Turner* standard: The third and fourth factors, however, weigh solidly in favor of the inmates. The defendants have utterly failed to show any ripple effect among inmates and staff from the narrow scope of the injunction. Prison administrators have implemented the injunction by logging inmates' unexcused absences as always; the only change is that unexcused absences attributable to Jumu'ah attendance are off bounds to the disciplinary process. Unlike *O'Lone*, this remedy does not require that Muslims receive preferential work assignments.

The plaintiffs suffer irreparable injury when they are unable to attend religious services commanded by the Qu'ran. At 938: "And the free exercise of religion in prisons is obviously in the public interest."

**PLRA--Three Strikes Provision**

*Higgins v. Carpenter*, 258 F.3d 797 (8th Cir. 2001). The three strikes provision is upheld in a typical superficial opinion which overrules *Ayers v. Norris* , one of the two extant district court opinions holding the provision unconstitutional.

Rational basis scrutiny applies. Inmates and indigents are not suspect classes. *Id.*:

> Even when § 1915(g) is applied, the affected inmate can file his suit by paying the full filing fee up front. The indigent inmate who has three strikes also may file if he is under imminent danger of serious physical injury. We conclude that an inmate's right of access to the courts is not impeded.
>
> It is true that some indigent inmates have no prison jobs or other income sources and cannot save the full filing fee--may be effectively prevented from pursuing valid constitutional claims after receiving three strikes. Yet, "a constitutional requirement to waive court fees in civil cases is the exception, not the general rule."

**Use of Force/Summary Judgment**

*Outlaw v. Newkirk*, 259 F.3d 833 (7th Cir. 2001). The plaintiff complained that an officer slammed a food service slot on his hand. The officer said the plaintiff tried to throw trash through the opening, that he didn't know the plaintiff's hand was in the opening, and it was an accident.

The defendant is entitled to summary judgment. It is undisputed that the plaintiff said, "Take this garbage, you bitch," and that prisoners in the maximum unit sometimes threw garbage or

other objects out of their cells. Also, medical records indicate that the plaintiff's injuries were minor. The evidence suggests that the defendant had a legitimate reason to close the door, regardless of whether the plaintiff was throwing garbage or offering it, and that the force applied was *de minimis*.

**PLRA--Exhaustion of Administrative Remedies/Federal Officials and Prisons**

*Massey v. Helman*, 259 F.3d 641 (7th Cir. 2001). The plaintiff complained of delay in hernia surgery but did not exhaust administrative remedies. His claim that he was denied the necessary forms is rejected because he filed suit a month *before* his memo requesting the forms.

**Work Assignments**

*Ali v. Johnson*, 259 F.3d 317 (5th Cir. 2001). Forcing prisoners to work does not violate the Thirteenth Amendment. The fact that Texas law omitted the explicit requirement that prisoners work does not matter, and an earlier case that says that a prisoner not sentenced to hard labor retains Thirteenth Amendment rights is not good law.

**Protection from Inmate Assault**

*Smith v. Gray*, 259 F.3d 933 (8th Cir. 2001). Segregation prisoners flooded their cells in protest over not receiving clean linens; the plaintiff was ordered to mop up the water. The other prisoners kicked and banged on their cell doors and threatened him. The defendants let another prisoner out of his cell without first restraining him, and he attacked the plaintiff and injured him. The defendants are entitled to summary judgment because there was no evidence that the officers knew releasing the unrestrained prisoner would pose a significant risk to the plaintiff.

**Access to Courts/Federal Officials and Prisons**

*Dahler v. United States*, 259 F.3d 763 (7th Cir. 2001). The contents of certain applications for post-conviction relief are specified by court rule. The Federal Bureau of Prisons distributes a form that states all applicants seeking leave to file a second or subsequent petition must use this form, except in capital cases. The form apparently comes from the Eleventh Circuit. At 766: "Yet the Bureau of Prisons lacks authority to limit how prisoners present their claims, for the Executive Branch cannot prescribe rules of practice and procedure in the federal courts." The court, having already admonished prison officials on this point, expresses its disappointment that they paid no attention, and cites a case holding prison officials in contempt.

**PLRA--Screening and Dismissal**

*Vanderberg v. Donaldson*, 259 F.3d 1321 (11th Cir. 2001). 28 U.S.C. § 1915(e)(2)(B)(ii) does not deny equal protection by permitting *sua sponte* dismissal of indigents' claims. Strict scrutiny does not apply because the statute only addresses procedures once a claim is presented; it does not affect the ability to prepare and file complaints, "thereby bringing them to a court's attention." (1323) Under rational basis review, the statute passes muster, since prisoners initially pay a reduced filing fee and have lots of free time, and since the statute provides a rational way to serve the interest in avoiding frivolous litigation in conjunction with the three strikes provision.

The *sua sponte* dismissal procedure does not deny due process. A district judge's review of a magistrate's recommendation and opportunity to object meet due process requirements.

The court does not resolve whether the rules require that plaintiff have an opportunity to amend (it notes the conflict between *Gomez* and *McGore*), because the plaintiff missed the appropriate deadline to file a motion to amend until after the case was dismissed, disentitling him to amendment as of right.

**PLRA--Exhaustion of Administrative Remedies/Procedural Due Process--Disciplinary Proceedings/Habeas Corpus/Transfers**

*Johnson v. Litscher*, 260 F.3d 826 (7th Cir. 2001). The plaintiff complained that after he won a lawsuit for the denial of a liver transplant, he became the object of a blitz of disciplinary reports and was then transferred to a maximum security prison. The district court dismissed for

nonexhaustion. The court says claims of retaliation must be exhausted, and that this grievance system does permit exhaustion of such claims. The plaintiff may be right that his transfer can't be challenged under any available remedy, but he can challenge the retaliation that the transfer is part of, and the fact that he can't get a particular remedy (re-transfer) doesn't matter under Booth. If prison officials refuse to consider his claim, he will have exhausted.

Defendants argued that under Balisok the plaintiff had to proceed via habeas corpus because he challenged the fact or duration of his confinement. Although he did say that he lost good time, this claim was not the "crux" of his complaint. Finding for him on this claim would not necessarily imply the invalidity of his conviction, sentence, or conduct reports, or result in revocation of conduct reports or restoration of good time. Other courts generally have held that if the prisoner is guilty of a disciplinary offense, that's the end of any retaliation claim for it.

**Hazardous Conditions and Substances/Work Assignments/PLRA--Exhaustion of Administrative Remedies**

*Richardson v. Spurlock*, 260 F.3d 495 (5th Cir. 2001). Complaints of "sporadic and fleeting" exposure to second-hand smoke on bus rides were properly dismissed as frivolous absent "competent evidence that [the plaintiff's] intermittent exposure to smoke during bus rides was an unreasonable risk to his health." (The magistrate judge appears to have had some sort of evidentiary proceeding on this motion to dismiss.)

The plaintiff failed to exhaust his administrative remedies as to his claim of retaliatory discipline because he filed an administrative appeal rather than a disciplinary appeal (499). As to other retaliatory claims, administrative process was still pending when he filed suit, so the claims were properly dismissed.

**Suicide Prevention/Pendent and Supplemental Claims; State Law in Federal Courts**

*Hott v. Hennepin County, Minn.*, 260 F.3d 901 (8th Cir. 2001). The 18-year-old decedent hanged himself in jail, where he had been for about 45 days. The record showed that he was lying dead in a seated position at the foot of his bed during a period when an officer repeatedly noted that he had performed health and well-being checks and seen nothing amiss.

The failure to identify the plaintiff as a suicide risk by obtaining medical records from a county hospital did not violate the Constitution. There is no such duty in general, and evidence that he engaged in conduct that might be interpreted as suggesting suicide did not establish deliberate indifference absent evidence that jail personnel had interpreted it that way.

The jail training materials are replete with references to the risk of suicide, and a jury could infer that the officer was aware that suicide prevention was a purpose of the health and well-being checks. However, there is insufficient evidence of the actual risk of suicide to support an inference that the officer was deliberately indifferent to a "substantial risk to general inmate safety.

The plaintiff's negligence claim against the officer survives because there was enough evidence to support a finding that if the officer had done his job, the decedent might have been deterred. The defendants having told the court their policy was an effective means of deterring and detecting suicide attempts, they "will not now be heard to argue . . . that as a matter of law" their policy would have failed if carried out.

**PLRA--Exhaustion of Administrative Remedies**

*Wright v. Hollingsworth*, 260 F.3d 357 (5th Cir. 2001). At 358: "Quibbles about the nature of a prisoner's complaint, the type of remedy sought, and the sufficiency or breadth of prison grievance procedures were laid to rest in Booth." The plaintiff's claim that, unlike the plaintiff in Booth, his claim for a ruptured eardrum can only be redressed by money damages, mischaracterizes Booth and is unconvincing. The court rejects his argument that he substantially complied, stating that he did not pursue the grievance remedy to conclusion, without saying whether or not "substantial compliance" would be good enough.

It's too late for this plaintiff to raise waiver after three years of litigation and remand from the Supreme Court.

Plaintiff requests, "if all else fails, dismissal without prejudice and equitable tolling of the Texas statute of limitations during the pendency of this action and any additional state administrative proceedings. These modifications of the judgment are appropriate."

**Publications/Correspondence/Deference/Mootness**

*Morrison v. Hall*, 261 F.3d 896 (9th Cir. 2001). The plaintiff complained of a regulation that prevented prisoners from receiving bulk rate, third, and fourth class mail. This court has already struck down such a rule as applied to a non-profit publication in *Prison Legal News v. Cook*, 238 F.3d 1145 (9th Cir. 2001). It applies the same analysis to a for-profit publication here. Under the *Turner* standard, the defendants did not show a valid, rational connection between the policy and their legitimate goals. They failed to present any evidence that the risk of contraband in first or second class mail is any lower than that in bulk, third, or fourth class mail. The rule does not serve an interest in fire prevention or in expediting searches because the defendants already have a rule limiting the total volume of property permitted. The prohibition does not significantly reduce required staff time. The distinction among mail sent at different postage rates is an arbitrary means of achieving the goal of reducing the volume of mail.

Prisoners do not have alternative means of obtaining materials. Radio and television are not an alternative to reading newspapers and magazines.

The *Turner* factor concerning impact on guards and other prisoners is addressed by the arguments showing a lack of valid, rational connection between policy and interests.

There is an easy, obvious alternative to serve defendants' goals. They were concerned with "junk mail"; they should distinguish between junk mail and subscriptions.

A change in the regulation does not moot the case under the "voluntary cessation of a challenged practice" mantra (900 n.5).

The plaintiff also challenged a requirement that incoming mail bear a return address and be addressed to the prisoner using committed name and prison identification. The court upholds the rule. Defendants claim without contradiction that under the policy, mail is delivered if the recipient can be identified. The requirement of complete name and return address facilitates return to sender, allows the prison to inform the sender of prison mail requirements, and assists defendants in investigations. This last reason by itself is sufficient.

**PLRA-Attorneys' Fees/Attorneys' Fees and Costs**

*Volk v. Gonzalez*, 262 F.3d 528 (5th Cir. 2001). In a pre-PLRA suit, plaintiff won a post-PLRA verdict for nominal damages. Constitutional challenges to the PLRA fee limits were waived for some unaccountable reason.

The district court did not abuse its discretion in halving the pre-PLRA part of the fee award because of limited success. The plaintiff's injunctive relief was vacated on appeal, so the relief here really was nominal. This is not a PLRA holding, but one based on general attorneys' fees law.

Legal assistant fees are recoverable under the PLRA and therefore subject to the PLRA's strictures. Exactly what this means in dollars isn't stated.

Fees on fees are recoverable under the PLRA; the court relies on the Third Circuit decision in *Hernandez v. Kalinowski*, 146 F. 3d 196 (3d Cir. 1998). Those fees are also subject to the PLRA's restrictions on fees, including the 150% of judgment limit. The court acknowledges this may lead to "harsh results in some cases," presumably meaning that defendants can litigate fees forever at no cost to themselves and wipe out the benefit of the fees award to plaintiff's counsel.

**PLRA--In Forma Pauperis Provisions--Filing Fees**

*Hubbard v. Haley*, 262 F.3d 1194 (11th Cir.

2001). Eighteen dialysis patients brought claims about their medical care and diet. The district court said each plaintiff had to file a separate complaint and pay a separate filing fee. The appeals court affirms. Not only does each plaintiff have to pay a separate filing fee, the court says that the plain language of the PLRA requires that *they file separate complaints*. There is absolutely no reasoning supporting the requirement of filing separate complaints, which amounts to a repeal by implication of a big chunk of the Federal Rules of Civil Procedure concerning joinder. Prisoners also must file separate notices of appeal.

**PLRA--Exhaustion of Administrative Remedies; Attorneys' Fees/Use of Force--Chemical Agents/Statutes of Limitations/Damages--Assault and Injury/Evidentiary Questions**

*Foulk v. Charrier*, 262 F.3d 687 (8th Cir. 2001). The plaintiff got a jury verdict for $1.00 in nominal damages after being sprayed with pepper gas.

One defendant argued that the plaintiff failed to exhaust as to him because the amended complaint naming him was not filed until after the PLRA (the rest were joined pre-PLRA). The relevant question is whether the later complaint relates back. The relation back issue should have been raised before the case went to trial. This holding is consistent with the prior holding that the requirement is not jurisdictional and that the PLRA exhaustion requirement is an affirmative defense under Rule 8(c). Since the law was uncertain, and the issue had been raised by the time of trial, the court does not actually hold that the issue was waived under these circumstances for this appeal.

The court then holds that the record was insufficient for the district court to dismiss for non-exhaustion. At the trial, defendant elicited that the plaintiff had filed an "informal resolution request" and had not received an answer, and that he couldn't file an actual grievance until he got an answer. This testimony suggested that no further proceedings were "available," and nothing in the trial record contradicts it.

The district court did not abuse its discretion in excluding evidence of the specific nature of the plaintiff's prior felonies (for rape and sodomy). The evidence was not highly probative as to credibility and the district court carefully weighed its probative value versus its prejudicial character. Nor did the court abuse its discretion in limiting the redundant documents the defendants could submit concerning the plaintiff's injuries and disciplinary violations.

The district court correctly instructed the jury that if they found in plaintiff's favor but that his damages had no monetary value, they should return a verdict for $1.00 in nominal damages. The court rejects the argument that nominal damages must mean *de minimis* force not actionable under *Hudson v.McMillian*, reiterating that force can be repugnant, malicious, or sadistic without inflicting compensable injury.

The plaintiff's testimony that he was following orders in a locked cell when the defendant enticed him to put his face to the cell door window and sprayed pepper spray directly into his face, and he was not allowed to wash the spray off and felt its effects for days, supported a jury verdict of malicious and sadistic force.

The district court erred in awarding more than $1.50 in fees based on the $1.00 damage award. The court "agree[s] with the majority of circuits" that the 150% cap does not violate the Constitution.

**Procedural Due Process--Disciplinary Proceedings/Habeas Corpus/Classification/ Good Time/Sanctions**

*Montgomery v. Anderson*, 262 F.3d 641 (7th Cir. 2001). Deprivation of the opportunity to earn good time credits, like revocation of already awarded credits, may and must be pursued via habeas corpus. At 643: "The stakes are the same: the length of incarceration." However, *only* the change in credit-earning status may be challenged via habeas corpus. At 643-44: "Disciplinary segregation affects the severity rather than duration of custody. More-restrictive custody must be challenged under § 1983, in the uncommon circumstances when it can be challenged at all." Also, this prisoner has been barred from filing §

1983 actions because he hasn't paid previously imposed sanctions.

The deprivation of the opportunity to earn good time does not deny liberty unless the state's system creates a liberty interest. Indiana's does, since it says prisoners may be reclassified to lower credit-earning classes *if* they break the rules.

Reduction in credit-earning class "likely" requires "less elaborate" process than required by *Wolff*. It questions whether any findings of fact need be made, but says it's adequate for the board to rely explicitly on the detailed conduct report and investigative report.

**Sexual Abuse**

*Fontana v. Haskin*, 262 F.3d 871 (9th Cir. 2001). An allegation of sexual harassment during arrest states a Fourth Amendment claim. The seizure "continues throughout the time the arrestee is in the custody of the arresting officers," so excessive force in transporting an arrestee gives rise to a Fourth Amendment claim. At 879 n.5: The court notes a split among circuits on the issue of how far in the arrest-to-court process the Fourth Amendment continues to govern.

The excessive force analogy is not directly applicable to sexual harassment because there is no countervailing governmental interest justifying sexual misconduct.

**PLRA--Prospective Relief--Termination of Judgments/Attorney Consultation/Use of Force-Restraints/Procedural Due Process/Pre-Trial Detainees**

*Benjamin v. Fraser*, 264 F.3d 175 (3d Cir. 2001). The court affirms a finding of continuing and ongoing violation after hearing a termination motion. It says little about the PLRA, nothing about the specificity required of a district court's findings in such a proceeding, and very little about tailoring of remedy, except to state gratuitously that one provision of the remedy looks unnecessary to them even though the defendants didn't challenge it, so they can take it up in the district court if they want to. (At 191 n. 13).

Plaintiffs' claim of delays and obstructions to attorney visits is governed by *Procunier v. Martinez* and not by *Lewis v. Casey*. *Lewis* did not say it overruled *Procunier*, *Procunier* is factually closer to this case, and Lewis is inapplicable to Sixth Amendment claims by detainees.

> Where the right at issue is provided directly by the Constitution or federal law, a prisoner has standing to assert that right even if the denial of that right has not produced an "actual injury." . . .
>
> . . . While a prisoner complaining of poor law libraries does not have standing unless he can demonstrate that a direct right--namely his right of access to the courts--has been impaired, in the context of the right to counsel, unreasonable interference with the accused person's ability to consult counsel is itself an impairment of the right.

Sixth Amendment claimants have not previously been required to demonstrate "actual injury"; the court cites both jail conditions cases and a Supreme Court habeas decision stating that denial of access to counsel is not subject to "prejudice analysis."

Under *Procunier*, the court examines the institutional justification for obstructions to consultation with counsel. The district court's findings that security reasons were not the sole or even the primary reason for delays was supported by the record. At 187 n.10: The court doubts that *Turner v. Safley* applies, since it refers to "penological interests" which include punishment, deterrence, and rehabilitation. This is dictum, since the challenged practices would not survive *Turner*.

Detainees subject to unusual restraint practices are deprived of liberty. The district court found that the practices "have a severe and deleterious effect . . . tantamount to punishment" and can be painful and injurious. The court affirms, especially since the court did not restrict the use of such restraints but merely required after-the-face procedural protections.

*Sandin*'s "atypical and significant" standard has no application to detainees, since the premise

of *Sandin*'s analysis is that a criminal conviction broadly extinguishes liberty, and *Sandin* itself distinguished detainees.

*Wolff* process rather than *Hewitt* process is required because a detainee's interest in freedom from unjustified infliction of pain and injury is more substantial than the interest in avoiding administrative segregation, and there is no governmental interest in avoiding subsequent process after immediate imposition of restraints.

**Sanitation/Use of Force--Chemical Agents/Negligence, Deliberate Indifference and Intent/Length of Stay/Emergency/Qualified Immunity/Summary Judgment/PLRA--Mental or Emotional Injury**

*DeSpain v. Uphoff*, 264 F.3d 965 (10th Cir. 2001). The plaintiff alleged that prisoners flooded his tier and the toilets were shut off, resulting in his being subjected to unsanitary flooding and exposure to human waste for 36 hours.

In Eighth Amendment analysis: "In general, the severity and duration of deprivations are inversely proportional, so that minor deprivations suffered for short periods would not rise to an Eighth Amendment violation, while 'substantial deprivations of shelter, food, drinking water, and sanitation' may meet the standard despite a shorter duration." (974) The plaintiff's allegations meet the standard. *Id.*: ". . . Exposure to human waste, like few other conditions of confinement, evokes both the health concerns emphasized in *Farmer* and the more general standards of dignity embodied in the Eighth Amendment."

The district court erred in applying the *Whitley* "malicious and sadistic" standard that is applied during prison disturbances. It was not clear that there was an ongoing threat to safety; the prisoners remained locked in their cells.

The district court erred in dismissing the associate warden in charge of the unit, in view of statements by guards that no one was allowed to clean up by order of the associate warden, an allegation that the rubber boots given the guards were issued by him, the fact that the guards who knew of the conditions reported to him, and the common sense proposition that a 36-hour deprivation of toilets would lead to waste management problems.

The defendants are not entitled to qualified immunity.

The plaintiff alleged that an officer sprayed pepper spray indiscriminately along the prison tier. That claim is governed by the *Whitley/Hudson* malicious and sadistic standard, since it involves an instrument by which officers wield their authority and therefore implicates excessive force, even though it does create a "prison condition." If, as alleged, the officer discharged the spray as a practical joke, it violates the Eighth Amendment.

The plaintiff's allegation of burning eyes and lung congestion and ongoing anxiety thereafter meets the *Hudson* threshold of more than *de minimis* force.

The officer is not entitled to qualified immunity.

**PLRA--Three Strikes Provision/Res Judicata and Collateral Estoppel**

*Kinnell v. Graves*, 265 F.3d 1125 (10th Cir. 2001). *Res judicata* prevents a prisoner with three strikes from relitigating whether his prior dismissals were actually frivolous. Constitutional objections to the statute are rejected as foreclosed by precedent or as insubstantial. At 1128: The lack of a time limit for treatment of prior dismissals as strikes does not make the statute unconstitutionally vague.

## Non-Prison Cases

**Color of Law/Use of Force/Juveniles/ Evidentiary Questions**

*Robert S. v. Stetson School, Inc.*, 256 F.3d 159 (3d Cir. 2001). The plaintiff alleged that he was physically abused by staff members of a private school specializing in the treatment and education of juvenile sex offenders.

The school and its staff did not engage in state action, since the plaintiff's placement in it was not mandated by any court order and was done with the plaintiff's mother's consent. Receipt of government funds and subjection to a detailed

contract with a state agency are not sufficient to create state action. Nor did the school perform a function that has been "traditionally the exclusive province of the state"; the only schools performing the relevant function are private. The fact that state law required the agency to provide those services did not create state action. *Milonas v. Williams* is partly distinguished on the ground that some commitments in that cases were involuntary, and otherwise rejected.

**Procedural, Jurisdictional and Litigation Questions**

*W.N.J. v. Yocom*, 257 F.3d 1171 (10th Cir. 2001). The plaintiffs sought to challenge the Utah fornication and sodomy statutes, and to do so pseudonymously. At 1172:

> When a party wishes to file a case anonymously or under a pseudonym, it must first petition the district court for permission to do so. . . . If a court grants permission, it is often with the requirement that the real names of the plaintiffs be disclosed to the defense and the court but kept under seal thereafter. . . . Where no permission is granted, "the federal courts lack jurisdiction over the unnamed parties, as a case has not been commenced with respect to them."

A lack of jurisdiction can't be corrected by an order *nunc pro tunc.*

**Rehabilitation**

*Doe I v. Otte*, 259 F.3d 979 (9th Cir. 2001). The Alaska Sex Offender Registration Act is punitive for purposes of the Ex Post Facto Clause and therefore cannot be applied to persons whose crimes antedated the statute. It imposes an affirmative disability by subjecting offenders to onerous conditions that in some respects are similar to probation or supervised release (e.g., they have to re-register at police stations four times a year for the rest of their lives and provide large amounts of personal information). It also requires posting of name, address, and employer address on the Internet, creating a substantial likelihood that the offender will not be able to find work. The statute is excessive in relation to its purpose, since proof of rehabilitation is irrelevant. Statutes that have been upheld have generally tailored the effect of the statute to the risk posed by the offender.

**Intervention**

*United States v. Tennessee*, 260 F.3d 587 (6th Cir. 2001). The United States and private plaintiffs sued the state over the treatment of mentally retarded and disabled persons. After relief had been preliminarily approved, an association of nonprofit agencies who provide service to those persons, mostly with government funding, sought to intervene.

The association was properly denied intervention as of right. Timeliness weighed heavily against intervention, since the case was nearly over, with substantive relief pending final approval. The intervenor had known of the litigation for a long time. The complication that this belated intervention would add to the litigation presents a risk of prejudice to the parties if they are forced to enter into collateral litigation over economic issues. The intervenor doesn't have a substantial legal interest because its members' interest in getting paid, and paid enough, does not concern the statutory and constitutional rights asserted in the litigation, and the agencies have other forums for pursuing favorable funding arrangements.

**Personal Involvement and Supervisory Liability/Damages--Punitive/Jury Instructions and Special Verdicts**

*Provost v. City of Newburgh*, 262 F.3d 146 (2d Cir. 2001). At 155:

> . . . [T]he direct physical participation of a defendant in the constitutional violation is not alone a sufficient basis for holding the defendant liable if the defendant had no awareness or notice of the facts that rendered the action illegal. . . .
>
> Thus, what we have meant by using phrases such as "direct

> participation" as a basis of liability is personal participation by one who has knowledge of the facts that rendered the conduct illegal.

A defendant may also be liable "who, with knowledge of the illegality, participates in bringing about a violation of the victim's rights but does so in a manner that might be said to be 'indirect'--such as ordering or helping others to do the unlawful acts, rather than doing them him- or herself." (155)

The district court erred in instructing the jury that punitive damages may depend on the defendant's financial resources where the defendant did not submit any evidence on that subject. However, since the jury awarded the plaintiff $10,000 in punitive damages against a police officer (along with nominal damages), the award approaches the limits of what would be constitutional under recent Supreme Court decisions. The error is therefore harmless.

**Qualified Immunity/Use of Force**

*Deorle v. Rutherford*, 263 F.3d 1106 (9th Cir. 2001). The defendant police officer shot the plaintiff with a "less lethal" "beanbag" round consisting of lead shot in a cloth bag. It put out one of the plaintiff's eyes and left shot embedded in his head. At the time of the shot, the plaintiff, unarmed, was walking toward the officer but was unarmed, and had been given no warning. These allegations support a finding of excessive force, and the defendant is not entitled to qualified immunity. At 1119: "Although there is no prior case prohibiting the use of this specific type of force in precisely the circumstances here involved, that is insufficient to entitle Rutherford to qualified immunity; notwithstanding the absence of direct precedent, the law may be, as it was here, clearly established."

**Consent Decrees**

*Labor/Community Strategy Center v. Los Angeles County Metropolitan Transp.*, 263 F.3d 1041 (9th Cir. 2001). Consent decree provisions that set out mathematically precise criteria and specific dates for defendants' performance could not be interpreted to require only "best efforts." The decree does not excuse nonperformance based on shortage of funds that would result in the agency's failure to meet other legally required goals if it met the consent decree requirements; the decree requires reallocation of funds to meet consent decree obligations.

The decree does not require the violation of other state and federal laws. At most, it may require noncompliance with legal preconditions for receiving state and federal funds, and consequent forfeiture of the funds.

**Disabled/State Officials and Agencies**

*Gibson v. Arkansas Dept. of Correction*, 265 F.3d 718 (8th Cir. 2001). Injunctive relief remains available under the Americans with Disabilities Act under the *Ex parte Young* fiction, as indicated by the Supreme Court in *Garrett*. The court rejects the argument that *Seminole Tribe* is inconsistent with this conclusion; *Seminole Tribe*, which held *Ex parte Young* inapplicable, involved a statute which Congress had intended to provide a more limited remedial scheme, while the ADA relies on existing civil rights enforcement mechanisms, and is distinguishable in other ways as well.

## U.S. District Court Cases

**Hazardous Conditions and Substances/Religion-Services within Institution/Cruel and Unusual Punishment--Proof of Harm**

*Crawford v. Artuz*, 143 F.Supp.2d 349 (S.D.N.Y. 2001). The plaintiffs complained of exposure to friable asbestos. Neither plaintiff presented sufficient evidence of the risk of future injury to withstand summary judgment. The plaintiffs submitted a 1980 OSHA publication which said one day's exposure can cause significant disease; defendants' medical expert said their level of exposure was trivial. Even if plaintiffs did show a risk of serious future injury, "*Helling* requires a more rigorous showing than plaintiffs have presented"; as a matter of law, the risk they complain of is not so grave as to violate contemporary standards of decency. (It is

completely unclear what the court thinks plaintiff has to show in this kind of case.)

Defendants did not violate the First Amendment by allowing the Mosque to become contaminated with asbestos, requiring its closure. Prisoners have a right to participate in congregate religious services, but there is no evidence that plaintiffs have not been able to practice their faith or to pray with other inmates.

**Ex Post Facto Laws**

*Crump v. Kansas*, 143 F.Supp.2d 1256 (D.Kan. 2001). A 1996 statute authorizing the parole board to defer the next parole appearance for ten years, rather than the three years of prior law, was not an *ex post facto* law as to the plaintiff because it did not present sufficient risk of greater punishment for his crimes. (He is serving six concurrent life terms consecutive with five other determinate sentences as a result of setting a booby trap dynamite bomb that, among other depredations, killed his ex-wife and five members of her family.)

**Use of Force/Personal Involvement and Supervisory Liability/Medical Care--Standards of Liability--Serious Medical Needs**

*Jones-Bey v. Conley*, 144 F.Supp.2d 1035 (N.D.Ind. 2000). The plaintiff alleged that he was beaten without provocation or resistance and thrown into a shower while clothed. He then resisted being returned to his cell without medical care and was beaten some more. Then he was moved elsewhere and remained there in full restraints, which were so tight as to damage his hands. He said he did not receive a proper medical examination. He was then forced to remain restrained on a cold concrete floor in handcuffs and shackles for four to five hours. Later he had blood in his urine, but the nurse lost the sample. The plaintiff's allegations are sufficient to withstand summary judgment. The court cites the *Hudson v. McMillian* factors and says the Seventh Circuit gives particular weight to factors 2 and 4 (severity of force and relationship between the need for force and the force applied).

A supervisor who was physically present and recording the cell extraction could be held liable for failure to intervene if he stood idly by when he could have prevented the excessive force.

**Grievances and Complaints about Prison/Res Judicata and Collateral Estoppel/Procedural Due Process--Disciplinary Proceedings/Habeas Corpus**

*Johnson v. Freeburn*, 144 F.Supp.2d 817 (E.D.Mich. 2001). The plaintiff alleged that after he reported a threat to an officer, he was issued a false misconduct ticket and was threatened with being shot. The defendant argued that the facts found in the disciplinary proceeding should preclude the plaintiff from disputing them in the federal action, even as to the claim concerning the threat of shooting.

Findings in disciplinary proceedings are not preclusive in subsequent civil actions under state law, so they are not preclusive under federal law. "Additional policy considerations argue against providing preclusive effect to prison disciplinary hearings." The court relies on these considerations "as well as" state law without discussing whether the policy considerations would trump state law if they were in conflict.

The plaintiff's disciplinary proceeding, which resulted in loss of 90 days' good time and has not been overturned in a state forum, cannot be pursued via § 1983 under *Heck* and *Balisok*.

**Contempt/Pre-Trial Detainees/Financial Resources/Medical Care/Environment**

*Carty v. Turnbull*, 144 F.Supp.2d 395 (D.V.I. 2001). The court finds that the defendants have not complied with its orders with respect to environmental health and physical plant, provision of personal hygiene articles, repair and replacement of cracked and torn mattresses, fire safety, distribution of medication, mental health care, legal supplies and law library access, faulty security systems, and renovations.

Lack of financing is not a defense to the failure to provide minimum constitutional standards in jails. At 416: "While it is the Government's prerogative to lock up criminals and pretrial detainees in prisons, that power carries

with it the duty to provide funds for maintaining those prisons in a constitutional manner." Also, repeated setbacks in renovations which are funded "demonstrate that there is more to Defendants' intransigence than a lack of money."

The actions of third parties do not provide an excuse for noncompliance. A contractor who delayed work did so because the defendants did not pay him on time and created other bureaucratic obstacles. "The defense of impossibility is limited to 'physical impossibility beyond the control of the alleged contemnor' and does not include failure to provide the wherewithal to comply."

Fashioning a contempt remedy is within the courts' discretion, but the least possible power adequate to its purpose must be used, and "the court must take into account the interest of state and local authorities in managing their own affairs." (418) The court may assess fines; in addition, it "may require the contemnor to undertake affirmative acts, even acts not required by the initial order." The court directs more expert reports to inform its choice of remedy.

**Searches--Person--Convicts/Use of Force/PLRA--Mental or Emotional Injury/Mootness**

*Ostrander v. Horn*, 145 F.Supp.2d 614 (M.D.Pa. 2001). The plaintiff alleges that the defendants authorized a "live exhibition/exercise" by CERT officers, with civilian witnesses, in which he was forcefully extracted from his cell and dragged to an exercise unit where he was placed in a cage with his hands cuffed behind his back, then dragged back, strip-searched, returned to his cell; along the way the CERT officers shoved his face into a corner while screaming at him not to turn around. During this process he was repeatedly cuffed and uncuffed while his arms were twisted. The defendants say that this was an "emergency preparedness drill involving an RHU fire drill evacuation."

Since the plaintiff has been transferred, his injunctive claim is moot. The plaintiff's allegations do not state a constitutional claim. This was at most a *de minimis* use of force.

In connection with the plaintiff's claims of humiliation and emotional distress, the court maunders on inconclusively about the mental/emotional injury provision of the PLRA but then says there's no constitutional violation anyway.

Prisoners do not have a Fourth Amendment expectation of privacy in their cells, nor do they have a Fourth Amendment right to be free from strip searches, which need only be conducted in a reasonable manner. This court thinks it's OK to manhandle prisoners just for practice.

**Medical Care--Standards of Liability--Deliberate Indifference/Qualified Immunity**

*Seals v. Shah*, 145 F.Supp.2d 1378 (N.D.Ga. 2001). The plaintiff, who had had arterial grafts in both legs, began to have pain and numbness in his legs and feet; a nurse saw a sign of thrombosis. He got the typical jail medical runaround. Eventually he had part of his foot amputated. The defense of qualified immunity is not available to a defendant guilty of deliberate indifference to serious medical needs.

The plaintiff's deliberate indifference claim was supported by evidence that the doctor did not physically examine the plaintiff; that the doctor, though knowing of plaintiff's prior vascular problems, did not schedule a follow-up appointment until six days later; that the doctor refused to see him the day after the first non-examination when his condition did not improve, even though he had signed off on their notes showing the plaintiff's deteriorating condition; and that the doctor only sent the plaintiff to the emergency room after two more days of nurses and others voicing concern about his condition.

**Pre-Trial Detainees/Crowding/Sanitation/Ventilation and Heating/Medical Care/Furnishings/Food/Fire Safety/Recreation and Exercise/Unsentenced Prisoners and Convicts Held in Jails/PLRA--Prisoner Release Orders/Injunctive Relief--Preliminary**

*Maynor v. Morgan County, Ala.*, 147 F.Supp.2d 1185 (N.D.Ala. 2001). The county jail is grossly overcrowded, with prisoners sleeping on the concrete floor space under bunks, between

bunks, on tables, between tables, sometimes without sleeping mats, blankets, or sheets. There is inadequate laundry and linen service, the cells are dirty (there is no janitor service and the inmates are not provided with adequate cleaning supplies and equipment), the metal surfaces of the showers have been eroded by rust. Ventilation and heating are inadequate. Prisoners do not receive personal hygiene items. Recreation occurs once or twice a month. The food is "inadequate in amount and unsanitary in presentation." Prescribed medications are not provided and there are dangerous delays in medical services. The jail is a fire hazard.

The cause of the crowding is the state prison system's persistent failure to remove "state ready" prisoners from the jail upon sentencing. The state prison system is at 96.7% per cent of capacity, and nobody sleeps on the floor. The state prison system pays nothing to the County for leaving prisoners there.

The court finds an Eighth Amendment violation and issues a preliminary injunction requiring the jail administration to: (a) screen each incoming prisoner for serious medical conditions and to provide prescribed medications within 24 hours of admission; (b) provide bunk beds, mattresses, sheets, and blankets to all prisoners; (c) provide immediate diagnosis and appropriate treatment by a qualified mental health specialist of inmates with suicidal tendencies or other indicia of serious mental illness; (d) clean and fumigate the jail, and provide cleaning supplies and equipment for daily cleaning; (e) provide clean bedding, clothes, soap and toothpaste weekly; (f) clean the ventilation ducts and maintain temperatures between 65 and 85 degrees; (g) repair and maintain fire safety equipment; (h) maintain proper ventilation and lighting; (i) provide one hour a week of outdoor exercise except during inclement weather and emergencies.

The state prison system is enjoined to present a plan for removing all state ready prisoners within a month and to start transferring at least one Morgan County state ready prisoner whenever they accept a state ready prisoner from another county.

The court does not cite either the PLRA prisoner release provision or the preliminary injunction provision.

**Visiting--Right to Visit; Contact Visits/Deference/Standing/State, Local and Professional Standards/Cruel and Unusual Punishment--Proof of Harm/Procedural Due Process**

*Bazzetta v. McGinnis*, 148 F.Supp.2d 813 (E.D.Mich. 2001), aff'd. The plaintiffs challenged restrictions on visiting which (1) prohibited visits by siblings, nieces and nephews under 18 years old; (2) prohibited visits by children whose prisoner parents had had their parental rights terminated, even if voluntarily so the child could be adopted; (3) prohibited visits from former prisoners who are not immediate family; (4) required children to be brought to visits by a parent or legal guardian; and (5) imposed a permanent ban on visiting for any prisoner found guilty of two substance abuse misconducts. As to the first four of these, the issue is only as to non-contact visits, since the court has previously upheld those restrictions as to contact visits. The court rules in plaintiffs' favor, in what is probably the most important visiting decision since Kentucky Dept. of Corrections v. Thompson.

Many courts have recognized liberty interests in familial relationship other than strictly parental ones. The First Amendment and the Fourteenth Amendment protect the fundamental rights to establish and maintain family relationships and to make child-rearing decisions.

The Turner standard applies. "Both the prisoners themselves and their prospective visitors are entitled to the protection of these rights, always with the acknowledgment that the demands of the prison system may involve significant restriction. "In applying the Turner test, Defendants bear the burden of demonstrating that the challenged regulation is reasonably related to a valid penological objective." Deference "does not mean blind acceptance of the proffered rationales."

The interests asserted with respect to minor children and former prisoners are preventing physical and sexual abuse of children, preventing

injury to children in visiting rooms, preventing the smuggling of weapons, drugs, or other contraband, and reducing the overall volume of visiting to ease the crowding of visiting rooms and the administrative burden on prison staff. The establishment of "visiting standards" (limiting the number of visits per inmate per month, the hours of visiting, and weekend visits) and limiting each prisoner's visiting list to 10 people, neither of which the plaintiffs challenged, had already reduced visiting by 50%. The restriction to non-contact visits eliminates risk of abuse of children or of contraband. Defendants therefore failed to show a valid, rational connection between their goals and these means.

As to the other Turner factors, "[u]ncontroverted evidence establishes that letters and telephone calls are not adequate alternate means of staying in contact with minor children." (849) Allowing non-contact visits for presently excluded visitors would have no impact on guards or other inmates and a minimal impact on the allocation of prison resources. Allowing non-contact visiting is an obvious alternative to the present policy.

The permanent ban on visits based on two substance abuse misconducts violates the Eighth Amendment. At 851: "The unrefuted evidence establishes that visitation with family and friends is the single most important factor in stabilizing a prisoner's mental health, encouraging a positive adjustment to the prisoner's term of incarceration and supporting a prisoner's successful return to society." A permanent ban thus meets the "sufficiently serious" test of *Farmer v. Brennan*, even though it isn't always permanent in application but is theoretically reviewable in two years.

The court concludes that the permanent ban is not necessary to meet a penological objective, since there was no evidence that the ban had reduced substance abuse of violent, and substantial evidence showed that the permanent ban is counterproductive to prisoners' mental health, stability, potential for future substance abuse, and rehabilitation.

The ban also violates the First Amendment. It is questionable whether there is a valid, rational connection between the permanent ban and reducing substance abuse, since its effects on substance abuse were not supported by much evidence. It is an exaggerated response, since drug abuse in the prison system had declined since the 1980s and was not a pervasive problem within the system. Defendants' failure to provide enough drug treatment programs to meet the demand further shows that the restriction is used as a substitute for treatment that might reduce drug dependency and recidivism.

The ban also denies due process. The permanent ban is atypical and significant under Sandin. It is unique among state correction systems, it contradicts American Correctional Association standards, it differs sharply from past practice, and it "creates an unusually harsh and punitive environment for the prisoners restricted." (858) One *Sandin* factor is duration of the restriction imposed compared to discretionary confinement.

**Statutes of Limitations/Use of Force/Medical Care--Standards of Liability--Serious Medical Needs/Procedural, Jurisdictional and Litigation Questions/Eye Care/Medical Care--Denial of Ordered Care/Classification/Equal Protection/Service of Process**

*Shelton v. Angelone*, 148 F.Supp.2d 670 (W.D.Va. 2001). A state statute provides that the limitations period for claims brought by prisoners about the conditions of confinement is one year, or six months after exhaustion of administrative remedies, whichever is longer. That statute does not apply to the plaintiff's § 1983 action, since the Supreme Court has directed use of the residual limitations period for personal injury actions in § 1983 cases.

Small cuts on the plaintiff's wrist and "signature marks" from a stun gun did not constitute serious medical needs placing medical personnel on notice that lack of immediate treatment created any significant risk of harm. Nonmedical defendants were entitled to rely on a nurse's judgment whether treatment was required.

The allegation that prison staff ignored two

doctors' orders that the plaintiff be provided with tinted glasses with shields states a deliberate indifference claim.

The claim against the former warden is dismissed for lack of service of process, since nobody can find him. What is notable here is the efforts the court went to to assist: it obtained the last known address from the defendants in confidence, tried mail service, then directed the Marshal to attempt service there.

**Evidentiary Questions/Summary Judgment/Medical Care--Standards of Liability--Serious Medical Needs/Personal Involvement and Supervisory Liability**

*Davidson v. Scully*, 148 F.Supp.2d 249 (S.D.N.Y. 2001). The court grants the plaintiff's motion to submit additional evidence in opposition to summary judgment on his medical care claim. The evidence was of more recent events at a prison to which the plaintiff had been newly transferred; while it was not relevant to his prior treatment, it was relevant to his injunctive claim notwithstanding that it involved persons other than the named defendants. At 254:

> [L]ack of personal involvement is not a bar to consideration of the new evidence as it relates to plaintiff's claim for injunctive relief against the DOCS Commissioner in his official capacity.
>
> Here, plaintiff seeks an injunction directing the DOCS Commissioner in his official capacity "to provide proper medical treatment" to plaintiff." . . . The DOCS Commissioner has the overall responsibility to ensure that prisoners' basic needs are met and the authority to perform the required act.

The new evidence will also be helpful in determining whether the plaintiff has a serious medical need, since two of the plaintiff's medical conditions have been newly recognized by prison doctors.

**Psychotropic Medication/Procedural Due Process/Federal Officials and Prisons**

*United States v. Humphreys*, 148 F.Supp.2d 949 (D.S.D. 2001). The decedent was provided with a lay advocate in his hearing concerning the involuntary administration of psychotropic medication. The lay advocate wound up testifying against the defendant and presented no evidence or argument on his behalf. This denies due process.

Administrative determinations permitting involuntary medication are judicially reviewable for arbitrariness. This determination doesn't pass muster because it does not satisfactorily explain the hearing officer's findings, containing only a summary of his impressions of the defendant and the defendant's perceptions of himself, without reference to his dangerousness, grave disability, or inability to function in the prison population. The court remands to the agency to do it right, and reserving the right to have its own court appointed expert in further proceedings.

**Communication and Expression/Federal Officials and Prisons/Deference**

*Kimberlin v. United States Dept. of Justice*, 150 F.Supp.2d 36 (D.D.C. 2001). In 1997 Congress enacted the Zimmer Amendment, which *inter alia* prohibited any expenditure of funds for the use or possession of electric or electronic musical instruments. Before it was even passed, the Bureau of Prisons issued an implementing policy which prohibited the use or possession of electric or electronic instruments by individual prisoners. The plaintiff challenged the restriction, arguing that it was impossible for him to play his songs on an acoustic guitar.

Since the BOP policy antedates the Zimmer Amendment, the court focuses on the policy rather than the statute..

At 42: Prisoners "have a First Amendment right to express themselves through music."

The policy is upheld. It serves a legitimate interest, to decrease spending on prison amenities and comforts.

There is a rational relationship between the goal and the means. The notion that making prison harsher will deter crime "may be optimistic, but it

is not irrational." (45) *Id.*: "Congress does not have a duty to create a factual record with respect [to] its Amendment."

Prisoners have alternative means of expression, i.e., using acoustic instruments.

Accommodation of the plaintiff's interest would not have an impact on prison administration, but it would contravene the statutory purpose.

There are no obvious, easy alternatives that would serve the deterrent purpose.

The Bureau of Prisons' exception to the electric instrument ban for religious purposes violates the Administrative Procedures Act, since it is not a reasonable interpretation of the statutory language; the statute is not ambiguous and contains no such exception.

**Food/Religion--Practices--Diet/Classification--Race/Qualified Immunity/Evidentiary Questions/Deference**

*Caldwell v. Caesar*, 150 F.Supp.2d 50 (D.D.C. 2001). The plaintiff, a member of the Liberal Catholic Church, alleged that he was denied the vegetarian diet required by his belief that such diet is ecologically sound and that meat production is cruel to animals. (The Liberal Catholic Church encourages a vegetarian diet but does not require it; in fact, that church does not appear to require anything.) Apparently the jail authorized the diet, but the plaintiff still didn't get it, and then refused to authorize renewal of the diet.

The plaintiff's and his expert's testimony that his religion "strongly encouraged" vegetarianism presents a genuine issue "as to the nature of Plaintiff's religious beliefs and the extent to which adherence to a vegetarian diet is essential to his religion."

There is a genuine issue of fact whether a requirement that prisoners like the plaintiff renew their requests for a religious diet every 90 days or at arbitrary intervals was a substantial burden on the plaintiff's religious exercise and whether it was the least restrictive means of serving a compelling interest. The record did not show whether the plaintiff had other means of observing his religion, e.g., engaging in group prayer.

The court assumes that the Religious Freedom Restoration Act is constitutional as applied to the District of Columbia, then proceeds to the constitutional questions. How it rationalizes refusing to decide this question, which is squarely raised and will determine the standard to be applied by the jury, is not explained.

At 59: "Racial discrimination in the administration of religious diet requests plainly would violate clearly established constitutional law, as any reasonable correctional officer or prison psychologist knew or should have known."

The official was not entitled to qualified immunity based on his not having heard of the Liberal Catholic Church. The constitutional right to nondiscriminatory treatment is clearly established, and questions about the validity of the individual's underlying claim are not part of the inquiry.

The court unconvincingly distinguishes *Scott v. D.C.*, the D.C. Circuit's decision about second-hand smoke, on the ground that that was an injunctive case and this is a damage case.

Evidence that defendants sometimes did not provide the vegetarian diet, but instead merely provided the regular meal with the meat removed and no alternative source of protein, sufficiently supported a nutritionally inadequate diet in violation of the Eighth Amendment.

The evidence supported a negligence claim for violation of the D.C. Municipal Regulation requiring regular handwashing and for serving unsanitary food. Expert testimony is not needed on these points.

**PLRA--Exhaustion of Administrative Remedies**

*Gibbs v. Bolden*, 151 F.Supp.2d 854 (E.D.Mich. 2001). The plaintiff's claim against a defendant who was not mentioned in his grievance must be dismissed under Sixth Circuit law.

**PLRA--Attorneys' Fees**

*Sallier v. Scott*, 151 F.Supp.2d 836 (E.D.Mich. 2001). Hours spent responding to a defendant's post-judgment motions are subject to the attorneys' fees cap of 150% of the damage award. The plaintiff recovered $13,000, so the maximum fees that can be charged to the

defendants are $19,500. The court previously applied $130.00 (1%) of the judgment to the attorneys' fees. Since the original fee award was slightly less than $19,000, the defendants are directed to pay the rest.

**Disabled**

*Beckford v. Portuondo*, 151 F.Supp.2d 204 (N.D.N.Y. 2001). The wheelchair-bound plaintiff alleged that he was denied a shower in retaliation for filing a lawsuit; when he tried to bathe in his cell sink, the defendant turned off the water in his cell. He then smeared feces on his cell walls and set fire to wastepaper, and was placed in a plexiglass-front cell and on a restricted diet, denied exercise, and refused showers for a week.

*Hygiene* (210-211): Deprivation of a single shower did not violate the Eighth Amendment. Turning off the water in the plaintiff's cell for six days because he had previously flooded the cell did not violate the Eighth Amendment; he was given water twice each shift.

Denial of all shower privileges for a week might violate the Eighth Amendment, especially in view of defendants' knowledge that the wheelchair-bound plaintiff had bladder problems and had to clean himself frequently to avoid decubitus ulcers.

*Punitive Segregation, Furnishings, Clothing* (211-12): Placement in a plexiglass-front strip cell after the plaintiff had smeared feces on his cell walls did not violate the Eighth Amendment, especially since the plaintiff had previously thrown urine and feces at officers. However, an allegation that the plaintiff was deprived of all clothing and bedding and forced to sleep on cold steel because he would not cut a fingernail stated an Eighth Amendment claim.

*Food* (213): Denial of two out of three meals a day (even meals of "diet loaf") may violate the Eighth Amendment if the remaining meal is not nutritionally adequate and if done maliciously to cause harm.

*Recreation and Exercise* (213-14): A six month denial of outdoor recreation did not violate the Eighth Amendment. Apparently the plaintiff was allowed indoor recreation.

*Use of Force* (215-16): An allegation that officers sprayed the plaintiff with a fire extinguisher as punishment, causing minor injury, supports an Eighth Amendment claim.

*Protection from Inmate Assault* (216-17): An allegation that officers stood by while another prisoner assaulted the plaintiff with bleach was sufficient to withstand summary judgment; the plaintiff would have to prove that the defendants knew of a "substantial or pervasive risk of serious harm" and acted with deliberate indifference by failing to correct it.

*Procedural Due Process--Disciplinary Proceedings* (218-19): Restricted diet, limited water, and placement behind a plexiglass shield for periods not exceeding a week were not atypical and significant under *Sandin*. Placement in keeplock for six months without a hearing also did not implicate a liberty interest.

*Disabled* (220-22): Placement of the plaintiff in a cell that was not wheelchair accessible did not violate the Americans with Disabilities Act or the Rehabilitation Act because it was of short duration and no cell was available that was wheelchair accessible and equipped with a plexiglass shield. There is no evidence of intent to discriminate.

**Dental Care/Pre-Trial Detainees/Personal Involvement and Supervisory Liability/Medical Care--Standards of Liability and Deliberate Indifference/Statutes of Limitations/Summary Judgment**

*Manney v. Monroe*, 151 F.Supp.2d 976 (N.D.Ill. 2001). The plaintiff alleged that he tried for ten months to get treatment for a toothache, despite his grievances. He saw a dentist several times but his toothache was not treated.

Jail staff who processed grievances but had no authority to take action on them could not be held liable.

The Superintendent could not be held liable; even though the plaintiff said he sent letters to him, he did not provide documentary support for this claim, nor did he provide deposition testimony from family members who allegedly contacted him.

A dental hygienist who had contact with the

plaintiff and who had the power to schedule dental examinations could be held liable for denial of dental treatment. A prolonged and painful toothache is a serious medical need.

The plaintiff sufficiently supported a deliberate indifference claim. Although he saw a dentist several times, he only received pain medication, and the dental hygienist repeatedly ignored his continuing complaints. (The court is impressed by the fact that once he got to state prison, he had four teeth pulled.)

**Use of Force**

*Montero v. Crusie*, 153 F.Supp. 368 (S.D.N.Y. 2001). *Sexual Abuse* (375): Allegations that on several occasions during pat frisks, one defendant squeezed his genitalia, and that the officer made sexual propositions, did not state constitutional claims.

*Procedural Due Process--Disciplinary Proceedings* (376): False disciplinary charges do not violate the Constitution.

*Verbal Abuse* (376): "Verbal threats or harassment, unless accompanied by physical force or the present ability to effectuate the threat, are not actionable under § 1983."

*Protection from Inmate Assault; Negligence, Deliberate Indifference, and Intent* (377): The plaintiff alleged that officers released another prisoner into a recreation area in hopes that he would attack the plaintiff. These allegations stated a claim.

**Federal Officials and Prisons/Access to Courts--Punishment and Retaliation**

*Merritt v. Hawk*, 153 F.Supp.2d 1216 (D.Colo. 2001). Allegations of removal of property, strip searches, deprivation of exercise and medical care, and harassment such as coughing and spitting into food may not support Eighth Amendment claims, but they support a First Amendment claim of retaliation for denial of access to courts.

*Use of Force* (1223-24): Defendants are denied summary judgment on plaintiff's use of force claim. At 1223: "Defendants' objection that *de minimis* application of force is not actionable . . . misapprehends the Supreme Court's standard. It is a *de minimis* application of force, not a *de minimis* injury, that fails to rise to the level of a constitutional violation. . . ." Allegations that defendants body-slammed him against walls and floor, kicked, punched, and choked him, slammed his head into walls, without justification while he was restrained, while subjecting him to racial and anti-semitic abuse, sufficiently alleged malicious and sadistic intent. The plaintiff need not identify which officer landed which blows for them to be held liable.

The court disagrees with the magistrate judge that an incident was *de minimis* force in which officers took the plaintiff, handcuffed, from the "lawroom," slammed and pinned him against the wall, tripped him and lodged a knee in his solar plexus while making threats because the plaintiff was litigious.

*Verbal Abuse, Equal Protection* (1225): The plaintiff's allegations of racial epithets sufficiently support an equal protection claim.

*Protection from Inmate Assault* (1226-27): Allegations that officers labelled the plaintiff a snitch stated a failure to protect claim; the magistrate judge erroneously dismissed on the ground that the plaintiff was in SHU, where no one could get at him, since there were ways to get at him, and anyway he alleged repeated attempts to remove him to general population.

*Personal Involvement and Supervisory Liability* (1227-28): The plaintiff's assertions that he had informed various supervisory officials about his problems sufficed to support their personal involvement.

*Cruel and Unusual Punishment, Environment* (1228): Sleep is a basic life necessity, deprivation of which can violate the Constitution.

**PLRA--Exhaustion of Administrative Remedies/PLRA--Screening and Dismissal**

*Henry v. Medical Dept. at SCI-Dallas*, 153 F.Supp.2d 553 (M.D.Pa. 2001). Non-exhaustion is not a failure to state a claim permitting *sua sponte* dismissal at the screening stage (i.e. before service of process); the court follows the Second Circuit's reasoning in *Snider v. Melindez*. Courts do have

the power of *sua sponte* dismissal after service of process.

**Procedural, Jurisdictional and Litigation Questions**

*Ramey v. Georgia Dept. of Corrections*, 153 F.3d 1382 (M.D.Ga. 2001). The plaintiff sued the state in state court for deliberate indifference to his medical needs. The defendants, through the state Attorney General, removed the case to federal court. The plaintiffs then moved to remand on the ground that the district court lacked jurisdiction because the Attorney General lacked authority to waive Eleventh Amendment immunity from the plaintiff's claim against the state. Under state law, they are right.

## Non-Prison Cases

**Indemnification**

*Blumberg v. Gates*, 144 F.Supp.2d 1221 (C.D.Cal. 2001). Past decisions to indemnify police officers in civil rights suits may be actionable on the theory that they have caused subsequent civil rights violations. The court makes it clear that it thinks the Ninth Circuit precedent compelling this conclusion is wrong.

**Use of Force/Municipalities/Staffing--Training**

*Hucker v. City of Beaumont*, 144 F.Supp.2d 696 (E.D.Tex. 2001). An arrestee's claim that a police officer showed him off his porch and onto the ground and hog-tied him with his belt to carry him to the police car stated a constitutional claim. Since such conduct was not in accordance with city policy, it is hard to see how the defendant could have thought his conduct was lawful.

Deposition testimony from a police captain that officers transporting prisoners requiring medical care have discretion whether to take the prisoner to a hospital or the jail, and there was no specialized training on how to distinguish who should go where, sufficiently supported a claim of municipal liability for failure to train.

**Disabled**

*Pugliese v. Arizona Dept. of Health and Human Services*, 147 F.Supp.2d 985 (D.Ariz. 2001). Damage claims under the Rehabilitation Act are barred by the Eleventh Amendment. Prior authority holding that the acceptance of federal funds constitutes a waiver of Eleventh Amendment protection under the Spending Clause is overruled by the Supreme Court's decision in College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board, which requires waiver of Eleventh Amendment immunity to be by "clear declaration" and not by implication or construction.

**Procedural, Jurisdictional and Litigation Questions/AIDS/Standing**

*Roe v. City of New York,* 151 F.Supp.2d 495 (S.D.N.Y. 2001). Intravenous drug users who used state-authorized needle exchange programs alleged that they were harassed by the police.

The plaintiffs had standing to seek injunctive relief. There is no minimum number of past incidents that must be pled to establish standing, and in addition they plead an ongoing pattern and practice by the police. *Lyons* is distinguished because this case involves a police response to lawful behavior. In addition, the plaintiffs are all IV drug users who frequent needle exchange centers in "known drug areas." At 504: "Courts have repeatedly found that plaintiffs who are members of such an identifiable class of targeted individuals have standing to sue." The chain of causation is also less speculative than in *Lyons*, given the alleged police policy of targeting members of the plaintiff class. A reasonable fear of arrest also confers standing.

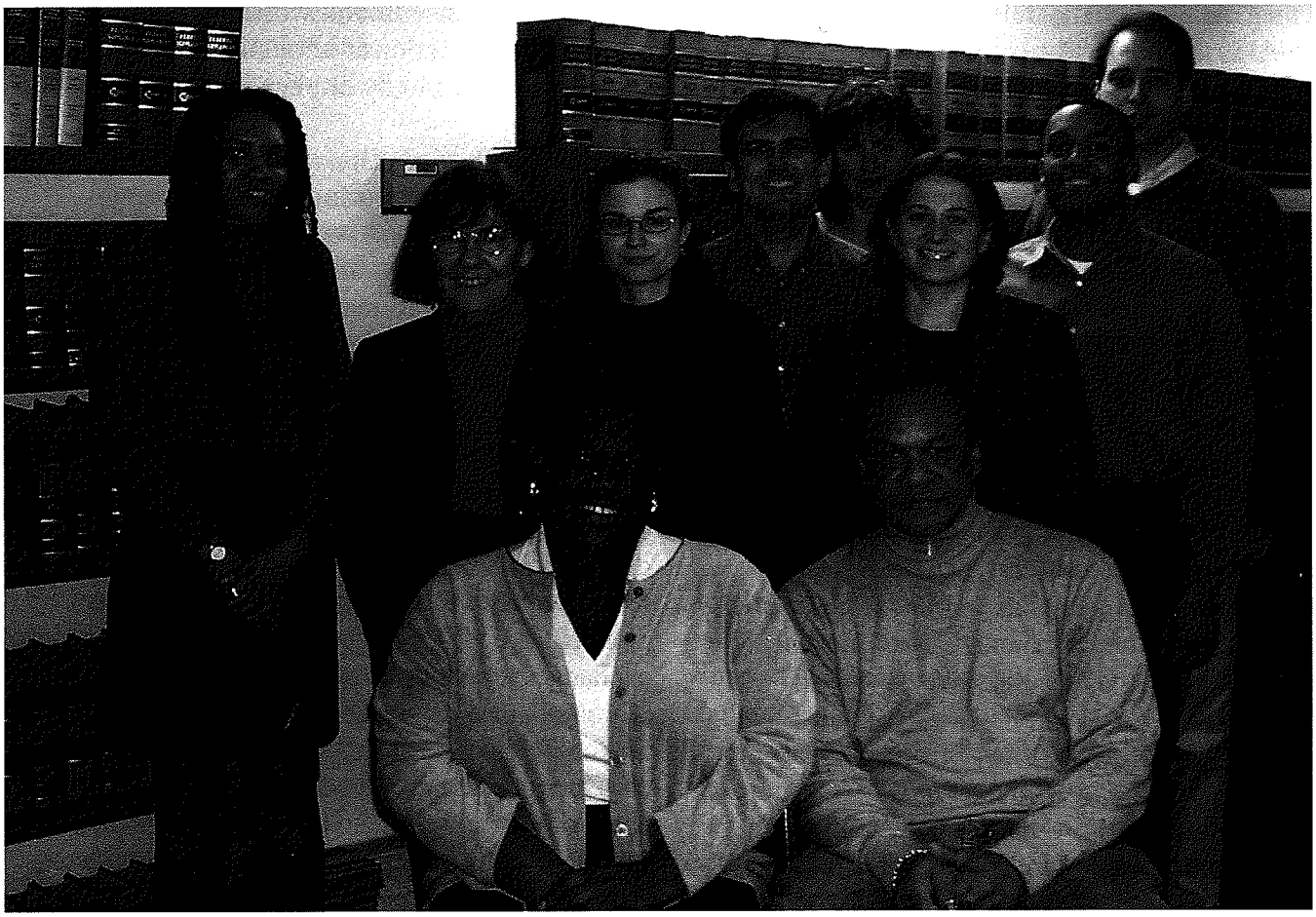
The new plaintiff is permitted to proceed anonymously because of his ongoing drug use and HIV positive status. At 510: "Such a motion is commonly granted in cases that 'concern[] matters of a highly sensitive and personal nature.'" HIV-positive persons in particular have been allowed to proceed anonymously.

**Mental Health Care**

*Iowa Protection and Advocacy Services, Inc. v. Gerard Treatment Programs, L.L.C.*, 152 F.Supp.2d 1150 (N.D.Iowa 2001). The plaintiff, an organization with authority under Protection and

Advocacy for Mentally Ill Individuals ("PAMII") (a/k/a PAIMI), has the authority to investigate incidents of abuse and neglect and to have access to the records and facilities of publicly and privately run institutions, notwithstanding state confidentiality laws. The plaintiff is entitled to a preliminary injunction to obtain records even where the parents, guardians, or guardians ad litem of the allegedly abused child opposed such access.

# National Prison Project Staff



Starting left: (seated)Eugenia Bigelow and Thandor Miller; (standing) Jackie Walker, Elizabeth Alexander, Amy Fettig, David C. Fathi, Margaret Winter, Kara Gotsch, Terrance Moore and Eric Balaban; (missing) Craig Cowie, Johnice Galloway and Mohamedu Jones.

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