ACLU AMERICAN CIVIL LIBERTIES UNION FOUNDATION
NATIONAL PRISON PROJECT
JOURNAL

Vol. 17, No.1, Summer/Fall 2003 • ISSN 1076-769X

ACLU Applauds Alabama's Move to Open Rehabilitative Programming to HIV+ Prisoners

The American Civil Liberties Union commended the reversal of a nearly 20-year-old segregation policy within the Alabama Department of Corrections in January that led to the integration of more than 200 HIV-positive prisoners into educational and vocational training programs.

"Since 1987, prisoners with HIV/AIDS in Alabama have fought to receive the same opportunities to learn and rehabilitate themselves as other prisoners," said Margaret Winter, Associate Director of the ACLU's National Prison Project. "Male prisoners with HIV are closer to equality in Alabama than they have ever been before."

After months of speculation and a comprehensive report from the Governor's HIV Commission for Children, Youth and Adults recommending full integration of HIV-positive prisoners into prison programming, Commissioner Donal Campbell announced the policy change. Prisoners living with HIV/AIDS at the Limestone Correctional Facility began attending in-prison programs with prisoners housed in general population in January.

In a letter sent to Commissioner Campbell, the ACLU inquired about plans to integrate women prisoners who are HIV-positive and emphasized the need for HIV/AIDS education in prison. "One factor that we all believe is essential in ensuring a completely successful and peaceful transition to program integration is appropriate HIV education for all staff and prisoners," the ACLU letter said.

The only state prison system other than Alabama to retain total HIV segregation into the 1990s was Mississippi. After a broad campaign by the ACLU, prisoners, prisoners' family members, and local and national advocates, Mississippi integrated its in-prison programs in 2001. The change was preceded by comprehensive HIV/AIDS education for prisoners and staff, and has been an unqualified success. "With this policy change, Alabama now joins Mississippi in starting to bring its HIV prison policies in line with national standards," said Winter.

The policy change follows a long history of litigation and advocacy opposing Alabama's segregation of prisoners with HIV/AIDS. In 1987, the ACLU's National Prison Project filed a lawsuit on behalf of prisoners with HIV contesting their exclusion from prison programs. After an unsuccessful trial, an appeal to the 11th Circuit in 1991 resulted in a reversal of the trial court's decision and called for a new trial. In 1995, the trial court ruled against the prisoners again, saying any risk of transmission, no matter how implausible, was a significant risk and warranted segregation and exclusion of HIV-positive prisoners from rehabilitative programs. After another appeal that went up to the U.S. Supreme Court, the Alabama policy was left intact and prisoners with HIV committed to continuing their long struggle for quality medical care and equal access to prison programs.

"The end to educational and vocational programming segregation in Alabama marks a milestone for HIV/AIDS activism," said Jackie Walker, HIV/AIDS and Hepatitis Information Coordinator for the National Prison Project. "This new opportunity for HIV-positive prisoners may be too late for many former and deceased prisoners, but it will dramatically improve the lives of current HIV-positive prisoners and allow them to begin the long road to rehabilitation and re-entry to society."

ACLU Tells Appeals Court That Inhumane Conditions on Mississippi's Death Row Must End

The American Civil Liberties Union in November urged a federal appeals court in New Orleans to end the deplorable conditions on Mississippi's death row and reinstate remedies ordered by a federal district court judge that protect prisoners from serious physical and mental illness.

"The federal district court's courageous decision in Mississippi sought to end the dangerously high temperatures, pervasive filth, uncontrolled mosquito infestation and grossly inadequate mental health care on death row," said Margaret Winter, Associate Director of the ACLU's National Prison Project. "Every day that Mississippi prison officials allow to pass without implementing these changes leaves the men confined to death row at high risk for heat stroke and psychiatric breakdown."

The ACLU's oral argument before the 5th Circuit Court of Appeals defended an order issued in May 2003 by U.S. Magistrate Jerry Davis from the Northern District of Mississippi, who said that "no matter how heinous the crime committed, there is no excuse for such living conditions" in Mississippi's prisons. According to Judge Davis, "the isolation of Death Row, along with the inmates' pending sentences of death and the conditions of Unit 32 C, are enough to weaken even the strongest individual."

The ACLU said in its brief defending the decision that three death row prisoners are "extremely psychotic," six or eight more "very psychotic," 20 or more have very serious mental illness and at least half have significant mental illness. "These conditions actually induce psychosis. Prisoners who are not already mentally ill become mentally ill and those on the verge of illness are pushed over the edge," the ACLU brief said.

Judge Davis's order resulted from a case filed in July 2002 by the National Prison Project and the Washington law firm of Holland & Knight on behalf of the death row prisoners housed in Unit 32 of the State Penitentiary in Parchman. Attorneys for the state appealed the decision because of objections by Department of Corrections officials that remedies like providing fans, ice water and showers on excessively hot days are unnecessary -- despite expert medical testimony that failure to provide any relief during the brutally hot summer months is inhuman and likely to cause heat stroke and death.

In August, the Fifth Circuit of Appeals granted the state's appeal, but also granted the ACLU's request for an expedited appeal of that decision.

"Mississippians are distressed not only by the Department of Corrections' inability to meet minimal standards of decency, health and well-being in our prisons but by their claim that they shouldn't have to," said Nsombi Lambright, Executive Director of the ACLU of Mississippi. "Locked prison doors cannot keep out the Constitution's protections from cruel and unusual punishment."

The oral argument was presented by Winter of the ACLU's National Prison Project. Co-counsel in the lawsuit, *Russell v. Johnson*, include Steve Hanlon, a partner with Holland & Knight, Amy Fettig of the National Prison Project, and civil rights attorney Robert McDuff.

NATIONAL PRISON PROJECT JOURNAL

NPP Director: Elizabeth Alexander
Editor: Kara Gotsch
Subscriptions Manager: Thandor Miller

The National Prison Project is a special project of the ACLU Foundation. It seeks to strengthen and protect the rights of adult and juvenile prisoners, improve overall conditions in correctional facilities, and develop alternatives to incarceration.

The Journal is published biannually by the ACLU's National Prison Project, located at 733 15th St., NW, Ste. 620, Washington, DC 20005. Contact us by phone at (202) 393-4930, by fax at (202) 393-4931 or through email at kgotsch@npp-aclu.org for more information. **(NO COLLECT CALLS PLEASE)**

The reprinting of Journal material is encouraged with the stipulation that the Journal is credited as the source of the material, and a copy of the reprint is sent to the editor. Subscriptions to the Journal are $30 per year ($2 for prisoners), prepaid by check or money order.

ACLU Joins Lawsuit Over Conditions at Jail Run by Infamous Arizona Sheriff

The American Civil Liberties Union in December joined an important litigation effort to defeat Sheriff Joe Arpaio's bid to terminate existing federal protections for pre-trial detainees housed in the Maricopa County Jail -- known internationally for the degrading chain gangs and other harsh policies introduced by its infamous sheriff.

"For many years we have been concerned about the extremist policies and practices introduced by Sheriff Arpaio," said David C. Fathi, an attorney with the ACLU's National Prison Project. "Our involvement with this lawsuit renews our commitment to bringing Maricopa County's jail into compliance with constitutional requirements."

The self-described "toughest sheriff in America" is notorious for policies requiring prisoners to wear pink underpants and striped uniforms and for spending less money to feed prisoners than his police dogs. Recent tours conducted by the ACLU found that seriously dangerous and inhumane conditions persist in the jail system, including inadequate medical and mental health care and severe crowding.

"Allowing mentally ill prisoners to lie in a catatonic state, naked on a bare concrete cell floor for 23 hours a day, is not being 'tough on crime," said Alice Bendheim, a cooperating attorney with the ACLU of Arizona. "The conditions I witnessed in the Maricopa County Jail were cruel and detrimental to the well-being of the people confined there."

At issue is a 1995 federal consent decree that Sheriff Arpaio seek to end that ensures protections for the over 5,000 pre-trial detainees housed in the jail. It requires Maricopa County officials to reduce overcrowding, provide access to religious services, improve medical, dental and psychiatric care, and adhere to national fire protection standards and suitable sanitation and safety standards. Recent incidents at the jail demonstrate that many provisions of the decree are not being met.

"Sheriff Arpaio's practices and policies not only harm the low-level offenders incarcerated in the jail, but pre-trial detainees who cannot go home only because they are too poor to post bail," said Eleanor Eisenberg, Executive Director of the ACLU of Arizona. "It is our belief that detainees who have not even had a trial yet are entitled to a high degree of security and decent treatment."

In 1998, a U.S. Department of Justice report harshly criticized the use of excessive force at the facility; the report led to a settlement agreement with Sheriff Arpaio to restrict the use of pepper spray, stun guns and restraint chairs. Earlier this year, the Arizona Court of Appeals affirmed a verdict for a prisoner who was severely beaten in the jail's "Tent City," a unit housing 2,000 prisoners outdoors in the Arizona desert. The court affirmed the finding that Sheriff Arpaio was deliberately indifferent to the risk of attack in the tent unit and affirmed an award of punitive damages against him. Additional lawsuits are pending on behalf of other prisoners who were beaten in the facility.

Court Asked to Revive Lawsuit Against Baltimore Jail to Protect Detainees from Deplorable Conditions

Citing deplorable living conditions at the Baltimore City Detention Center that violate a federal consent decree, the American Civil Liberties Union and the Public Justice Center filed in December a motion to enforce crucial provisions of the decade old order.

"The gross neglect of the health and well-being of detainees creates an intolerable and inhumane environment for the 4,000 men, women and children confined at the detention center," said Elizabeth Alexander, Director of the ACLU's National Prison Project. "We hope today's motion will force Maryland officials to end these life-threatening conditions."

In August 2002, the U.S. Department of Justice issued a damning report on the BCDC after an investigation found unconstitutional conditions there. The report details how "persons confined suffer harm or the risk of harm from deficiencies in the facility's fire safety protections, medical care, mental health care, sanitation, opportunity to exercise and protections of juveniles."

Recent interviews of BCDC detainees conducted by the ACLU and the Public Justice Center found little has changed since the DOJ investigation. Detainees complain that decent medical care is difficult if not impossible to receive in the crowded facility. Interviews and medical records revealed that patients have waited up to six months to receive treatment for serious medical concerns, HIV-infected and mentally ill detainees have been denied medications, and access to physician services has been severely limited.

"The failures of the BCDC's medical services have already resulted in the deaths of at least two pre-trial detainees, and will likely lead to more if care is not improved," said Wendy Hess, an attorney with the Public Justice Center. "Thousands of pre-trial detainees who remain behind bars face dangerous punishment before they are even convicted of a crime."

The December motion highlights multiple cases of serious medical neglect at the jail and points to some findings from last year's Department of Justice report. In one case, a doctor ordered a re-evaluation of a detainee with asthma, but the re-evaluation never occurred. The detainee eventually died of an acute asthma attack when his inhaler failed to work because of overuse. In another case, a woman committed suicide after a physician's order regarding suicide precautions was not followed.

"For far too long, Maryland officials have allowed conditions at the Baltimore City Detention Center to deteriorate," said local attorney Frank Dunbaugh. "This filing brings Baltimore one step closer to ending the cruel conditions at BCDC."

The request to restore the medical and physical plant provisions of the consent decree in *Duvall v. Glendening* was filed in U.S. District Court by Alexander, Hess and Dunbaugh as well as attorney Deborah Jeon of the ACLU of Maryland.

Court Approves Settlement of ACLU Lawsuit to Improve Conditions at Jail in Washington State

Judge Ronald Leighton of U.S. District Court approved a settlement agreement in January between the American Civil Liberties Union and Jefferson County officials to improve conditions for prisoners at the Jefferson County Jail in Port Hadlock on the Olympic Peninsula in Washington. The agreement resolves a class-action lawsuit over inhumane conditions for prisoners filed by the ACLU of Washington and the ACLU's National Prison Project in February 2002.

"The settlement will mean substantial improvements to what had been inhumane treatment of prisoners. We congratulate County officials for their commitment to upgrade conditions at the jail," said ACLU of Washington Legal Program Director Julya Hampton.

The terms of the settlement address a range of deficiencies in the jail's treatment of the people it houses, including the following:

Health Care: The jail's health care program was disorganized and understaffed. Prisoners who requested medical help were often not seen by licensed health care professionals, and untrained jail staff often made medical decisions for the prisoners. Jail staff frequently denied necessary medication, leading to seizures or hospitalization that could have been avoided. Under the settlement, the jail will implement health care policies and practices that will enable it to qualify for accreditation by the National Council on Correctional Health Care, a nonprofit organization that sets standards in the area.

Sanitation: Prisoners were not provided enough basic hygiene supplies, such as toilet paper and feminine hygiene products. Prisoners have been forced to use makeshift replacements, such as pages from telephone books, towels, or paper bags. Under the settlement, the jail will keep an adequate supply of toilet paper and sanitary napkins on hand and will deliver them to inmates whenever needed.

Use of Crisis Cell: Some of the worst abuses in the jail involved use of the "crisis cell," a bare concrete room with a hole in the floor for a toilet. Although such cells are designed only for prisoners who pose a danger to themselves or others, the jail used it for discipline for routine infractions and to terrorize prisoners. The cell was not adequately monitored, leading to a prisoner

death in the cell in March 2001. Under the settlement, the crisis cell will not be used as discipline for infractions or misbehavior. The crisis cell may only be used to house: (1) inmates who show evidence of being a risk of harm to themselves, to others, or to jail property; (2) inmates who require medical or psychiatric supervision; or (3) inmates who are intoxicated. Health care providers will be called when an inmate is placed in the crisis cell for medical or psychiatric reasons.

Temperature: Climate control had been inadequate, often leading to extreme cold conditions in winter and extreme heat conditions in the summer. The jail did not provide adequate blankets or cold-weather clothing. Under the settlement, all inmate areas of the jail will be kept between 60 and 80 degrees Fahrenheit. Inmates in cells with exterior walls will be entitled to receive up to two extra blankets.

Grievances: The jail had no functioning grievance policy to allow prisoners to seek internal corrections. Prisoners had to request grievance forms from officers, who would refuse to provide them if the prisoner intended to complain about the officer. All written communication between prisoners and guards was on scraps of paper that guards sometimes threw away without response. Under the settlement, grievance forms, medical request forms, and regular request forms will be made available in each cell block. All written grievances will receive written replies within seven days. Jail staff will not retaliate against or deny privileges to any inmate for writing grievances.

Mail: Under the settlement, mail may not be delayed or denied as a disciplinary measure. The rules forbidding receipt of outside books, magazines, or material printed from the Internet are rescinded.

The agreement will be enforced by independent outside monitors who will visit the jail at six-month intervals for three years and report on the jail's compliance with the agreement.

Staff attorney Aaron Caplan of the ACLU of Washington and staff attorney David Fathi of the National Prison Project handled the case.

Case Law Report: Highlights of the Most Important Prison Cases

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

U.S. Court of Appeals Cases

Pregnancy, Childbirth, and Abortion/Equal Protection/Deference

Gerber v. Hickman, 291 F.3d 617 (9th Cir. 2002) (en banc). Prison officials refused to allow the plaintiff, who was serving 100 years to life, to provide a sperm sample so his wife could be artificially inseminated. Life prisoners are excluded from family visits.

The court concludes that a right to procreate in prison is fundamentally inconsistent with incarceration, and therefore it doesn't have to reach the *Turner* analysis. "The fact that California prison officials may choose to permit some inmates the privilege of conjugal visits is simply irrelevant to whether there is a constitutional right to conjugal visits or a right to procreate while in prison."

There is no equal protection violation vis-a-vis inmates who receive conjugal visits because they are not similarly situated. At 623: "Inmates eligible for conjugal visits will eventually be released from prison, . . . while Gerber will not." Therefore rational basis review is applied, and prison officials could rationally decide that maintaining external contacts is more important for those who will be released.

The prohibition doesn't violate the Eighth Amendment because it doesn't deny plaintiff "the minimal civilized measure of life's necessities."

PLRA--Exhaustion of Administrative Remedies

Dixon v. Page, 291 F.3d 485 (7th Cir. 2002). A dismissal for non-exhaustion without prejudice is appealable when the reason for dismissal can't be cured. This prisoner is out of prison, so he can't exhaust. That doesn't excuse him for having failed to exhaust in this suit, though he may be able to re-file without having to exhaust if the statute of limitations permits (488 n.1). At

489: "§ 1997e applies only to prisoners, and a plaintiff's status as a 'prisoner' is to be determined as of the time he brought the lawsuit."

The plaintiff won one grievance at an intermediate stage, but prison officials did not carry out the grievance decision. Defendants argued that he should have done something administratively to compel compliance, such as filing another grievance. At 490: "Requiring a prisoner who has won his grievance in principle to file another grievance to win in fact is certainly problematic." There is the prospect of a "never-ending cycle of grievances." Defense counsel conceded that such intentional action by prison officials "could not be tolerated." However, counsel said, the prisoner could have taken a further appeal to the Director if after 30 days the situation had not been resolved. The court assumes that this representation is reliable and holds that under *Pozo v. McCaughtry*, the prisoner has failed to comply literally with the terms of the exhaustion requirement. It allows for the possibility that this might not be the case, but simply affirms the dismissal, leaving the prisoner no apparent avenue for pursuing the matter further.

Federal Officials and Prisons/Trial--Conduct of Trial/Evidentiary Questions/Privacy

Ueland v. United States, 291 F.3d 993 (7th Cir. 2002). The plaintiff sued under the Federal Tort Claims Act, complaining that he was injured in a collision between a prison van and its "chase car." The defendants said everyone was wearing a seat belt; the plaintiff said that nobody was.

The district court erred in excluding the deposition of another prisoner who was being held in a prison more than 100 miles away from Chicago, where the trial was held, since its use was sanctioned by Rule 32(a), Fed.R.Civ.P.

There was nothing improper about the U.S. Attorney talking to the Bureau of Prisons doctor who treated the plaintiff and ultimately testified. At 999:

> Intoning "physician-patient privilege" gets Ueland nowhere: the Bureau of Prisons is entitled to up-to-date medical information about persons in its custody--indeed is constitutionally obliged to obtain that information, in order to prevent the infliction of cruel and unusual punishment--so it is entirely legitimate for Dr. Reed to tell both prison administrators and federal lawyers what he knows about Ueland's condition. . . . That is not to say that the federal government could gratuitously reveal a prisoner's medical information to third parties; Ueland may have some privilege with respect to particular uses of information. . . .

Color of Law/Use of Force

Townsend v. Moya, 291 F.3d 859 (5th Cir. 2002). The plaintiff was injured by an officer with a knife in an incident of stupid horseplay for which the officer was fired. The officer did not act under color of law. The parties were engaged in "mere horseplay, which involves a 'purely private aim and no misuse of state authority.'. . ." "They were calling each other names, a 'purely private aim,' and a physical reaction ensued." (862) The fact that the officer in this case had direct authority over the prisoner and used a knife he possessed only by virtue of his position and authority does not distinguish this case from Fifth Circuit precedent; the "key inquiry" is whether he had a "purely private aim," (862), and there is no indication that the officer actually exercised any authority during the incident.

Searches--Living Quarters/Access to Courts--Punishment and Retaliation/Procedural Due Process--Disciplinary Proceedings

Carter v. McGrady, 292 F.3d 152 (3d Cir. 2002). The plaintiff alleged he was subjected to cell searches and disciplinary proceedings in retaliation for his jailhouse lawyering.

Allegations of retaliation for the exercise of constitutional rights are governed by the *Mount Healthy* "but for" standard under prior Third Circuit precedent. (158) Under it, prison officials may prevail in the face of a *prima facie* case of retaliation if they show that they would have made the same decision absent the protected conduct for reasons reasonably related to legitimate penological interests. (154) The court grants

summary judgment with respect to the disciplinary proceedings because the plaintiff was clearly guilty of, e.g., stealing a typewriter and unauthorized use of the mail. At 159: "Even if prison officials were motivated by animus to jailhouse lawyers, Carter's offenses . . . were so clear and overt that we cannot say that the disciplinary action taken against Carter was retaliatory."

Procedural Due Process--Disciplinary Proceedings/Habeas Corpus

Torres v. Fauver, 292 F.3d 141 (3d Cir. 2002). The "favorable termination" rule of *Heck v. Humphrey* "does not apply to claims that implicate only the conditions, and not the fact or duration, of a prisoner's incarceration." (143) Therefore the plaintiff, who was placed in segregation for a disciplinary offense but not deprived of good time, was not barred from seeking damages. At 150: "Because these punishments did not alter the length of his incarceration, the success of his claim would not 'necessarily imply the invalidity of' the fact or duration of his confinement."

The plaintiff's 15-day placement in disciplinary detention and 120-day placement in administrative segregation is not "the type of atypical, significant deprivation in which a State *might conceivably* create a liberty interest" (151, *quoting Sandin*, emphasis supplied); the court then notes that these events took place in a state where prisoners have no protected interest in being free of indefinite segregated confinement. Exactly how the two propositions relate is not explained.

Procedural Due Process--Disciplinary Proceedings/Pendent and Supplemental Claims; State Law in Federal Courts

Gaines v. Stenseng, 292 F.3d 1222 (10th Cir. 2002). The plaintiff served 75 days in disciplinary segregation after hearings that a state court held denied due process.

Violation of state statutes and regulations does not state a § 1983 claim.

The question whether plaintiff's confinement was atypical and significant under *Sandin* could not be determined summarily at the pleading stage, "[a]lthough the court might properly conclude at the summary judgment stage that such segregation mirrors conditions imposed upon inmates in administrative segregation and protective custody, and that therefore the complaint should be dismissed." (1226) *Id.*: "In particular the district court must determine whether the seventy-five day duration of Gaines's confinement in disciplinary segregation is itself 'atypical and significant.'" (Citing the Second Circuit decision in *Colon v. Howard.*) The court acknowledges that a lesser period of segregation might fail as a matter of law to reach the atypical and significant threshold.

PLRA--Exhaustion of Administrative Remedies

Medina-Claudio v. Rodriguez-Mateo, 292 F.3d 31 (1st Cir. 2002). The plaintiff was injured in a Puerto Rico prison and transferred to a federal institution, from which he filed suit. His claim is dismissed for non-exhaustion, since there's nothing in the Puerto Rico grievance rules that make the process unavailable to persons outside the Puerto Rico prisons (except the statement that it's available to prisoners "in" that system, but never mind that).

Dismissal without prejudice is the appropriate remedy for non-exhaustion.

Homosexuals and Transsexuals/Deference

Veney v. Wyche, 293 F.3d 726 (4th Cir. 2002). The court holds that a homosexual prisoner's complaint that male homosexuals, unlike heterosexuals or lesbians, are not allowed to be placed in double cells, does not state an equal protection claim. Outside prison, this claim would be subject to rational basis scrutiny. At 732: "When equal protection challenges arise in a prison context, however, courts must adjust the level of scrutiny to ensure that prison officials are afforded the necessary discretion to operate their facilities in a safe and secure manner." So the court applies the *Turner* reasonable relationship test.

There is a valid, rational connection to legitimate penological interests in keeping homosexual prisoners out of double cells, which include avoiding sexual activity between cellmates (which presents risks to security and of disease transmission) and avoiding friction and possibly violence between cellmates. The differential treatment of male and female homosexual prisoners is justified by the less violent and less

homophobic character of female prisoners, which the court bases on two articles from the *Prison Journal* and a case from the Eighth Circuit, rather than anything in the non-existent record in this case (see below).

The impact of accommodating the asserted constitutional right would consist of prison officials' having to spend more time to making cell assignments to avoid putting homosexuals together or with violent homophobic inmates, and "the sexual tension caused by such a living arrangement" would make it more difficult for guards to manage.

There are no reasonable alternatives to the policy that would address the problems of double celling gay male prisoners.

The court reaches this disposition even though the district court *dismissed the complaint on initial screening* and prison officials *denied that the policy exists.* Nonetheless the court applies the *Turner* standard with no factual assertions or even an answer to the complaint from the defendants. It is not clear to what extent the defendants made the arguments in support of the policy that they deny that they have, or whether the court just made them up on its own.

Use of Force/Personal Involvement and Supervisory Liability/Procedural Due Process--Disciplinary Proceedings/PLRA--Exhaustion of Administrative Remedies

Smith v. Mensinger, 293 F.3d 641 (3d Cir. 2002). The district court should not have focused nearly exclusively on the lack of a serious physical injury in dismissing the plaintiff's use of force claim; "the Eighth Amendment analysis must be driven by the extent of the force and the circumstances in which it is applied; not by the resulting injuries." (648) Injuries are only one factor in the analysis, though *de minimis* injuries might support a conclusion that the defendants' account is more credible than the plaintiff's, or that the force used was not of constitutional dimension. At 649: "Punching and kicking someone who is handcuffed behind his back and under the control of at least six prison guards as he is being thrown into cabinets and walls is 'repugnant to the conscience of mankind,' absent the extraordinary circumstances necessary to justify that kind of force." Defendants' claim that earlier the plaintiff had struck an officer would not justify the treatment described, given plaintiff's allegation that he did not resist and was in handcuffs when he was beaten.

The fact that the plaintiff could not say whether particular defendants who were present actually participated in the beating does not require their dismissal, since they were alleged to have been immediately present; the extent of their participation presents a factual issue. An officer who did not participate could be held liable for failure to intervene if he "had a reasonable opportunity to intervene and simply refused to do so." (650)

The district court held that seven months in segregation was not atypical and significant under *Sandin.* The plaintiff says the court missed the point and that his complaint is that the discipline was in retaliation for his misconduct and to cover up a beating. However, such a complaint is actionable only when the retaliation is for the exercise of a constitutional right. Here, where there is no such allegation, *Sandin* governs.

Medical Care--Standards of Liability--Deliberate Indifference/Medication/Denial of Ordered Care

Walker v. Benjamin, 293 F.3d 1030 (7th Cir. 2002). The plaintiff sustained a hand injury but was not allowed to go to sick call for two days; then he was not allowed to see a doctor, because the nurse insisted on treating the wound, which became badly infected. A doctor then ordered penicillin, which he did not receive, and an x-ray, but did not refer him to a specialist and did not review the x-ray, though another doctor reviewed the x-ray. His next complaint of continuing serious infection resulted in treatment with a topical antibiotic. Two days later, he got a different antibiotic. A week later, he was told he had a bone infection. After another couple of weeks of fumbling around, during which he finally saw a specialist, he received "emergency" surgery. He did not get pain medication during this period or after the surgery, even though there was an "as needed" prescription for it, with medical staff accusing him of wanting to get high.

The initial delays between the plaintiff's

complaint of infection and the specialist referral were not shown to be within the defendants' control or to have aggravated his injury, so they do not amount to deliberate indifference. The failure to receive prescribed antibiotics does not state a deliberate indifference claim against the doctor who prescribed them, absent evidence that the matter was in his control. The failure to prescribe IV antibiotics once osteomyelitis was diagnosed was at most negligent, as was the failure to diagnose it earlier.

The allegation that a nurse purposefully refused to provide the plaintiff prescribed pain medication, accusing him of wanting to get high, stated a deliberate indifference claim. The court notes that he had an injury likely to cause considerable pain and his doctor prescribed medication for it. The same analysis applies to a doctor who refused to give the prescribed medication. Whether these defendants had a good-faith belief that the plaintiff was malingering and trying to get high presents a jury question.

Pro Se Litigation/PLRA--In Forma Pauperis Provisions--Screening and Dismissal/Pleading

Grayson v. Mayview State Hospital, 293 F.3d 103 (3d Cir. 2002). The PLRA does not change the rule allowing amendment of deficient complaints before they are dismissed. The court reviews the case law at length and explains why it rejects the Sixth Circuit's rule that forbids amendments to avoid dismissal in cases governed by the PLRA.

Government Benefits/Procedural Due Process--Property/Non-Constitutional Rights/Access to Courts--Punishment and Retaliation

Higgins v. Beyer, 293 F.3d 683 (3d Cir. 2002). The plaintiff was sent a check for $7,608 in Veterans Administration disability benefits, and prison officials deducted $1,000 of it to pay a fine he owed, notwithstanding 38 U.S.C. § 5301(a), which says that such benefits are exempt from the claims of creditors and not liable to attachment, levy, or seizure under any circumstances.

§ 5301(a) creates a right enforceable under § 1983, since it meets the standard of *Blessing v. Freestone* that Congress must have intended that the provision benefit the plaintiff, the right asserted must not be so "vague and amorphous" as to strain judicial competence, and the statute must unambiguously impose a binding obligation on the states. The court rejects a prisoner exception to the statute on the ground that Congress knows how to make exceptions, and didn't.

The federal statute pre-empts the New Jersey Criminal Injuries Compensation Act authorizing seizure of prisoners' funds for the benefit of crime victims. The Victims of Crime Compensation Board is a creditor under the federal statute.

Since prisoners have a property interest in funds in their accounts, and the seizure of funds was done pursuant to state policy, the plaintiff was entitled under *Zinermon v. Burch* to predeprivation notice and hearing.

At 694: "A person may state an independent cause of action for retaliation for the exercise of his or her right of access to the courts, regardless of whether the allegations of a deprivation of federal statutory or constitutional rights are meritorious."

PLRA--Mental or Emotional Injury

Malik v. McGinnis, 293 F.3d 559 (2d Cir. 2002). Applicability of the exception from the PLRA three strikes provision for cases in which "the prisoner is under imminent danger of serious physical injury" is assessed as of the time the complaint is filed.

Appointment of Counsel/Medical Care--Standards of Liability--Deliberate Indifference, Serious Medical Needs/Denial of Ordered Care/Medical Records/Color of Law/Pleading

Montgomery v. Pintchak, 294 F.3d 492 (3d Cir. 2002). The plaintiff appeals in a complex medical care case in which the defendants include Correctional Medical Services, Inc.

The plaintiff's assertion that defendants violated his rights "with deliberate indifference" was sufficient to plead a deliberate indifference claim under "the more lenient standard that district courts are required to apply to *pro se* submissions." (500)

The plaintiff's complaint about treatment for HIV and a cardiac condition sufficiently demonstrated a serious medical need, since the

conditions can be life-threatening if not properly treated.

The mere loss of medical records is not deliberate indifference. However, the plaintiff's assertion that for nine months the defendants refused to provide him with treatment prescribed before the records disappeared, despite his repeated requests for care; that they refused to recreate his medical records and then falsified material when they finally did start to recreate them, supported a deliberate indifference claim, as did the ten-month failure to perform a prescribed cardiac catheterization or to provide prescribed medication.

The district court is held to have abused its discretion under this court's *Tabron v. Grace* standard in refusing to appoint counsel for the plaintiff, given that he presents a clear *prima facie* case with more than an "extremely slim" chance of success on the merits. The court cites the plaintiff's inexperience as a jailhouse lawyer, his inability to take depositions in prison, defendants' resistance to discovery, and the complexity of factual and legal issues, and the need for expert testimony.

Protection from Inmate Assault/Discovery

Peate v. McCann, 294 F.3d 879 (7th Cir. 2002). The plaintiff was attacked twice by the same prisoner and alleged that the second assault resulted from deliberate indifference by prison staff.

The plaintiff's allegation that after the first assault, an officer gave the assailant his weapon (a bag of bricks) back and then stood by and watched the beating, sufficiently alleged deliberate indifference to defeat summary judgment. Actual knowledge of the risk of the second assault was provided by the first assault.

Protection from Inmate Assault/State Officials and Agencies/Municipalities

Cortez v. County of Los Angeles, 294 F.3d 1186 (9th Cir. 2002). The decedent was beaten to death by five of his cellmates; he was a former gang member who had disavowed his membership before incarceration. His survivors alleged that he and they had notified the Sheriff of the danger from gang members but they left him in the same cell.

A California sheriff is an official of the county, not the state, for purposes of implementing security procedures for the county jail.

Medical Care--Standards of Liability--Deliberate Indifference/Appeal/Color of Law

Burke v. North Dakota Dept. of Corrections and Rehabilitation, 294 F.3d 1043 (8th Cir. 2002). The plaintiff alleged failure to treat him for Hepatitis C. His complaint should not have been dismissed. He "alleged that he was denied treatment entirely; that NDDCR's medical director (whom he sought to add as a defendant in his amended complaint) prevented him from being seen by doctors; and that she was using her position to block his treatment because of his prior lawsuits against her." (1044) He also stated a claim against Medcenter One, the prisons' medical services contractor: "he alleged that its hepatitis C treatment protocol and its doctors' complicity with the actions of NDDCR's medical director were damaging his health in violation of his Eighth Amendment rights." (1044)

PLRA--Mental or Emotional Injury/Procedural, Jurisdictional and Litigation Questions

Mitchell v. Brown & Williamson Tobacco Corp., 294 F.3d 1309 (11th Cir. 2002). The plaintiff sued five tobacco companies in Alabama state court and the defendants removed to federal court based on diversity of citizenship. The district court erred in dismissing under the mental/emotional injury provision.

The plaintiff argued that § 1997e(e) does not apply to actions that were removed from state court. At 1315: "We agree, insofar as the action filed in state court by Mitchell solely alleged state-law claims unrelated to prison conditions. This matter is in federal court because the defendants exercised their right to remove Mitchell's state-law claims based on the district court's diversity jurisdiction." The court cites the statutory term "brought" as requiring an assessment of the case at the time it was filed. "Applying this interpretation of the term 'brought' to the matter sub judice, § 1997e(e) has no application to Mitchell's case, which was clearly not a federal civil action when it was brought--it was filed in state court and based solely on state law." This all leaves it completely

unclear whether a state court case raising federal claims would be a "federal civil action" governed by § 1997e(e), or would become one if removed.

PLRA--In Forma Pauperis Provisions--Applicability

United States v. Campbell, 294 F.3d 824 (7th Cir. 2002). A criminal defendant moved for disclosure of matters before a grand jury. The court holds that such a motion under Rule 6(e) is civil, and thus governed by the PLRA's filing fee provisions.

Disabled/Drug Dependency Treatment

Thompson v. Davis, 295 F.3d 890 (9th Cir. 2002). The plaintiffs alleged that the defendant parole authorities have an unwritten policy of automatically denying parole to prisoners with substance abuse histories. The court previously held that this claim is not barred by the *Heck v. Humphrey* rule.

Drug addiction that substantially limits a major life activity is a recognized disability under the ADA. Persons currently engaging in the illegal use of drugs are not protected by the ADA, but the statute protects persons who have successfully completed or are participating in a supervised drug rehabilitation program and are no longer using illegal drugs. Persons who are statutorily eligible for parole have sufficiently pled that they are "otherwise qualified for the public benefit they seek, consideration for parole." (896)

The district court erred in holding that the Americans with Disabilities Act "does not apply to the substantive decision making process in the criminal law context." At 897: "Although the power to fashion and enforce criminal laws is reserved primarily to the States, many functions traditionally reserved to the states are subject to the ADA, including quarantine laws and, significantly, prison administration." There is no *per se* rule exempting substantive decision-making from ADA scrutiny. Case law and the EEOC guidelines prohibit policies resulting in discriminatory arrests or abuse of disabled people.

Moreover, state powers to determine parole release are "already curtailed by federal anti-discrimination guarantees. For example, . . . race is an impermissible criterion in the parole decision-making process." (897) At 898: ". . . [S]ince a parole board may not categorically exclude African-Americans from consideration for parole because of their race, and since Congress thinks that discriminating against a disabled person is like discriminating against an African-American, the parole board may not categorically exclude a class of disabled people from consideration for parole because of their disabilities."

In addition, state parole boards fall squarely within the statutory definition of "public entity."

The court does not address *Younger v. Harris* abstention and its systemic offspring *O'Shea v. Littleton*.

PLRA--Prospective Relief Provisions/PLRA--Judgment Termination/Dental Care/Mental Health Care/Medical Care--Staffing/Psychotropic Medications/Suicide Prevention/Contempt/Use of Force/Chemical Agents/Discovery/Women

Hallett v. Morgan, 296 F.3d 732 (9th Cir.2002), *superseding* 287 F.3d 1193 (9th Cir. 2002). Plaintiffs at a women's prison moved to extend the term of a consent decree and for contempt. The defendants moved to terminate the decree. The district court denied the plaintiffs' motions and granted the defendants'.

At 742-43: A motion to extend the duration of a consent decree is a request for prospective relief under the PLRA. Even though an extension calls for no "new remedy," the statute says that anything other than money damages is prospective relief. Cases in which plaintiffs seek only to enforce substantive terms of a decree are distinguishable.

PLRA--In Forma Pauperis Provisions--Applicability

Agyeman v. Immigration and Naturalization Service, 296 F.3d 871 (9th Cir. 2002). At 885-86: The PLRA filing fee provisons do not apply to alien detainees as long as they do not also face criminal charges, because they are not "prisoners" under the PLRA; deportation proceedings are civil rather than criminal in nature.

Correspondence--Non-Legal/Deference

Duamutef v. Hollins, 297 F.3d 108 (2d Cir.

2002). The plaintiff alleged that a "mail watch" was placed on his mail after he received a book titled *Blood in the Streets* (subtitled *Investment Profits in a World Gone Mad*). The plaintiff has a history of disciplinary problems and involvement in "prohibited organizational activities." The mail watch entailed "stopping, opening, and reading all non-privileged correspondence" for 30 days; the court doesn't say exactly what this means, i.e., whether his mail was delayed, whether he got all his mail after 30 days or not, etc.

The court cites the "heightened deference" due in prison cases and concludes that defendants' actions were reasonably related to legitimate penological interests under the *Turner* standard in light of the "background facts" about the plaintiff. Even if a more thorough examination of the book would have shown it innocuous, "we find that it is generally sufficient for a prison official to base a security decision on the title alone." (113) The court doesn't discuss the fact that there is almost no constitutional protection of the confidentiality of non-legal mail anyway.

Federal Officials and Prisons/Media/Deference

Wolf v. Ashcroft, 297 F.3d 305 (3d Cir. 2002). A federal prison policy prevents prisoners from viewing movies rated R or NC-17, in order to implement the Zimmer Amendment, which prevents the expenditure of funds for viewing such movies. The district court correctly held that the *Turner* standard is applicable, but did so in too cursory a fashion. It "never stated or described the interest purportedly served by the prison policy, nor did it determine whether the interest was neutral and legitimate" (308); the appeals court can't tell which of several rationales the court accepted, or how any of them are rationally connected to the restriction at issue. At 308: "We have noted that the party defending the policy should 'demonstrate' that the policy's drafters 'could rationally have seen a connection' between the policy and the interests, and that this burden, though slight, must 'amount[] to more than a conclusory assertion.'" Part of the *Turner* inquiry is determining whether that requirement is met. *Id.* at n.2: "We do not reach the issue pressed by the government in its brief as to how the 'reasonable relationship' aspect compares to the 'rational basis' test for equal protection, nor do we see the need to elaborate on the nature of the government's burden, as our statement in *Waterman* that it must 'demonstrate' the necessary relationship should suffice."

The district court didn't bother with an evidentiary record, believing that the Third Circuit has endorsed a "common sense" approach to the *Turner* standard; the prisoners argued that evidence must be presented. At 308-09:

> We eschew both categorical approaches and hold, instead, that while the connection may be a matter of common sense in certain instances, such that a ruling on this issue based only on the pleadings may be appropriate, there may be situations in which the connection is not so apparent and does require factual development. Whether the requisite connection may be found solely on the basis of "common sense" will depend on the nature of the right, the nature of the interest asserted, the nature of the prohibition, and the obviousness of its connection to the proffered interest. The showing required will vary depending on how close the court perceives the connection to be.

Here the connection between barring R-rated movies in jail and reducing crime is not so clear, so the court must address the valid, rational connection on remand. The district court also failed to evaluate the other three *Turner* factors, and it must do so even though the "valid, rational connection" factor is "foremost" in the sense that without it the challenged restriction fails. At 309:

> As to the need for a foundation for these three prongs, it is worth noting that we have historically viewed these inquiries as being fact-intensive. . . . If the District Court concludes that the *Turner* analysis cannot be undertaken on an undeveloped record, then the Court should treat the matter as on summary judgment,

> and rule only after considering the factual basis developed by affidavits or depositions.

PLRA--Exhaustion of Administrative Remedies

Strong v. David, 297 F.3d 646 (7th Cir. 2002). The plaintiff's complaint was erroneously dismissed for non-exhaustion. Normally dismissal without prejudice is not final and therefore not appealable, but this plaintiff had no more remedies to exhaust, so his dismissal was final.

The degree of specificity required in a grievance depends on what the grievance rules require, under *Pozo v. McCaughtry*. At 649:

> It is up to the administrators to determine what is necessary to handle grievances effectively. Systems with more money to hire investigators will require less of prisoners than do resource-starved systems that are strapped to handle even those claims made with particularity. The only constraint is that no prison system may establish a requirement inconsistent with the federal policy underlying § 1983 and § 1997e(a). . . . Thus, for example, no administrative system may demand that the prisoner specify each remedy later sought in litigation--for *Booth v. Churner* . . . holds that § 1997e(a) requires each prisoner to exhaust a process and not a remedy. No comparable doctrine prevents a prison system from requiring factual particularity in an internal grievance.
>
> . . . When the administrative rulebook is silent, a grievance suffices if it alerts the prison to the nature of the wrong for which redress is sought. As in a notice-pleading system, the grievant need not lay out the facts, articulate legal theories, or demand particular relief. All the grievance need do is object intelligibly to some asserted shortcoming. Strong's two grievances were comprehensible and contained everything that Illinois instructed him to include. Defendants can't complain that he failed to do more. . . .

At 650: The court questions whether the plaintiff has a good claim against supervisory defendants. "But ours is a system of notice pleading, and Strong may be able to show that he has a real claim against someone other than David. Given what we said above it should not be necessary to add--though we add it anyway--that Strong's entitlement to do this is not limited to or by the contents of his intraprison grievances." In other words, they don't buy the Sixth Circuit's position that exhaustion must be done as to each defendant.

Use of Force--Chemical Agents/Damages--Assault and Injury/Personal Involvement and Supervisory Liability/Discovery/Sanctions/ PLRA-Attorneys' Fees

Lawrence v. Bowersox, 297 F.3d 727 (8th Cir. 2002). After a riot, search teams went around the prison. When they got to the two plaintiffs' cell, an officer called out, "Niggers get naked," and one plaintiff asked, "What did you say?" The officer called for a movement team, and when it arrived another officer immediately sprayed the two plaintiffs (cellmates) with pepper spray, soaking them and the entire interior of the cell. After ten minutes or so they got a shower.

A prior decision holding that a one-second burst from a small can of pepper spray amounted to *de minimis* injury did not mean that all applications of pepper spray result in *de minimis* injury. There, the prisoner refused direct orders, became threatening, was not confined to his cell and was much larger than the staff member. Here, the plaintiffs were confined to their cell and did not disobey orders, and they were soaked from a large container resembling a fire extinguisher. The jury was not bound in assessing their injuries by the testimony and records of the nurse who treated them; that is a credibility judgment.

A jury awarded nominal damages of $1.00 each and punitive damages totaling $10,000. It found that the officer who sprayed the gas used excessive force, but did not find him liable;

liability was found against the officer who made the racial comment and called for the movement team. These findings are entirely consistent; the officer who sprayed said he arrived at the cell with no knowledge of what had happened, and the jury could have concluded that he was following the other officer's orders. At 733: "Orchestrating an unnecessary pepper spray shower violated clearly established rights of which a reasonable person should have known."

An award of nominal damages does not mean that injury was *de minimis* as a matter of law.

The district court awarded $8,125 in attorneys' fees and $587.19 in expenses for failing to produce the original videotape of the incident and giving conflicting stories about which staff members were involved in the incident. It did not abuse its discretion. Defendants gave assurances that they would produce an original videotape, but never did, producing only tapes that had been "conveniently edited." Then they found 14 videotapes and, rather than determining which was the original, simply handed them over to plaintiffs to do the work (which showed the original did not exist). Their claim they couldn't determine who was present because of bad memories ignored that they could have looked at the videotapes or conducted their own investigation. Providing a long list of those who might have been involved violated the letter and spirit of Rule 26(a)(1). The award was appropriate for prison officials who "were playing 'hide the ball'" (734)--in fact,the court was generous in not striking their pleadings and entering a default judgment.

The court notes (734 n.2) "a disturbing tendency . . . to 'misplace' videotapes of prison incidents," citing three instances in five years as "more than mere coincidence. Perhaps it is time to remind" the DOC of provisions for striking pleadings and entering default judgments against parties who violate the discovery rules.

PLRA--Exhaustion of Administrative Remedies

Ahmed v. Dragovich, 297 F.3d 301 (3d Cir. 2002). A dismissal for non-exhaustion was a final and appealable order because the statute of limitations had expired, so the prisoner's failure to appeal within 30 days left the appeals court without jurisdiction.

A plaintiff who filed a grievance appeal five months later and sued before completing the grievance process did not substantially comply with the exhaustion requirement.

Released prisoners need not exhaust.

PLRA--In Forma Pauperis Provisions--Three Strikes Provision

Robinson v. Powell, 297 F.3d 540 (7th Cir. 2002). Plaintiff got his third strike in the district court, which, contrary to the literal language of the three strikes provision, granted him IFP status on appeal. At 541:

> That authorization was contrary to the language of the statute. Three strikes and you're out. Two of our sister circuits, however, have refused to apply the statute literally, on the ground that to do that in a case such as this would prevent the prisoner (if he couldn't pay the fees required of litigants who are not permitted to proceed in forma pauperis) from obtaining appellate review of the correctness of the ruling by the district court that resulted in his getting his third strike. *Adepegba v. Hammons*, 103 F.3d 383, 387 (5th Cir.1996); *Jennings v. Natrona County Detention Center Medical Facility*, 175 F.3d 775, 779-80 (10th Cir.1999). The concern expressed by those courts is legitimate, but it does not require twisting the statute and allowing a fourth strike. Robinson had a perfectly good remedy, which was to ask us for leave to proceed in forma pauperis. Fed. R.App. P. 24(a)(5); . . . Consideration of his motion would require us to decide whether indeed he had three strikes, in which event the Rule 24(a)(5) motion would have to be denied, while if we thought the district court might have erred in dismissing Robinson's complaint for failure to state a claim we would permit him to proceed in

forma pauperis. This procedure is in conformity with the statute; that of our two sister circuits is not and has the anomalous result of allowing a prisoner to file, without payment, a frivolous appeal from his third strike. Robinson did not follow the prescribed procedure, and therefore his appeal is dismissed unless within 14 days of the date of this decision he shall pay the appellate fees in full.

Use of Force--Chemical Agents/Medical Care--Standards of Liability--Serious Medical Needs, Deliberate Indifference/Negligence, Deliberate Indifference, and Intent/Qualified Immunity

Clement v. Gomez, 298 F.3d 898 (9th Cir. 2002). An officer administered two 2-5 second applications of pepper spray against two prisoners who were fighting in their cell and refused to stop; they were removed and attended to shortly afterward. The officers said that the initial application was blocked by the bodies of the fighting inmates, necessitating a second one. Inmates in neighboring cells complained that pepper spray vapors drifted into their windowless cells; at least two suffered asthma attacks or difficulty in breathing, others began coughing and gagging. The officers opened the yard door and placed a fan in the doorway and left the ventilation system on, but those actions did not solve the problem and may have made it worse. The bystander inmates did not get removed from their cells for showers for four hours.

The record described does not support a finding of force used maliciously and sadistically, even if one credits the allegation of neighboring inmates that the final spray was dispensed after coughing and gagging were heard from the cell.

The bystanding prisoners had a serious medical need, since the effects of pepper spray were painful and a serious medical need is present whenever there is the unnecessary and wanton infliction of pain (904). There is a factual issue as to deliberate indifference in the staff's four-hour delay in getting the prisoners out of their cells for showers and medical attention. Evidence of actual knowledge on their part includes that they took turns stepping outside for fresh air, prisoners were heard coughing and gagging in the hall, they made repeated requests to the staff for medical attention, and the officers opened the door and put a fan in the doorway. In addition, the prisoners allege that the supervisory defendants did not have adequate policies for minimizing the effects of pepper spray on bystanders; the court says they must meet the *Canton v. Harris* deliberate indifference standard without commenting on how that standard differs from the Eighth Amendment subjective deliberate indifference standard. Plaintiffs cited numerous prior instances of pepper spray use that harmed bystanders; a factfinder could conclude that the defendants were on "'actual or constructive notice' of the need to train." (905)

The defendants are not entitled to qualified immunity because the general law of prison medical care was clearly established, as was the rule that officers cannot intentionally delay or deny access to it. At 906: "Specificity only requires that the unlawfulness be apparent under preexisting law."

Rehabilitation/Res Judicata and Collateral Estoppel/Habeas Corpus/Ex Post Facto Laws/Procedural Due Process

Reed v. McKune, 298 F.3d 946 (10th Cir. 2002). The plaintiff complained of being ordered to participate in a Sexual Abuse Treatment Program (SATP), which requires disclosure of sexual history including uncharged offenses without guarantees of confidentiality, as well as polygraph and penile plethysmograph testing. When he refused, he was transferred to maximum security and lost numerous privileges.

The plaintiff's self-incrimination claim is barred by the intervening Supreme Court decision in *Lile v. McKune*. Although there is no majority opinion in that decision, the plaintiff's situation is close enough to the *Lile* plaintiff's that he cannot show a constitutional violation.

The plaintiff's claim for denial of parole is not precluded because the denials had not happened at the time of his state court adjudication. Since he is challenging the fact of his imprisonment, under *Heck* and *Balisok* he must get

the denials set aside in a state proceeding or via habeas corpus before he can bring a § 1983 action about them. His injunctive claim seeking to correct unlawful procedures is not barred by *Heck/Balisok*. The court thinks he has a viable due process theory based on the interest in "participating in a state's parole program," overlooking the holding in *Greenholtz*. He also might have an Ex Post Facto Clause claim because his crime antedates the parole provisions relied on. However, since the parole board relied in part on the seriousness of his offense, he can't show that he was denied parole based on the new parole standard.

Federal Officials and Prisons/PLRA--Exhaustion of Administrative Remedies/Statutes of Limitations

Clifford v. Gibbs, 298 F.3d 328 (5th Cir. 2002). The plaintiff's claim was previously dismissed for nonexhaustion; the case was remanded after prior appeal without reference to exhaustion; but that doesn't mean it was law of the case that he had satisfied the exhaustion requirement, since the appeals court did not actually pass on the question.

The exhaustion requirement applies to the plaintiff's failure to protect claim. The holding in *McCarthy v. Madigan* that exhaustion is not required when it would cause "undue prejudice to subsequent assertion of a court action" is no longer good law, being cast into doubt by the PLRA text. At 332: "Moreover, to the extent that the *McCarthy* exception had any application in § 1997e cases prior to its 1995 amendment, the Supreme Court's interpretation of § 1997e's new language in *Booth v. Churner* and *Porter v. Nussle* unambiguously forecloses application of such exceptions under the current statutory scheme."

When the district court dismissed without prejudice for non-exhaustion, the statute of limitations had run, so the dismissal functioned as a dismissal with prejudice. The court holds that the limitations period should be equitably tolled during the pendency of this action and during any additional state administrative proceedings. The court analogizes to *Wright v. Hollingsworth* but does not otherwise explain its action or when equitable tolling is appropriate. (332-33)

Visiting--Conditions/Homosexuals and Transsexuals/Standing/Deference

Whitmire v. State of Arizona, 298 F.3d 1134 (9th Cir. 2002). The plaintiff and a visitor challenged a rule forbidding same-sex "kissing, embracing (with the exception of relatives or immediate family) or petting" at visits. At 1136 n.2: The visitor has standing.

The district court dismissed under the *Turner* standard without a factual record. At 1136:

> A dismissal on the pleadings, without requiring any evidence corroborating that a rational connection exists between the visitation policy and correctional safety, is appropriate only when a common-sense connection exists between the prison regulation and the asserted, legitimate governmental interest. . . . Here, the ADOC asserts that its visitation policy protects inmates from being labeled as homosexuals and from being targeted for physical, sexual, or verbal abuse on account of such labeling. The ADOC's visitation policy, however, does not possess a common-sense connection to the concern against homosexual labeling; thus, the district court erred when it upheld the ADOC policy without requiring any corroboration.
>
> Common sense indicates that an inmate who intends to hide his homosexual sexual orientation from other inmates would not openly display affection with his homosexual partner during a prison visit. . . .

The court cites *Turner* and then continues "[u]nder rational basis review, . . ." (1136), without stating whether it means to equate the *Turner* reasonable relationship test with the equal protection rational basis test.

Communication with Media/Deference

California First Amendment Coalition v. Woodford, 299 F.3d 868 (9th Cir. 2002). A policy

restricting the public and the press from viewing the entirety of executions by lethal injection at San Quentin is "an exaggerated, unreasonable response to prison officials' legitimate concerns about the safety of prison staff and thereby unconstitutionally restricts the public's First Amendment right to view executions from the moment the condemned is escorted into the execution chamber." (870-71)

Rehabilitation/Religion/Procedural Due Process--Property

Searcy v. Simmons, 299 F.3d 1220 (10th Cir. 2002). The plaintiff, who pleaded *nolo contendere* to sexual exploitation of a child, was assigned to a Sexual Abuse Treatment Program, and signed a statement that the program was optional but failure to participate or complete it would result in withholding of good time credits. The program required that he sign an "Admission of Responsibility" form, listing all past behavior, charged or uncharged, that might have been a sex offense. It also requires submission to videotaped polygraph and penile plethysmograph examinations. The plaintiff refused to complete the form and hence was not allowed to participate in the program.

The plaintiff's allegation that penalizing refusal to participate in the program violates the Fifth Amendment right of self-incrimination is not foreclosed by the Supreme Court's decision in *Lile v. McKune*; there, length of incarceration was not an issue, but this plaintiff is subject to a regulation withholding good time for refusal to participate in assigned programs. However, the result is the same: the loss of opportunity to earn good time "is not a new penalty, but only the withholding of a benefit that the KDOC is under no obligation to give." (1226) *Id.*: "Mr. Searcy's lost privileges and lost opportunity to earn future good time credits are quite simply not the result of his refusal to incriminate himself, but are a consequence of his inability to complete rehabilitation the KDOC has determined--in light of the serious offense for which Mr. Searcy was convicted--is in the best interest for Mr. Searcy and society."

The plaintiff asserted that the Admission of Responsibility requirement violated his religion because it would require him to lie, and he is innocent. The claim fails because the court refuses to treat the loss of opportunity to earn good time as compulsion, and because the requirement is generally applicable to all inmates in the program and not directed at any particular religion or religious belief (citing *Employment Div. v. Smith*). In any case, the requirement passes muster under the *Turner* standard. The interest in rehabilitating sex offenders is valid, and the requirement of admission of responsibility is a legitimate part of the process. The plaintiff has an easy alternative for exercising his rights (don't join the program, which is voluntary), and accommodating him would undermine a basic premise of the entire program.

Sending the plaintiff's property (items he was no longer allowed to have because of his non-cooperation with the program) to his relatives did not deny due process. Since he still retained formal ownership of it, "the requirements of procedural due process were met when the prison authorities provided him the opportunity to dictate where to send the property." (1229) Sending the property to his relatives when he refused to give any other instruction was proper.

Telephones

United States v. Friedman, 300 F.3d 111 (2d Cir. 2002). The criminal defendants were convicted based in part on recordings of their telephone calls from jail. Title III of the Omnibus Crime Control and Safe Streets Act of 1968 generally forbids telephone surveillance without a warrant, but has exceptions for instances where one party has consented and for telephones used by "an investigative or law enforcement officer in the ordinary course of his duties." Consent may be express or implied, and implied consent has often been found based on notice that calls will be listened to. The telephones in the jail cells did not have signs indicating that calls made over them might be recorded; however, the booking area telephones had signs saying that calls to attorneys made over them would not be monitored or recorded.

The district court had found "a reasonable person could understand" that the booking area telephone signs meant that calls from other telephones might be recorded, but that was not sufficient notice to create implied consent. Instead,

it relied on the "ordinary course" exception, holding that notice was not required. The appeals court says that no circuit has ever applied the "ordinary course" exception in a situation where at least one participant had not received some notice of the possibility that the conversation would be recorded. However, it holds that "notice sufficient to support a finding of implied consent : . . . is not required . . . for a recording to fall within the 'ordinary course' exception." The notice the defendants got in this case is sufficient to support application of that exception. "Some notice" that calls may be monitored is all that is required where the monitoring practice is related to jail security.

Procedural Due Process--Administrative Segregation/Punitive Segregation/Recreation and Exercise

Rahman X v. Morgan, 300 F.3d 970 (8th Cir. 2002). The plaintiff, sentenced to death, asked to be placed in a segregation cell. Independently, prison officials decided to place him in a segregation cell for security reasons. He didn't like the cell he was placed in and complained about it, but was kept there for some 15 months.

Placement in the segregation cell did not deny equal protection, since the plaintiff's prior violent assaults and attempts to break out of his cell provided a rational basis for placing him in a more secure location. Nor did it deny due process, since it was not "atypical and significant hardship." At 973-74:

> Although the length of time he was kept in a segregation cell was substantial, he was not subject to the hardships that prisoners placed in that ward for punitive reasons face. For example, he was allowed out of his cell for recreation for three hours per week, the same amount of time that prisoners housed in death-row cells were allowed, whereas this privilege was not available to prisoners on punitive status. The main hardship that Mr. X seems to identify that he suffered that inmates housed on death-row did not was an inability to watch television in his cell. This is not a significant hardship, even combined with the other minor deprivations Mr. X alleges.

The plaintiff also received sufficient process. He said he didn't get notice, but he knew enough to request a hearing, and at the hearing he was allowed to make a statement and be heard, and his assignment was reconsidered every 60 days at a hearing where he was allowed to address the committee. The court cites no authority for its view that this process was sufficient.

The plaintiff was not allowed to go outside and exercise for three months, but he was permitted to use a dayroom with exercise equipment three days a week during this time, which meets Eighth Amendment standards.

Pre-Trial Detainees/Protection from Inmate Assault/Pleading

Calderon-Ortiz v. Laboy-Alvarado, 300 F.3d 60 (1st Cir. 2002). The plaintiff was held as a detainee in a state prison, which did not take measures to separate and house inmates according to their safety needs and the security risks they posed. No officer patrolled in the housing area. Several inmates approached the plaintiff, threw a blanket over his head, and sexually assaulted him.

The district court erred in applying the "deliberate intention" standard of *Daniels v. Williams*; the deliberate indifference standard of *Farmer v. Brennan* applies.

The plaintiff's allegations state sufficient facts from which deliberate indifference could be inferred and therefore survive even if a heightened pleading standard is applied (a question the court does not address). Knowledge "may be averred generally" under Rule 9(b), Fed.R.Civ.P. At 65: "The knowledge required is not knowledge that a specific harm would befall the inmate, . . . but rather, knowledge of facts from which the official can draw the inference that a substantial risk of serious harm exists." Allegations that the defendants knew about disregard of custody and security needs, that that practice is unreasonably dangerous, that custodial staff do not provide direct supervision to prisoners, were sufficient. Allegations that these practices were unreasonably dangerous were sufficient.

Habeas Corpus

Dotson v. Wilkinson, 300 F.3d 661 (6th Cir. 2002). The plaintiff challenged the retroactive application of new parole eligibility regulations under the Ex Post Facto Clause. That claim is not barred by *Heck* and *Balisok* since a challenge to eligibility rules does not "necessarily imply" the invalidity of conviction or sentence; a determination of the claim will have no immediate effect on his sentence. At 666: "Therefore, our unpublished decisions notwithstanding, we now join our sister circuits and hold that when a prisoner challenges his parole eligibility, and the challenge does not necessarily affect the duration of his confinement, the suit is cognizable under § 1983."

PLRA--Exhaustion of Administrative Remedies

Lewis v. Washington, 300 F.3d 829 (7th Cir. 2002). The plaintiff alleged assault by another prisoner and the defendants moved to dismiss for non-exhaustion. At 833:

> Lewis first argues that he was not required to exhaust administrative remedies because the prison officials' failure to respond to many of his grievances and requests rendered those remedies unavailable. Lewis must exhaust only those administrative remedies that are available to him. . . . The Eighth and Fifth Circuits have deemed administrative remedies exhausted when prison officials fail to respond to inmate grievances because those remedies had become "unavailable." . . . Both circuits based their holdings on the plain meaning of "available." . . . We join the Eighth and Fifth circuits on this issue because we refuse to interpret the PLRA "so narrowly as to ... permit [prison officials] to exploit the exhaustion requirement through indefinite delay in responding to grievances."

However, the plaintiff was obliged to appeal the grievance that officials *did* respond to. (He did appeal, but late, because he was waiting for responses to other requests that never arrived.)

Some courts apply a "substantial compliance" rule to exhaustion for claims that arose before enactment of the PLRA. The court declines to extend that rule to cases where prison officials did not respond to grievances. The court also declines to hold the defendants estopped from raising exhaustion because equitable estoppel requires a party to show "(1) a misrepresentation by the opposing party; (2) reasonable reliance on that misrepresentation; and (3) detriment. . . .," as well as some affirmative misconduct rather than just omission (834).

Federal Officials and Prisons/Telephones/ Consent Judgments/PLRA–Exhaustion of Administrative Remedies

Smith v. Federal Bureau of Prisons, 300 F.3d 721 (6th Cir. 2002). The plaintiff filed suit to enforce the settlement agreement in the telephone litigation against the Federal Bureau of Prisons. He followed the exhaustion requirement of the settlement agreement but his claim is still dismissed for non-exhaustion because the PLRA exhaustion requirement now governs and requires exhaustion of all available remedies.

The Sixth Circuit reiterates its unique rules for exhaustion (at 723):

> To demonstrate exhaustion of administrative remedies, the prisoner should attach the decision containing the administrative disposition of the grievance to the complaint, or in the absence of written documentation, describe with specificity the administrative proceeding and its outcome. . . . When a prisoner fails to exhaust administrative remedies before filing a civil rights complaint in federal court, or only partially exhausts administrative remedies, dismissal of the complaint is appropriate.

Consent Judgments/Contempt/Personal Property

Floyd v. Ortiz, 300 F.3d 1223 (10th Cir. 2002). A settlement of a challenge to prison

officials' keeping prisoners' money in non-interest-bearing accounts and taking proceeds from the prisoner canteen program for the state treasury has "all the attributes of a consent decree" and was "incorporated as an order of the court" per the docket sheet, though there was no separate judgment entered and no formal dismissal. An amended agreement was later adopted and "incorporated as an order of the court." Though the action was never certified as a class action, there was consensus that the settlement "would benefit, and be enforceable by, all DOC inmates, not just the named plaintiffs."

A currently incarcerated prisoner had standing as an intended third-party beneficiary to enforce the agreement, and the trial court retained jurisdiction to enforce it.

Searches--Person--Living Quarters

Willis v. Artuz, 301 F.3d 65 (2d Cir. 2002). The plaintiff's cell was searched without a warrant at the behest of the police, who were seeking evidence of an uncharged crime; prison security was not at issue.

Under *Hudson v. Palmer*, a prisoner has no expectation of privacy in prison living quarters. The court distinguishes its prior decision in *U.S. v. Cohen*, which held *Hudson* inapplicable to a non-security-related search instigated by non-prison officials, on the ground that *Cohen* involved a pre-trial detainee. At 69:

> Unlike the pre-trial detainee in *Cohen*, a convicted prisoner's loss of privacy rights can be justified on grounds other than institutional security. . . . One of the incidents of confinement for a convict is the loss of privacy, which serves the legitimate purpose of retribution as well as the institutional security needs of the prison system. We therefore hold that "society is not prepared to recognize as legitimate any subjective expectation of privacy that a [convict] might have in his prison cell." *Hudson* . . .

Protection from Inmate Assault

Case v. Ahitow, 301 F.3d 605 (7th Cir. 2002). The plaintiff alleged that he was assaulted by another prisoner.

The Seventh Circuit continues its habit of compromising the *Farmer v. Brennan* Eighth Amendment standard (at 605) (Posner, J.):

> Of course the defendants were not the actual attackers, but if they behaved with deliberate indifference to the plaintiff's safety, meaning that they knew of a serious danger to him (really knew--not just should have known, which would be all that would be required in a negligence case) and could easily have prevented it from materializing but failed to do so, they are liable. E.g., *Farmer v. Brennan* . . .

(In fact, *Farmer* requires prison officials to "act reasonably" in response to threats to prisoners' safety, not just do what is easy.)

This plaintiff was assaulted by another prisoner who had an extremely violent record and had given abundant notice that he was out to get the plaintiff. The plaintiff walked by his assailant's workplace after leaving the dining room and the assailant leaped out and beat him with a broomstick. The plaintiff's theory is that the assailant was placed in that location to work without supervision despite his terrible record because the defendants had it in for the plaintiff because of his own disciplinary problems and his having agreed to testify against a guard in a drug case. There is a triable factual issue even if the plaintiff can't prove his conspiracy theory. At 607: "There is evidence that the defendants knew that Jones posed a serious danger to Case, and they could have averted the danger either by leaving Case in segregation (it is common to place prisoners in segregation for their own protection . . .) or by placing the predatory Jones in segregation or at least by assigning him to work in a part of the prison not traversed three times a day by Case."

Protection from Inmate Assault/Qualified Immunity

Estate of Ford v. Ramirez-Palmer, 301 F.3d 1043 (9th Cir. 2002). The decedent was killed by his cellmate in a Psychiatic Administrative

Segregation Unit, and his estate sued, arguing that allowing the two to be double celled was deliberately indifferent.

The plaintiff's murderer, though he had a substantial record of violence and was on a list for transfer to a special unit for "extremely dangerous inmates," had been double celled before (with the decedent among others) without problems. Although the assailant was classified as a "predator," the decedent was not classified as a "victim." Under these circumstances, none of the defendants had actual knowledge that double celling the assailant with the decedent "posed such a substantial risk of serious harm that doing so would be constitutionally impermissible." (1053)

Disabled/State Officials and Agencies/Denial of Ordered Care/Hygiene/Equal Protection

Kiman v. New Hampshire Dept. of Corrections, 301 F.3d 13 (1st Cir. 2002). The plaintiff, who has amyotrophic lateral sclerosis (ALS), alleged that he was deprived of a cane and a shower chair, handcuffed so as to cause pain, made to stand in lines and climb stairs though it was painful to do so, denied a suitable toilet, and deprived of prescribed medication. The district court dismissed his ADA suit against the Department of Corrections on sovereign immunity grounds.

The court ducks the more general question whether Title II of the ADA exceeds Congress's enforcement power under section 5 of the Fourteenth Amendment. It holds that in this case, where the conduct alleged would violate the Constitution if proved, it is not necessary to address the statute's facial constitutionality by inquiring into Congress's justification for also addressing conduct that is not unconstitutional. The statute, as applied, simply provides an additional remedy for conduct that is clearly within the reach of the Fourteenth Amendment.

The plaintiff's allegations may also state an equal protection claim under the Supreme Court's *Village of Willowbrook v. Olech* holding that singling an individual out for arbitrary and irrational treatment may deny equal protection even if the individual is not a member of an identifiable class.

Pre-Trial Detainees/Telephones/Federal Officials and Prisons/Attorney Consultation/Habeas Corpus/Procedural Due Process

Valdez v. Rosenbaum, 302 F.3d 1039 (9th Cir. 2002). The plaintiff, a federal pre-trial detainee held in a local jail, was placed in administrative segregation and lost telephone access based on a letter from the prosecutor to the U.S. Marshal, which requested such action because the plaintiff's superseding indictment named five new defendants who were not yet in custody and he might warn them. He was able to telephone no one but his attorney, and that based on a written request; however, he was able to visit personally with his attorney and with family and friends. His telephone access was restored after four and a half months.

Alaska law did not give rise to a liberty interest in telephone use. The relevant statute only requires "reasonable access" to a telephone, rather than prescribing an outcome, leaving prison officials with discretion to determine what reasonable access means, and accompanying regulations provide that access may be limited if there are reasonable grounds to think restrictions are required to protect the public. (1044 n.3: *Sandin*, which rejects this mode of analysis altogether, does not apply to pre-trial detainees.)

At 1045: "Pretrial detainees have a substantive due process right against restrictions that amount to punishment." The defendants' actions were not punishment, since they were done for the non-punitive purpose of avoiding tipping off the plaintiff's co-defendants and thereby minimizing the risk of injury to the arresting officers. They were not an exaggerated response, given the actual risk of notifying plaintiff's co-conspirators and the fact that the restriction was kept only until after three of the co-conspirators had been arrested and one released on bail, which mooted the restrictions. As to his First Amendment claim, the court has stated in dicta prisoners have a First Amendment right to telephone access, subject to reasonable security limitations, but the basis of the right is obscure and statements of it have been conclusory and unnecessary to the decisions. The right at issue is the right to communicate with persons outside

prison walls. Use of a telephone provides a *means* of exercising this right. Under the *Turner* standard the court upholds the restrictions, since they were reasonably related to a legitimate purpose; the plaintiff had other ways of communicating with persons outside the jail (visits, letters); allowing him access would have required additional resources to monitor his calls; and there were no obvious, easy alternatives. The court does not explain why it applies the *Turner* standard in this pre-trial detainee case.

The plaintiff raised a Sixth Amendment claim, arguing that the requirement to obtain permission to call an attorney made it practically impossible speak with the attorney. The claim would necessarily imply the invalidity of Valdez's subsequent conviction, so it is barred by the rule of *Heck v. Humphrey.*

Federal Officials and Prisons/Accidents/Pre-Trial Detainees

Paschal v. United States, 302 F.3d 768 (7th Cir. 2002). The Inmate Compensation Program is the exclusive remedy for federal pre-trial detainees, as well as convicts, who are injured while working.

Protection from Inmate Assault/Verbal Abuse

Blades v. Schuetzle, 302 F.3d 801 (8th Cir. 2002). The plaintiff was assaulted by another prisoner.

The fact that the assailant had a violent record did not mean that releasing him to general population was deliberate indifference; he was a life prisoner, meaning prison officials had reason to believe he had an incentive to behave, and he had assured the warden he would do so.

The fact that the assailant had made a threat against the plaintiff did not make defendants' failure to protect him deliberate indifference. Defendants had acted reasonably by segregating the assailant and transferring the plaintiff; the plaintiff was back only for medical treatment and officials at the first prison did not know he was there when they released the assailant. At worst they were negligent. In any case, the plaintiff had told them that the assailant posed no risk of harm against him; this is "a bar to his claim." (804)

Defendants' failure to notify the plaintiff about a threat to him was not deliberate indifference, since the plaintiff knew about the threat and repeatedly told them there was no real danger, and as noted they had taken action previously as a result of the threat.

Racially derogatory language, unless it is pervasive or severe enough to amount to racial harassment, will not by itself violate the Fourteenth Amendment.

Rights of Staff/Disabled/State Officials and Agencies

Koslow v. Commonwealth of Pa., 302 F.3d 161 (3d Cir. 2002). Pennsylvania waived its Eleventh Amendment immunity from suit under the Rehabilitation Act against its Department of Corrections when it accepted federal money under the State Criminal Alien Assistance Program.

Habeas Corpus/Searches--Person

Kutzner v. Montgomery County, 303 F.3d 339 (5th Cir. 2002). The plaintiff sued to obtain the release of biological evidence for DNA testing, alleging it would be exculpatory as to his criminal conviction. His suit was, in effect, a challenge to the validity of his criminal conviction that must be pursued via habeas corpus. Since he had already lost a habeas proceeding on the subject, this action was properly dismissed as a successive habeas petition. (That is an interesting application of *Heck* and *Preiser*. The *Heck* rule bars federal suits in which success would "necessarily imply" the invalidity of the state judgment on which confinement is based. However, suits which do not directly challenge the basis of confinement, but seek relief that would lead to another proceeding which might or might not affect the basis of confinement, are generally not barred. *See, e.g.*, *Dotson v. Wilkinson*, 300 F.3d 661 (6th Cir. 2002) (holding that a challenge to denial of parole eligibility, which if successful would entitle the prisoner only to a parole hearing that could go either way, is not barred by *Heck*). The court in this case does not explain why the existence of a further contingency between success in obtaining evidence for DNA testing and the ultimate invalidation of his conviction does not insulate this claim from dismissal under *Heck.*)

PLRA--In Forma Pauperis Provisions--Filing

Fees/PLRA–In Forma Pauperis Provisions–Screening and Dismissal

Troville v. Venz, 303 F.3d 1256 (11th Cir. 2002). The plaintiff is civilly committed under a sexual predator statute; though he is held in a unit located within a prison, he is not charged with a crime or serving a term of incarceration. He is therefore not subject to the PLRA filing fee provisions.

At 1260 n.5: The PLRA's amendment to the IFP statutes "does not allow the district court to dismiss an *in forma pauperis* complaint without allowing leave to amend when required by Fed.R.Civ.P. 15."

PLRA--Exhaustion of Administrative Remedies

Jernigan v. Stuchell, 304 F.3d 1030 (10th Cir. 2002). At 1032: "We review de novo the district court's finding of failure to exhaust administrative remedies." *Id.*: "An inmate who begins the grievance process but does not complete it is barred from pursuing a § 1983 claim under PLRA for failure to exhaust his administrative remedies. . . . Nor is his argument that he gave notice of his claims to various Defendants by means other than the grievance process persuasive--the doctrine of substantial compliance does not apply. The plaintiff's claim that he got no response to his grievance is unavailing, since the grievance director told him he had ten days to "cure the deficiency" (the lack of a decision by the warden), and he didn't do so.

PLRA--Exhaustion of Administrative Remedies/Statutes of Limitations

Casanova v. Dubois, 304 F.3d 75 (1st Cir. 2002). The reality of what is grievable is shown to diverge from the written policy, in that staff practice was to treat compalints of alleged civil rights abuses by staff as not grievable. At 77 n.3: Exhaustion is an affirmative defense; great string cite.

The prisoners' claims were timely because the complaint is deemed filed when handed over to prison officials under the *Houston v. Lack* "mailbox rule." The fact that the prison did not have a system for recording legal mail did not defeat this conclusion; the state can adopt such a system if it wants, and Federal Rules of Appellate Procedure 4 and 25 make it clear that prisoners can attest to timeliness by declaration or notarized statement.

Inmate Legal Assistance/Injunctive Relief--Preliminary/Deference

Bear v. Kautzky, 305 F.3d 802 (8th Cir. 2002). Prison officials banned prisoners from providing legal assistance to each other and directed them to seek assistance from a private attorney under contract with the prison system. The district court granted a preliminary injunction on behalf of four prisoners with post-conviction proceedings pending or planned who said they did not have the skill to prosecute them on their own and who were receiving or seeking to receive effective assistance from jailhouse lawyers. At 804: "This testimony satisfied, at least for preliminary injunction purposes, the requirement that an inmate plaintiff demonstrate actual injury, that is, 'that the alleged shortcomings in the [prison's] library or legal assistance program hindered his efforts to pursue a legal claim.'" One plaintiff testified that the attorney had a conflict of interest, another that he had tried for a year to meet with the attorney, and a third that the attorney knew nothing about criminal law and was unable to provide research assistance, conduct investigations, or file papers.

The district court properly granted a preliminary injunction. At 805:

> We agree there is no absolute First Amendment right to communicate with other inmates about legal or other matters. . . . First, plaintiffs in this case alleged that ISP has imposed a total ban on all inmate legal communications, and they presented evidence that they have no satisfactory alternative way of obtaining needed legal assistance to pursue specific post-conviction claims. Second, and even more important, defendants introduced no evidence justifying the new policy under the deferential *Turner* standard, despite the Supreme Court's repeated caution that inmates do have First Amendment

> rights and therefore free speech restrictions must be justified by legitimate penological concerns.

This case is important because it applies a liberal definition of "hindering" efforts to pursue a legal claim, and therefore of actual injury.

PLRA--Exhaustion of Administrative Remedies

Lyon v. Vande Krol, 305 F.3d 806 (8th Cir. 2002). The plaintiff said he didn't exhaust with respect to his exclusion from Jewish activities because the warden told him the decision was not his to make and rested in the hands of "Jewish experts." At 808: ". . . Under the PLRA, . . . the question is a simple one: Was there a procedure available? There is no question in this case that there was, that Mr. Lyon was aware of it, and that he chose not to follow the steps that the procedure outlined." The statement made to him "was, at best, a prediction that Mr. Lyon would lose if he complained through the administrative grievance procedure. It was not a denial of Mr. Lyon's right to complain, nor could the statement have misled him about the availability of the procedure." The reference to "Jewish experts" did not change the fact that remedies were available.

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

Baxter v. Rose, 305 F.3d 486 (6th Cir. 2002). Here, the Sixth Circuit reiterates its adherence to two uniquely regressive interpretations of the PLRA and uses them to justify a third one.

The court has previously held that exhaustion must be pled with specificity by the plaintiff and supported where possible with documentation; the court now characterizes this as a "heightened pleading" requirement. It has also held that the existence of *sua sponte* screening regimes under the PLRA means that courts have no discretion to permit amendment of complaints to avoid dismissal. At 489:

> There is no reason to exempt the issue of exhaustion from this court's bar on amendment. This court's heightened pleading standards for complaints covered by the PLRA are designed to facilitate the Act's screening requirements, which require district court[s] to dismiss defective actions *sua sponte*, in many cases, before any responsive pleading by the defendant. . . . The bar on amendment similarly serves the purpose of the heightened pleading requirement, permitting courts to assess the fundamental viability of the claim on the basis of the initial complaint. The possibility of amendment undermines the screening process, preventing courts from efficiently evaluating whether the plaintiff met the exhaustion requirement.

The court does not mention the fact that every other circuit to consider the question has rejected that no-amendment view.

The Supreme Court's recent *Swierkiewicz* decision "does not displace our heightened pleading standard for exhaustion in PLRA cases" because that standard derives from the PLRA and not from the Federal Rules of Civil Procedure. At 490:

> The PLRA established an [sic] *unique* procedure under which the court, not the parties, is required to evaluate whether a claim on which relief may be granted is stated. Unlike in typical civil litigation, courts discharging their screening duties under the PLRA must not wait until the complementary rules of civil procedure, such as civil discovery or responsive motions, are implemented by the defendant. While the Federal Rules of Civil Procedure shift the burden of obtaining clarity to the defendant, the PLRA shifts that burden to the courts. The heightened pleading requirement, in cases to which the PLRA applies, effectuates the PLRA's screening requirement. Courts would be unable to screen cases effectively if plaintiffs were

able, through ambiguous pleading, to avoid dismissal of claims on which relief could not be granted.

Pre-Trial Detainees/Protection from Inmate Assault

Burrell v. Hampshire County, 307 F.3d 1 (1st Cir. 2002). The plaintiff was assaulted by another prisoner who had a record of several incidents of violence or threats of violence as well as other disruptive behavior. There had been prior arguments between the two, which the plaintiff had reported to staff, but he did not ask to be placed in protective custody. He did ask that the assailant be moved to avoid violence, but was told that he had already been moved around a lot and there was no place to put him.

The defendants were not deliberately indifferent. At 8: "Given the totality of the circumstances as understood by prison officials at the time, the defendants did not fail to take reasonable measures to avert potential harm." Burrell represented that he was proficient in martial arts and a decorated war hero, and he never asked for protective custody. Defendants knew of no motive for any future attack on the plaintiff, since the plaintiff was neither a rival gang member or an informant, nor was there any history of violence between the two, and the assailant's last violence against anybody was nine months previously. The plaintiff had the option of going into his cell and locking his door.

The county's policy of not screening and segregating potentially violent prisoners is not itself a facial violation of the Eighth Amendment, though lack of classification may be part of an Eighth Amendment violation. Here, prisoners were housed in individual cells that they could lock from inside, so the danger from other prisoners was considerably lessened. The policy also was not the cause of the plaintiff's injury, since he could lock his cell and could have requested protective custody or transfer, and there was no evidence of a pattern of harm going beyond his own assault.

Qualified Immunity/Protection from Inmate Assault

Lawrence v. Norris, 307 F.3d 745 (8th Cir. 2002). The plaintiff was attacked by another prisoner at a time when the only guard on duty was controlling traffic in the hallway. The plaintiff has stated a constitutional claim. The court lacks interlocutory appellate jurisdiction over defendants' qualified immunity appeal insofar as defendants are challenging the sufficiency of the evidence to support the conclusion that there are genuine issues of fact barring summary judgment.

Use of Force--Chemical Agents/Qualified Immunity

Treats v. Morgan, 308 F.3d 868 (8th Cir. 2002). The plaintiff alleged that he was sprayed in the face with Capstun without warning after declining to take his copy of a receipt for confiscated property, then slammed to the floor and handcuffed. He alleged that he did not intentionally disobey the defendant (he understood it wasn't mandatory to take the receipt) or threaten any officer.

On the plaintiff's version of the facts, there was no objective need for the force used since the plaintiff "had not jeopardized any person's safety or threatened prison security." (872) The record does not suggest that the plaintiff would have remained noncompliant if he had received clearer directions or warned him before spraying him, and there is no indication of any rule or reason why the plaintiff was required to take the receipt. A prior decision holding that "a limited application of capstun to control a recalcitrant inmate" is *de minimis* force does not necessarily immunize all such uses against "disobedient or querulous" inmates. At 873: ". . . [U]se of pepper spray will not be justified every time an inmate questions orders or seeks redress for an officer's actions. . . . A basis for an Eighth Amendment claim exists when, as alleged here, an officer uses pepper spray without warning on an inmate who may have questioned his actions but who otherwise poses no threat."

The claim that defendants "tempered their response" by getting the prisoner prompt medical attention did not establish that the force was reasonable. The use of force would have been "tempered" if the defendant had followed the prison regulation requiring staff to warn prisoners before spraying.

Evidence that there was no objective need

for the degree of force used or the pain inflicted, that the plaintiff could not reasonably have been perceived as a threat to staff or security, and that defendants did not temper their forceful response could support a jury finding that the defendant acted maliciously with the intent to cause injury.

The defendants are not entitled to qualified immunity. The right is well established. At 875: "It is also clearly established that force may be justified to make an inmate comply with a lawful prison regulation or order, but only if the inmate's noncompliance also poses a threat to other persons or to prison security." *Id.*: "Prison regulations governing the conduct of correctional officers are also relevant in determining whether an inmate's right was clearly established. *Hope*. . . ." The prison regulations authorize use of capstun only when an inmate threatens physical harm, refuses to produce an item, or refuses to relocate, and prohibit its use without warning or as punishment. There is evidence that all of these rules were violated.

Access to Courts--Punishment and Retaliation/Qualified Immunity

Bell v. Johnson, 308 F.3d 594 (6th Cir. 2002). The plaintiff alleged that two officers shook down his cell and confiscated his legal papers and medical diet snacks, as well as threatening him, in retaliation for his filing a civil rights lawsuit.

The district court erred in granting judgment as a matter of law on the ground that the "deter a person of ordinary firmness" standard, which the Sixth Circuit had just adopted, was not "a judicially or juridically satisfying proposition" and in any case was not met, nor was the "shock the conscience" standard that the Sixth Circuit had just discarded.

Whether retaliatory action would deter a person of ordinary firmness is a jury question, and there was enough evidence to go the jury here. Courts have held that confiscating legal papers and destroying property are sufficient injury to support a First Amendment retaliation claim, as are a retaliatory shakedown and seizure of documents. The plaintiff testified that defendants' actions caused him to fear leaving his cell and to worry that guards were tampering with his food. Repeated thefts of legal papers could directly impede his pursuit of a claim and deter others from preparing legal papers. A jury could find that deliberately taking dietary supplements designed to ameliorate a deadly disease like AIDS could deter a person of ordinary firmness from exercising legal rights.

Food/Pleading

Phelps v. Kapnolas, 308 F.3d 180 (2d Cir. 2002). The plaintiff alleged that he complained about an improper search and was then subjected to a worse improper search, falsely charged with throwing food, and placed in SHU. For the first 14 days (seven before, seven after his disciplinary hearing) he was fed raw cabbage and diet loaf. He alleged that he lost over 30 pounds and suffered severe abdominal pain as a result.

The district court erred in dismissing for failure to plead an Eighth Amendment violation. The alleged treatment satisfies the requirement of objective seriousness. With respect to defendants' knowledge, the plaintiff was not required to plead additional facts besides asserting that the defendants knew or recklessly disregarded that the diet was nutritionally inadequate. The district court's contrary holding "amounted to a heightened pleading standard and is unwarranted under FRCP 8(a)(2)."

Protection from Inmate Assault/Qualified Immunity

Krein v. Norris, 309 F.3d 487 (8th Cir. 2002). The plaintiff was attacked by another prisoner. He alleged no basis for prison officials to have anticipated the particular attack, but did allege that defendants provided inadequate security. Specifically, they provided only one guard for three barracks housing 150 inmates; the violence level in one of these was five times that of any other, but they did not change the staffing; the number of isolation cells was inadequate; and defendants failed to keep track of the number and location of assaults in the prison.

The plaintiff sufficiently alleged a deliberate indifference claim; the claim does not arise from the attack *per se*, "but arises from plaintiff's substantiated allegation that defendants were deliberately indifferent to a known substantial risk that such an attack would occur." (491)

Hazardous Conditions and Substances/Damages--Assault and Injury, Punitive/Qualified Immunity

Reilly v. Grayson, 310 F.3d 519 (6th Cir. 2002). The district court awarded $36,500 in compensatory damages and $18,250 in punitive damages for exposure to environmental tobacco smoke. The plaintiff had asthma and asserted a need to be in a smoke-free unit.

The defendants were not entitled to qualified immunity. They said *Helling* and relevant Sixth Circuit authority dealt only with persons celled with a smoker, but "the language of the opinions is broader than those facts would indicate, repeatedly emphasizing the right to be free from *exposure* to second-hand smoke." (521).

The district court did not err in finding that the plaintiff suffered from a serious medical condition that was exacerbated by exposure to ETS and that the defendants refused to respond to repeated medical recommendations to place the plaintiff in a smoke-free environment. The evidence supported damages for actual injury and the district court's finding of reckless disregard supported punitive damages.

This case is to my knowledge the only one in which a prisoner has actually recovered damages in a second-hand smoke case.

Work Assignments/PLRA--Exhaustion of Administrative Remedies

Jones v. Norris, 310 F.3d 610 (8th Cir. 2002). The plaintiff alleged that he was assigned to a job inappropriate to his medical condition. He filed repeated grievances, all denied. The district court said he didn't exhaust because his grievances were not considered on the merits because he didn't follow the rules, and that his grievance forms weren't submitted until after he had filed suit. At 612: "Because Jones's medical classification is unchanged, filing a proper grievance against all defendants remains an available remedy."

The court affirms on the merits because to prevail, the plaintiff must show deliberate indifference, and he received quite a bit of medical treatment. At 612: "Neither differences of opinion nor medical malpractice state an actionable Constitutional violation." Also, the plaintiff failed to refute the defendants' assertion that his medical complaints are an attempt to avoid the prison's requirement of work without pay. (At 612: "Jones' current medical classification notes Jones cannot grip with his right hand, but can accomplish field work.")

Ventilation and Heating/Use of Force--Restraint/Qualified Immunity

Burchett v. Kiefer, 310 F.3d 937 (6th Cir. 2002). At 944-45:

> The right to be free from "excessively forceful handcuffing" is a clearly established right for qualified immunity purposes, . . . and applying handcuffs so tightly that the detainee's hands become numb and turn blue certainly raises concerns of excessive force. Our precedents allow the plaintiff to get to a jury upon a showing that officers handcuffed the plaintiff excessively and unnecessarily tightly and ignored the plaintiff's pleas that the handcuffs were too tight.

This plaintiff loses because the officers removed the handcuffs on his first complaint after he said he would behave.

The plaintiff alleged that he was detained for three hours in a police car with the windows rolled up in ninety degree heat. At 945: "We agree that unnecessary detention in extreme temperatures, like those that could be reached in an unventilated car in ninety-degree heat, violates the Fourth Amendment's prohibition on unreasonable searches and seizures." The court cites *Hope v. Pelzer*. On these facts, where the plaintiff was engaging in no conduct that made it necessary to keep the windows rolled up, the officers violated the law. Under *Hope v. Pelzer* that law was clearly established, given prior decisions holding that the Fourth Amendment limits detention to the least intrusive means reasonably available, and that excessive force does not require assault but can consist of the physical structure and conditions of the place of detention.

NON-PRISON CASES

Use of Force--Restraints

Rodriguez v. Farrell, 294 F.3d 1276 (11th Cir. 2002). The plaintiff complained that he was handcuffed behind his back and kept that way for a long time even though he told the arresting officer that he had an arm injury. The officer was not obliged to believe what a suspect told him.

Non-Constitutional Rights

United States v. Duarte-Acero, 296 F.3d 1277 (11th Cir. 2002). The International Covenant on Civil and Political Rights "does not create judicially-enforceable individual rights. Treaties affect United States law only if they are self-executing or otherwise given effect by congressional legislation." (1283)

U.S. District Court Cases

Federal Officials and Prisons/Religion--Practices--Hair, Beards, Dress/Transfers/Injunctive Relief

Gartrell v. Ashcroft, 191 F.Supp.2d 23 (D.D.C. 2002), *appeal dismissed*, 1003 WL 1873847 (D.C. Cir., Apr. 11, 2003). The Federal Bureau of Prisons' placement of prisoners whose religious beliefs require them to wear beards and long hair in the Virginia prison system, which forbids both, violated the Religious Freedom Restoration Act. RFRA continues to apply to federal officers and agencies, and each placement in a Virginia prison is subject to RFRA scrutiny, since the statute applies to all federal law and its implementation.

The Virginia grooming policy substantially burdens plaintiffs' religious belief. At 37: "A substantial burden on a sincerely held religious belief exists where the government imposes punishment or 'denies . . . a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs.'" (Citations omitted)

Plaintiffs' showing of a substantial burden on their religious beliefs requires defendants to show that their practice is the least restrictive means of achieving a compelling interest. As a less restrictive alternative, the Bureau of Prisons could house plaintiffs in prisons run by BOP or other contractors that do not so burden plaintiffs' beliefs. The court rejects the defense that BOP's prisons are overcrowded, since capacity concerns are not implicated by individualized designations, because the BOP population is in constant flux around the country. It also rejects the argument that the Bureau of Prisons can't possibly decide who has sincere religious objections to shaving and hair-cutting; the Supreme Court has made it clear that government can and must do this for free exercise purposes, and prison officials in other systems can and do assess sincerity of belief in order to administer prison programs and policies. At 39: "Moreover, the government cannot meet its burden to prove least restrictive means unless it has actually considered and rejected the efficacy of less restrictive measures before adopting the challenged practice." Here they didn't, even when they were required to adopt it temporarily under a preliminary injunction; they reverted to prior practice when the injunction was lifted.

The court enjoins the Bureau of Prisons to consider inmates' religious beliefs before sending them to Virginia; burden on religious belief should "militate against" designation to Virginia. BOP is required to evaluate prisoners presently in Virginia and move them out if their religious beliefs and practices are burdened by Virginia's policies. Disciplinary action imposed for violation of the Virginia policy should be expunged.

Medical Care--Standards of Liability--Deliberate Indifference, Serious Medical Needs
Use of Force--Restraints
Searches--Person--Arrestees

Turner v. Kight, 192 F.Supp.2d 391 (D.Md. 2002). The plaintiff was arrested on an outstanding warrant and detained for about 14 hours. Her neck brace and medication were confiscated and not returned during that period.

The pain the plaintiff suffered from lack of medication and neck brace was not a serious medical need. Even if it had been, defendants were not deliberately indifferent. At 402: "Although Plaintiff walked with a cane and carried a neck brace, it does not follow that Defendants drew the inference that a substantial risk of serious harm existed." Anyway, when she was arrested, she walked without cane or noticeable limp. The

plaintiff's complaints to a defendant of pain and muscle spasms do not provide "objective evidence from which [a defendant] would infer that a serious medical need existed." (403) The fact that the defendant noticed the plaintiff's surgical scars doesn't impress the court.

A strip search on arrest did not violate the Fourth Amendment because the searching officer was of the same gender, the search was in private and preceded a mandatory shower, and there was no physical contact with the plaintiff. The court cites no authority for this proposition, but the search apparently was not a complete strip search.

Procedural Due Process--Disciplinary Proceedings, Work Assignments, Classification/Pendent and Supplemental Claims; State Law in Federal Courts/Access to Courts--Punishment and Retaliation/Equal Protection/Appointment of Counsel/Pro Se Litigation

Williams v. Manternach, 192 F.Supp.2d 980 (N.D.Iowa 2002). The plaintiff's placement in disciplinary detention for 30 days, his loss of "level status," and the loss of his job are not atypical and significant hardship under *Sandin* and do not call for due process protections. There is no constitutionally protected interest in having state officers follow state law in connection with prison disciplinary proceedings.

At 986: ". . . [W]hen giving a *pro se* complaint the liberal construction to which it is entitled, the question is whether factual allegations support a legal theory, not whether the legal theory is specifically articulated."

The plaintiff's allegations that defendants retaliated against him for his legal activities should have been considered by the magistrate judge even though the plaintiff did not use the word "retaliation" in his complaint. The absence of a due process violation does not mean the disciplinary proceeding was not retaliatory; manifestations of retaliation need not be independently unconstitutional. Under Eighth Circuit law, however, a retaliation claim fails if the prisoner was guilty of the disciplinary offense, which is established by the presence of "some evidence," but that cannot be determined at the pleading stage.

The plaintiff's allegations of disparate treatment of "lifers" with respect to jobs and classification sufficiently pled an equal protection violation, even though defendants might later prevail under the rational relationship test. It is implicit in these claims that persons who are not lifers are similarly situated to the plaintiff but are not subject to the treatment complained of.

PLRA--Exhaustion of Administrative Remedies/Protection from Inmate Assault

Williams v. McGinnis, 192 F.Supp.2d 757 (E.D.Mich. 2002). The plaintiff was assaulted after he was named as an inmate informant in a disciplinary report. The court refuses to reconsider summary judgment for the hearing officer, since plaintiff shows no facts indicating that the hearing officer was aware of a significant risk before including his name in the report. The court previously said the plaintiff had substantially complied with the exhaustion requirement, but now cites Sixth Circuit law that substantial compliance is not applicable in post-PLRA cases, and dismisses because there is no evidence that Step I and Step II grievances were *received*, and the plaintiff did not appeal to Step III (he only sent a letter).

Medical Care/Evidentiary Questions/Summary Judgment/Qualified Immunity

Fenner v. Suthers, 194 F.Supp.2d 1146 (D.Colo. 2002). The plaintiff alleged inadequate policies, procedures, and protocols for treatment of Hepatitis C.

The magistrate judge incorrectly recommended granting summary judgment on the grounds that the policies were appropriate, based largely on material on Internet sites which "appear to have some connection to the National Institute of Health." That material was probably not appropriate for judicial notice under Rule 201(e), Fed.R.Ev., and in any case the plaintiff had no opportunity to be heard concerning it.

The defendants have not established a factual basis for qualified immunity on the ground that there is no clearly established right to treatment of hepatitis C. It might be that there is a single, clear treatment for the disease which defendants refused to provide; or it might be that

the proper course of treatment is experimental or that defendants might reasonably believe the plaintiff did not meet the conditions for that treatment. In any case, defendants are not entitled to qualified immunity for their injunctive claim.

Federal Officials and Prisons/Accidents/Immunities--Federal Officials and Employees

Bultema v. United States, 195 F.Supp.2d 1001 (N.D.Ohio 2002). The plaintiff fell out of a bunk bed and injured his knee. He had an order to be placed in a lower bunk but didn't tell anybody about it. The order was in the prison computer but the responsible employee didn't look at it.

The plaintiff's claim under the Federal Tort Claims Act is barred by the discretionary function exception. His argument that the medical restriction eliminated all discretion misses the point; "the issue is whether there is generally any federal statute, policy, regulation or the like that *requires* a particular method for assignment of quarters . . . or whether that is simply left to the discretion of individual prison authorities." The second prong of the exception is whether the judgment is of the kind the discretionary function exception was designed to shield, and it is met. At 1008: "Here, the policy-makers apparently decided that the quickest and most efficient method for communicating a medically-necessary bottom bunk assignment to the unit officer was to utilize the inmate himself."

The failure to place guard rails on bunk beds was also discretionary; they could be removed and turned into weapons, so the determination should be left to prison administrators' judgment.

The plaintiff would lose on the merits in any case, since under Ohio law, contributory negligence greater than the defendant's negligence bars any recovery, and the plaintiff's failure to tell anybody he was assigned to a bottom bunk constitutes such contributory negligence.

Medical Care--Standards of Liability--Deliberate Indifference, Serious Medical Needs/Grievances and Complaints about Prison/Personal Involvement and Supervisory Liability

Joyner v. Greiner, 195 F.Supp.2d 500 (S.D.N.Y. 2002). The plaintiff alleged that he had serious back pain over a period of time that was not adequately treated. Defendants do not dispute that this is an objectively serious injury, and prior decisions support that conclusion. However, plaintiff has not pleaded sufficient facts to support a deliberate indifference claim. There are no allegations of the defendant doctor's culpable mental state, that he knowingly and intentionally rendered improper treatment, that he knew of and disregarded a substantial risk of serious harm, etc. The plaintiff continuously received pain medication, was seen by a physician's assistant, had x-rays done, received physical therapy, etc. The fact that the plaintiff wanted an MRI and didn't get it shows only a difference of opinion over medical treatment.

The Superintendent could not be held liable based on his affirmance of the plaintiff's grievance. At 506: ". . . [A] prison administrator is permitted to rely upon and be guided by the opinions of medical personnel concerning the proper course of treatment. . . ."

Another doctor could not be held liable based on the plaintiff's sending him a letter of complaint. At 507: "The general rule is that 'an allegation that an official ignored a prisoner's letter of protest and request for an investigation of allegations made therein is insufficient to hold that official liable for the alleged violation.'" (Not necessarily. *See Gentry v. Duckworth*, 65 F.3d 555, 561 (7th Cir. 1995); *Pacheco v. Commisse*, 897 F.Supp. 671, 678 (N.D.N.Y. 1995); *Mandala v. Coughlin*, 920 F.Supp. 342, 351 (E.D.N.Y. 1996); *Barry v. Ratelle*, 985 F.Supp. 1235, 1239 (S.D.Cal. 1997) (holding prisoner's letters to prison medical director sufficient to allege liability); *Boone v. Elrod*, 706 F.Supp. 636, 638 (N.D.Ill. 1989) (holding prisoner's letters sufficient); *Strachan v. Ashe*, 548 F.Supp. 1193, 1204 (D.Mass. 1982) (holding letter from plaintiff's attorney sufficient).)

PLRA--Exhaustion of Administrative Remedies

Perez v. Blot, 195 F.Supp.2d 539 (S.D.N.Y. 2002). The plaintiff didn't grieve, but he complained, and the Inspector General did an elaborate investigation, and referred the case for criminal prosecution. In the subsequent suit

plaintiff sought discovery re his contacts with prison officials concerning the alleged assault; the defendants refused to answer except as to formal grievances. The court allows the discovery, since the plaintiff may have satisfied the less formal harassment grievance procedure maintained by the prison system.

In addition, case law that says informal efforts to resolve don't meet the exhaustion requirement was overruled by *Marvin v. Goord.* Defendants said that *Marvin* is inapplicable because that plaintiff solved his problems "at the correctional level." However, plaintiff alleges that he complained in the prison as well as writing to the IG. As in *Marvin*, this plaintiff says he got as favorable an outcome informally as he could have through the grievance process.

AIDS/Medication

Evans v. Bonner, 196 F.Supp.2d 252 (E.D.N.Y. 2002). The plaintiff complained that he did not get his HIV medication on time. However, the evidence showed that his viral loads got better rather than worse during the relevant period, a doctor testified that it really didn't matter whether he got his medications on time, and the nurse defendant was not shown to have known that untimely medication delivery would cause a substantial risk to the plaintiff's health.

PLRA--Exhaustion of Administrative Remedies

Brady v. Dr. Attygala, 196 F.Supp.2d 1016 (C.D.Cal. 2002). The plaintiff filed a grievance to see an ophthalmologist. The grievance was granted at the second level on the ground that he had already seen an ophthalmologist. The plaintiff need not have appealed his victory to have exhausted; the court relies on *Booth v. Churner*, which says that the possibility of "some redress" is required for a remedy to be "available." At 1020: "Further pursuit of an administrative appeal is therefore not required when no relief whatsoever is left available for the inmate to obtain through the prison administrative process. At that point, the inmate has 'nothing [left] to exhaust.'"

PLRA--Exhaustion of Administrative Remedies

Floyd v. Shelby County, Tenn., 197 F.Supp.2d 1101 (W.D.Tenn. 2001). The plaintiff sued over an assault by other prisoners. The court dismisses for failure to exhaust, notwithstanding his arguments that he did not receive a copy of the jail handbook and did not know about the grievance procedure; that he told staff who asked him that he wanted to press charges; and that a drug counselor said it would be difficult for him to stay in the program if he filed a claim against the gang members. Even if his actions constituted "substantial compliance," that standard applies only to cases in which the claim arose before the effective date of the PLRA.

PLRA--Mental or Emotional Injury/Damages--Intangible Injuries

Ford v. McGinnis, 198 F.Supp.2d 363 (S.D.N.Y. 2001). Plaintiff alleged a First Amendment violation and argued that he was not subject to the mental/emotional injury provision. The court finds the statute unambiguous and says (at 366):

> The plain language of the statute does not permit alteration of its clear damages restrictions on the basis of the underlying rights being asserted. The underlying substantive violation, like Canell's First Amendment wrong, should not be divorced from the resulting injury, such as "mental or emotional injury," thus avoiding the clear mandate of § 1997e(e). The statute limits the remedies available, regardless of the rights asserted, if the only injuries are mental or emotional. . . .
> *Searles v. Van Bebber*, 251 F.3d 869, 876 (10th Cir.2001). Accordingly, plaintiff may be awarded an amount to compensate him for the denial of his religious meal. *See, e.g., Bryant v. McGinnis*, 463 F.Supp. 373, 388 (W.D.N.Y.1978) (awarding plaintiffs $3,000 each for violations of their First Amendment rights to practice their religion in prison). Such an award, however, may not be based on plaintiff's "mental

> anguish, depression, increased anxiety, difficulty sleeping, and psychological suffering." Complaint at 7.

PLRA--Exhaustion of Administrative Remedies

Hemphill v. New York, 198 F.Supp.2d 546 (S.D.N.Y. 2002). The plaintiff's letter to the Superintendent complaining of excessive force, sent five months after the incident, was not a grievance and did not meet the exhaustion requirement. At 549: "Prison officials are entitled to require strict compliance with an existing grievance procedure." Even if the letter were construed as a grievance, it was late, and the plaintiff did not ask for an exception to the time limits.

Appeal

Knickerbocker v. Artuz, 198 F.Supp.2d 415 (S.D.N.Y. 2002). A *pro se* prisoner's notice of appeal is deemed filed when the prisoner delivers it to prison authorities for forwarding, but that rule does not benefit a prisoner who does not use the prison mail system.

Protection from Inmate Assault/PLRA--Mental or Emotional Injury

Kemner v. Hemphill, 199 F.Supp.2d 1264 (N.D.Fla. 2002). The plaintiff alleged that he was sexually assaulted by another prisoner for nearly two hours and forced to perform oral sex, suffering physical pain, cuts, scrapes, and bruises, and also vomiting when his assailant ejaculated. He was later found hiding in shock. The defendants argued that his claim was barred by the PLRA mental/emotional injury provision. At 1265-66:

> Despite the way it is worded, the statute limits the types of relief, not causes of action. If there is no "physical injury" alleged, then mental or emotional monetary damages, as well as punitive damages, cannot be recovered, but declaratory and injunctive relief may be available.

The plaintiff has alleged physical injury. At 1271: "Any physical force which causes the human body to convulse in vomiting and to go into shock has caused a physical injury as intended by § 1997e(e)." The court gets there after examination of sexual assault cases under the mental/emotional injury provision, cases involving other kinds of physical injury that don't involve cuts and bruises, and the categorization of this kind of assault under state criminal law. At 1269-70: "Sexual battery is a serious felony in Florida." At 1270:

> A sexual battery involves, at a minimum, the physically forceful activity of the assailant. Copulation requires movement. It is alleged here that there was "physical force" as those words were used in the footnote in *Harris*. The penetration of Plaintiff's mouth was an act of force, and there may have been other kinds of "physical force" used, though not alleged. This kind of physical force, even if considered to be de minimis from a purely physical perspective, is plainly "repugnant to the conscience of mankind." Surely Congress intended the concept of "physical injury" in § 1997e(e) to cover such a repugnant use of physical force.

Correspondence--Legal and Official/Access to Courts/Grievances and Complaints about Prison/Heating and Ventilation/Procedural Due Process--Disciplinary Proceedings

Moore v. Gardner, 199 F.Supp.2d 17 (W.D.N.Y. 2002). The plaintiff made numerous complaints about mishandling of his legal mail, disappearance of documents sent for copying, etc., but absent any evidence of actual injury or of involvement of the named defendants, they are dismissed. Complaints of retaliation for complaints are dismissed for similar reasons.

At 33:

> It is clear that "[p]rison inmates have a First Amendment right to the free flow of both incoming and outgoing mail," and that "[p]rison restrictions on inmate mail must be reasonably related to prison interests in security." . . .
>
> With regard to outgoing

> legal mail, "prison officials can only open an inmate's outgoing legal mail if there is a 'rational justification' for doing so." . . . Although a single, isolated incident may fail to state a constitutional claim, multiple occurrences of prison officials opening an inmate's privileged mail may give rise to a Section 1983 action.

The plaintiff's allegation that prison officials opened and returned an outgoing letter to an FBI agent, and that he had sufficiently identified the addressee, raised a triable issue of fact. The plaintiff's allegation that when he tried to send documents to an attorney, the envelopes were opened and documents were missing, raised a triable issue of fact. The plaintiff's allegation that a letter from the U.S. Department of Justice was opened before delivery raised a triable issue of fact. The allegation that a defendant refused to deliver 16 pieces of mail addressed to the plaintiff, but returned them all to sender, raised a triable issue of fact. At 36: "It is well-settled that '[p]rison regulations or practices affecting a prisoner's receipt of non-legal mail must be reasonably related to legitimate penological interest.'" (Sic, citation omitted.)

The plaintiff's allegation that in 10 to 12-degree weather, he was provided only with one and a half bedsheets and a summer weight blanket for a period of several weeks, and that he complained to staff about it, raised a triable issue

Two months in SHU does not constitute atypical and significant hardship under Sandin. In any case, the plaintiff's disciplinary conviction for fighting was supported by some evidence, since he admitted he was fighting, though he said the other prisoner was the aggressor.

Religion--Practices/Religion--Services Within Institution/Deference/Evidentiary Questions/Publications

Marria v. Broaddus, 200 F.Supp.2d 280 (S.D.N.Y. 2002). The plaintiff challenged a prison policy excluding all publications of the Five Percent Nation and denying his request to assemble with other members of the group, pursuant to a "non-recognition strategy for security threat group management." Prison officials said that letting them assemble and receive literature would legitimize their status.

Prison officials said that the publications did not go to the Media Review Committee because "literature defined as contraband does not fall under the jurisdiction of the Media Review Committee." (285 n. 7)

The defendants moved to exclude the report of plaintiff's expert, Toni Bair, under *Daubert* and *Kumho*. The court rejects their argument that he is unqualified to opine on whether Five Percenter literature poses a security threat. It rejects the argument that he did not use a reliable methodology; he relied on his twenty years' experience and could testify to why he, as a warden, would not have banned the publication. It rejects the argument that Bair's assessment of the publication's contents is irrelevant because it is its presence that they object to; plaintiffs are not bound by the way the defendants have framed the issue.

The plaintiffs moved to exclude the report of defendants' expert, George Camp, and the court excludes it based on the unreliability of the survey he conducted. Camp sent it by e-mail to members of the Association of State Correctional Administrators with an introduction reading "Dear Members, We need your help. We are helping to defend the NYS Department of Correctional Service" etc. It identifies the issue in the litigation and the defendants' position on it. The survey is biased, its results unreliable, so it is inadmissible. It has other methodological deficiencies as well. Plaintiffs also persuasively challenged Camp's analysis of unusual incident and other reports (e.g., a drop in the percentage of Five Percenters involved in unusual incidents actually reflected a rise in the *numbers* of members of other groups involved in them).

The court rejects the defendants' claim that the plaintiff can't invoke the Religious Land Use and Institutionalized Persons Act because he has failed to demonstrate that he has sincere religious beliefs, citing his statement that the Five Percenters are not a religion but a way of life. That is semantics; there is a triable issue whether the

plaintiff sincerely believes what he says and whether his beliefs are religious. At 292-93: "Plaintiff explains that although he would not use the word 'religion' to describe the Nation, the Nation holds the same significance in his life as Christianity to an observant Christian."

The court denies summary judgment on the First Amendment claim as well, applying the *Turner* standard. The plaintiff has created a material issue of fact with respect to the valid, rational connection of policy to legitimate security interests by submitting evidence that the Five Percenters as a group are committed to righteousness and nonviolence, that the Supreme Alphabet and Supreme Mathematics are not a code, that there are no initiation rites, and members can leave when they want; the fact that some Five Percenters have acted violently does not justify banning the whole group. There is also evidence that the ban is not really content-neutral. At 295:

> . . . [A]lthough DOCS bans possession of such literature as the 120 Degrees by Nation members, inmates who have registered as [Nation of Islam members] may possess some of the exact same material. The position that DOCS has chosen to advance, namely, that one religious group may possess the same materials that if possessed by another contribute to gang formation, is, we think, a challenging one to sustain.

With respect to alternative means of exercising the right, there is a material factual dispute: defendants say Five Percenters can read other religious groups' materials and discuss Five Percenter principles during meals and recreation, plaintiff says they have to have access to the literature that comprises the lessons central to the practice of the religion.

There are factual disputes concerning accommodation of the right and alternatives to the challenged policy--e.g., whether redaction of offensive emblems or language, submitting Five Percenter material to the Media Review process, providing a secluded place to read the literature, etc., would sufficiently serve defendants' interests.

Under RLUIPA, the plaintiff has to show that his free exercise rights have been "substantially burdened." His claims that study of Five Percenter writings, individually and with others, are integral to his practice, raise a material issue of fact, as does the question whether the prison policy is the least restrictive alternative.

The failure to send Five Percenter literature to the Media Review Committee does not deny due process, since the adequacy of procedures for content-based review is more of a First Amendment argument, and defendants argue that the Media Review Committees are not appropriate for material categorized as contraband.

The defendants are granted qualified immunity from damage claims, since the status of the Five Percenters as a security threat group is unsettled.

Programs and Activities--Education and Training/Punitive Segregation/Equal Protection

Little v. Terhune, 200 F.Supp.2d 445 (D.N.J. 2002). The plaintiff has spent 15 years in "administrative segregation," where he was sent for "disciplinary reasons," and complains he has been denied educational opportunities.

The plaintiff's equal protection claim is governed by the rational basis standard. At 450:

> Although inmates do not have a constitutional right to educational and work programs, once the state grants such rights to prisoners it may not invidiously discriminate against a class of inmates in connection with those programs unless the difference in treatment is rationally related to the legitimate governmental interest used to justify the disparate treatment.

The disparate availability of educational programming between general population and administrative segregation is "rationally related to overlapping security concerns and budgetary constraints." (453) The fact that prisoners in other administrative segregation units get educational programming does not create an equal protection violation, since only the plaintiff's prison is deemed "maximum security," and that fact creates "a distinct set of institutional imperatives, especially related to security." Also, if uniformity

in programming were required, prison officials would be less willing to experiment and innovate. "Varying arrays of variables affect the programmatic posture of an institution. . . ." (454)

The plaintiff's argument that it is irrational to deny him programming because doing so interferes with his rehabilitation is rejected, since "the Supreme Court suggests that rehabilitation is not an overriding goal, but rather is a contingent value depending on scarce resource distribution," and prison officials could rationally determine that it's better to spend scarce resources to reach more people in general population.

The distinction between prisoners under 21, who get education, and older ones, who don't, is rational because state law requires providing education for young people and provides the funds for it. At 457: "It cannot be gainsaid that the State acts rationally in requiring and funding the education of children, including childhood offenders housed in prisons." Young people may be more susceptible to rehabilitation, and in any case they are more likely to gain eventual release.

Grievances and Complaints about Prison/Procedural Due Process--Disciplinary Proceedings/Publications

Farid v. Goord, 200 F.Supp.2d 220 (W.D.N.Y. 2002). The plaintiff prepared a petition alleging abusive conduct by a correction officer. He was subsequently disciplined after searches of his cell and work area turned up articles he had written which were deemed to be inflammatory, threatening, etc. The disciplinary conviction was ordered expunged in state court because the hearing was not timely.

At 235: "It is settled law that an inmate's 'right to complain to public officials and to seek administrative relief is protected by the First Amendment.'" At 236: "Farid's claimed conduct, filing a petition, is constitutionally protected. . . . The right to petition government for redress of grievances--in both judicial and administrative forums--is 'among the most precious of the liberties safeguarded by the Bill of Rights.'" The Second Circuit has said that so long as a grievance procedure is available, it is permissible for prison officials to bar the circulation of petitions. However, there is no such rule, and the plaintiff was not disciplined for sending the petition; instead they sent it through channels for investigation. "From these facts it can be inferred that petitioning was a proper--or at least non-objectionable--means to communicate grievances." (236)

There is a question of fact whether circulating the petition was a substantial or motivating factor in the subsequent discipline. The plaintiff submitted circumstantial evidence that one of the officers had a bias against Muslims generally; there was temporal proximity between the petition and the disciplinary action; it was possible for the charging officer to have known about the petition before the misbehavior report. In addition, the gravity of the charges are so disparate from the evidence in support as to legitimize the retaliation claim. The plaintiff was found guilty of improper solicitation based on having copies of a freely available application for membership in an approved organization and on *intending* to solicit, which the rules do not bar. He was found guilty of threats based on the contents of an article without any evidence that he ever tried to distribute it to other inmates. One of them had been published in a newspaper and a "reasonable reading" would support the conclusion that it did not advocate violence or disruption.

The court concludes that there is sufficient evidence that the plaintiff would not have been disciplined absent protected conduct.

The content of the articles seized from the plaintiff's cell does not present any threat to prison security. The court notes that there was no effort to send the material to the facility Media Review Committee, which is charged with making such content-based determinations, and there is no explanation why not. At 241: ". . . [W]here a corrections officer chooses to ignore established standards or procedures, he must be prepared to demonstrate that his decision is supported by reasonable justification." *Id.*: "Most decisive, the articles are quite benign and obviously satirical. They are thoughtful, well-written political and social commentaries that use historical allusions to make their point. Simply because the Rip article contains the words 'mass mobilization' does not mean that it can reasonably be interpreted as Farid's issuing a call for mass mobilization of prisoners." The point seems to be that the

discipline may have violated the First Amendment independently of any retaliation for the petition.

The denial to the plaintiff of witnesses he requested at his disciplinary proceeding, and the refusal of a hearing officer to recuse himself despite some evidence of a bias against Muslims, raised factual issues barring summary judgment as to plaintiff's due process claim.

Damages--Conditions of Confinement/PLRA--Mental or Emotional Injury

Caldwell v. District of Columbia, 201 F.Supp.2d 27 (D.D.C. 2001). The plaintiff was awarded $174,178.00 by a jury based on evidence of subjection to "feces in his cell, small cells and beds, lack of outdoor recreation, general lack of cleanliness, poor ventilation, smoke and mace in the air, flooding in the cellblocks, noise and odors in the cell blocks, foul water dripping in his cell and poor temperature regulation" (33), not to mention failure to treat his skin cancer.

The plaintiff's claim is not barred by the PLRA mental/emotional injury provision. The court rejects defendants' position that plaintiffs must show "serious, 'lasting' physical injury" and notes cases to the contrary. The plaintiff testified that as a result of the unconstitutional jail conditions he was dizzy, dehydrated, and disoriented, which were symptoms of heat exhaustion; he sustained a severe rash from the heat and plastic mattress, which increased his risk of skin infection and additional skin cancer; smoke from repeated fires caused bronchial irritation (reflected in his medical records); a small bunk aggravated his pre-existing back condition; the frequent use of mace caused his eyes and nose to run and made him choke and sneeze. At 34: "Plaintiff has alleged and proven significant physical injury which is more than sufficient to satisfy the PLRA."

Cruel and Unusual Punishment--Proof of Harm, Totality of Conditions (34-35): The verdict need not be vacated, insofar as it relies on proof of exposure to second-hand smoke, for lack of proof of the quantity of smoke and the resulting injury. The case is not just about cigarette smoke. At 34: "Plaintiff testified to a variety of conditions that, taken together, resulted in an unconstitutional situation in the cell to which he was confined, including excessive heat, lack of ventilation, the plastic mattress, the occasional lack of drinking water, flooding, and feces in the cells." Similarly, the lack of proof of hearing loss did not invalidate the verdict insofar as it rested on evidence of excessive noise, given that the jury was instructed that it must find a substantial risk of serious harm.

Evidence of "exposure to feces in his cell, foul water, filth, excessive heat, smoke, and mace, and the lack of outdoor exercise" could support a conclusion of substantial risk of serious harm. In addition, plaintiff's medical expert testified that he experienced symptoms of heat exhaustion from excessive heat without ventilation and lack of water; bronchitis from smoke exposure; and back pain from the refusal to provide a bed suited to his height, which caused him additional back pain. At 36: "As Plaintiff points out, a violation of the Eighth Amendment may occur when a prisoner is subjected to unnecessary pain."

Negligence, Deliberate Indifference and Intent (36): Grievances, a consent decree, and a study by the Department of Justice showed that individual defendants and the District of Columbia were on notice of many of the conditions.

Damages--Punitive (40-41): Punitive damages were not rendered improper by the lack of evidence of the defendants' financial resources; it was defendants' job to present such evidence.

Religion--Practices/Deference/Qualified Immunity

Murphy v. Carroll, 202 F.Supp.2d 421 (D.Md. 2002). Prison officials' designation of Saturday as cell cleanup day violated the Free Exercise clause as applied to an Orthodox Jewish prisoner. (They made him clean his cell on other days, but they wouldn't provide him with cleaning supplies on other days, so he had to do it with his bare hands.) Defendants' management concerns "are understandable but they are not persuasive, i.e., they are not 'minimally rational' in the face of Murphy's weighty free exercise claim." Defendants have "obvious, readily available alternatives," i.e., providing the plaintiff cleaning materials on Sunday. The court invokes the *Turner* standard but does not analyze all the factors.

The defendants are entitled to qualified immunity because there was at the relevant time

virtually no guidance regarding the observance of the Jewish Sabbath in the context of prison work, programming, and assignments.

Procedural Due Process--Disciplinary Proceedings

Hoskins v. McBride, 202 F.Supp.2d 839 (N.D.Ind. 2002). The plaintiff was convicted of a disciplinary drug offense based on circumstantial evidence related to the finding of drugs in a trash can in the visiting area.

The right to witnesses can be satisfied with written statements. At 844: "There is no right to confront witnesses at a CAB hearing." Here, the witnesses the plaintiff called did not answer the questions he wanted answered in their written statements. However, the decision was not based on their statements. At 844: "Due process is not denied if witnesses are not asked to give testimony that is irrelevant or repetitive."

A prisoner has the right to have security videos viewed in considering whether the prisoner violated prison rules. At 845: "Security videos are documentary evidence that the [Conduct Adjustment Board] is required to review if the inmate requests the tapes." *Id.*: "However, no court has as yet found that the inmate, himself, has that right." The right to have exculpatory evidence disclosed is limited by security considerations.

It was sufficient for the disciplinary board to see the contraband items and for them to be described to the plaintiff.

The conviction was supported by some evidence, since the visiting room videotape showed a child throwing something into the trash can where the drugs were found, and the petitioner was the only person who had a child visitor at the time. "This is not much evidence," but it suffices in combination with other evidence showing that *someone* was trafficking in contraband.

The petitioner got his conviction thrown out but received a harsher sentence on rehearing. There is no right not to receive a harsher sentence on remand in prison disciplinary proceedings. There is a right not to be judged by a partial trier of fact, but there's no evidence of partiality here.

Procedural Due Process--Transfers/Transfers/Color of Law

Koos v. Holm, 204 F.Supp. 1099 (W.D.Tenn. 2002). Transferring a prisoner to a private prison outside the state does not deny due process or waive jurisdiction over the prisoner, since prisoners do not have a liberty interest in assignment to a particular prison. Such a transfer is not atypical and significant under *Sandin*. The court cites the Fifth Circuit's *Orellano* decision holding that "only deprivations that clearly impinge on the *duration* of confinement, will henceforth even possibly qualify for constitutional 'liberty' status." (1103) *Id.*: "It is a popular myth among prisoners that a state's authority over a prisoner ends at the state's geographical border."

Prisoners do not have a right to travel to another country and renounce their citizenship. Prisoners cannot compel the Attorney General or Immigration and Naturalization Service to deport them.

PLRA--Prospective Relief Provisions--Entry of Relief/Procedural Due Process--High Security, Administrative Segregation, Classification/Monitoring and Reporting

Austin v. Wilkinson, 204 F.Supp.2d 1024 (N.D.Ohio 2002). The court previously held that prisoners at the Ohio State Penitentiary, which is operated as a supermax facility, have a liberty interest at stake because the length of their placement and the severity of its restrictive conditions impose an atypical and a significant hardship upon them. The court held that by denying the plaintiffs adequate notice, adequate hearings, and sufficiently detailed decisions concerning their placement at the OSP, they denied due process. At 1026: "Because the defendants have violated the plaintiffs' constitutionally protected liberty interest, the Court orders the least intrusive means to correct the violation. *See* 18 U.S.C. § 3626(a)(1)(A)." The order provides for detailed notice of placement, a hearing with *Wolff* rights, statement of reasons, appeal mechanism, and greater specificity in the rules governing reasons for placement in the unit. Defendants are required to produce documents on an ongoing basis for monitoring purposes, and monthly meetings to discuss implementation are required.

Religion--Services within Institution/Res

Judicata and Collateral Estoppel/Pendent and Supplemental Claims; State Law in Federal Courts/PLRA--Exhaustion of Administrative Remedies/Pleading/Grievances and Complaints about Prison/Qualified Immunity/Access to Courts--Punishment and Retaliation

Cancel v. Mazzuca, 205 F.Supp.2d 128 (S.D.N.Y. 2002). The Shi'ite Muslim plaintiff alleged that prison authorities did not provide separate services for Shi'ites and they were pressed by the dominant Sunnis to give up their Shi'ite beliefs. His grievance was denied, but a state court held that the denial of the grievance was arbitrary and capricious and violated state statutes. He then sued for damages under § 1983.

The state court's decision, which rested on state law and not the Constitution, estopped defendants from contesting only those issues in the present litigation that were "necessarily decided" in the state case, limited to the finding of fact that there are "significant dogmatic differences" between Shi'a and Sunni sects and the legal conclusion that defendants' actions violated the state Correction Law.

The suit is not barred by the PLRA mental/emotional injury provision. At 138:

> It is certainly true that Mr. Cancel does not allege a physical injury. Nevertheless, it is equally true that he brought this action, inter alia, for alleged violations of his First Amendment rights, rather than "for mental or emotional injury." *Id.* (emphasis supplied). Accordingly, § 1997e(e) does not present an obstacle to the instant action.

The defendant Imam, former Ministerial Program Coordinator and Islamic Affairs Coordinator for DOCS, who allegedly used his position to discriminate against Shi'ites, is not entitled to qualified immunity. The allegation that he hired only Sunnis does not state a violation of law that was clearly established before the state court decision in plaintiff's case, but the allegation that he engaged in an active campaign of hostility towards Shi'ites does state a violation of clearly established law, since it amounts to a violation of the obligation to provide all prisons with "reasonable opportunities" to exercise religious rights, proclaimed in 1972 in *Cruz v. Beto*.

Pregnancy, Childbirth and Abortion/Medical Care--Standards of Liability--Serious Medical Needs/Deference

Victoria W. v. Larpenter, 205 F.Supp.2d 580 (E.D.La. 2002). A policy requiring a prison inmate to obtain a court order and pay all attendant costs of a non-therapeutic abortion did not violate the Fourteenth Amendment. (The Sheriff said that this policy applied to all "elective surgery.")

Under the *Turner* standard, the Sheriff has a valid penological purpose in maintaining security and in avoiding liability if there is an escape attempt or a prisoner is negligently released in connection with an abortion. While prisoners are taken outside the prison for other purposes, the Sheriff has a valid interest in limiting the circumstances. (Here, the Sheriff would have had to take the plaintiff to New Orleans, since abortions are not available in Terrebone Parish.) Accommodating the plaintiff would therefore have had an effect on prison resources, and there are no ready alternatives to the court order policy that would serve the Sheriff's interests. The court does acknowledge that there is no alternative way to exercise the right to abortion other than having an abortion. The court dismisses the contrary decision in *Monmouth County Correctional Institutional Inmates v. Lanzaro* on the ground that it failed to acknowledge the difference between transportation for procedures that are medically required and those that are not, and (at 597):

> Besides its failure to recognize the validity of any restriction on the abortion right, perhaps the most troubling aspect of the *Monmouth* decision, is its imposition of an *affirmative* duty on the part of the government to preserve inviolate the abortion right during incarceration--a stance wholly at odds with the jurisprudence interpreting prisoner access to virtually every other right guaranteed by the Constitution. The gist of the *Monmouth* decision is that incarceration serves to broaden the right to abortion rather than

> curtail it any way--a result completely opposite from the norm. Under *Monmouth*, inmates are given far greater protections of the abortion right in prison than they ever would have been entitled to in the free world.

At 598:

> Further, the exceptionally broad reach of *Monmouth* is demonstrated best by the court's requirement that the prison accommodate the abortion right in those cases where the inmate is unwilling or unable to pay for the procedure--even where public funds would necessarily have to be allocated in order to accommodate the inmate's request.

Monmouth was also decided before the Supreme Court cases that applied the "undue burden" test.

A non-therapeutic abortion sought for financial and emotional reasons is not a serious medical need; it is "simply lacking in similarity and intensity to the other medical conditions that have been found to be serious medical needs under the Eighth Amendment. . . . The inconvenience and financial drain of an unwanted pregnancy are simply insufficient in terms of the type of egregious treatment that the Eighth Amendment proscribes." (601)

Sexual Abuse/PLRA--Exhaustion of Administrative Remedies/Personal Involvement and Supervisory Liability/Qualified Immunity/Pendent and Supplemental Claims; State Law in Federal Courts

Morris v. Eversley, 205 F.Supp.2d 234 (S.D.N.Y. 2002). The plaintiff complained of sexual assault by a staff member.

The court rejects the claim that the plaintiff failed to exhaust. She exhausted under the summary "harassment grievance" procedures, which the court deems a substitute for the usual grievance procedure, in contradiction to the decision in *Houze v. Segarra.* She complained to the employee's supervisor; at that point, the Superintendent was supposed to render a decision within 12 working days, but did not do so. The plaintiff did not appeal this non-decision, but was not required to do so; the regulation says she "may" appeal. The allegations were also brought to the attention of the Inspector General's office, the Attorney General's office, and the Manhattan DA's office. "Under the circumstances," the plaintiff has exhausted.

The plaintiff is also now released from prison. If the court were to dismiss without prejudice, the plaintiff could simply refile without exhausting. Considerations of judicial efficiency and economy advise against dismissal (241).

The plaintiff's allegations that defendants knew officers at Bayview were engaging in sexual contact with women prisoners (e.g., from prior complaints, some corroborated by pregnancy) but failed to act, and that they failed to act based on reports (i.e., this plaintiff's report), sufficiently alleged the personal involvement of the Superintendent and the Assistant Deputy Superintendent.

The defendants are not entitled to qualified immunity, since sexual contact between officers and staff is illegal in New York, and defendants are charged with knowledge of the law.

Food/Pre-Trial Detainees/Justiciability/Cruel and Unusual Punishment--Proof of Harm

Drake v. Velasco, 207 F.Supp.2d 809 (N.D.Ill. 2002). The plaintiff alleged that Aramark Food Services prepared food under unsanitary conditions.

The defendants argued that the plaintiff's claim of injury was so abstract as not to state a case or controversy. However, he "alleges that Aramark's food preparation is so unsanitary as to pose both an immediate risk to Drake's health, . . . and that the food served has hindered recovery from his illnesses," and that is sufficient (812).

The plaintiff's allegations state a constitutional claim. At 812:

> Inmates are entitled to nutritionally adequate food that is prepared and served in such a manner that it does not constitute an immediate danger to the health of the inmates who consume it. . . . Food that "occasionally contains foreign

> objects or sometimes is served cold, while unpleasant, does not amount to a constitutional deprivation. . . . Even a dead mouse in an inmate's meal was only a minimal deprivation without a showing of injury. . . . Drake is not merely complaining about the quality of the food. He claims that the food served does not meet the minimal standards of safety, and he alleges that the food actually prevents his recovery and that it is so routinely unsanitary that it presents an immediate threat to his safety. The constant presence of contaminants can rise to constitutional levels. [Citations omitted]

The plaintiff sufficiently pled deliberate indifference. At 813: The plaintiff "alleges that Aramark failed to rectify deficiencies and failed to ensure appropriate food handling practices and that it knowingly provides food to inmates that is so unsanitary that it presents an immediate risk to Drake's health." It doesn't say that he ever told Aramark about his illness or the quality of the food, but a pleading need only convey enough information that the defendant can understand the gravamen of the complaint. "Furthermore, defendants can be expected to know of systemic conditions."

The risk of future injury pled by the plaintiff is comparable to the risk held to be actionable in *Helling v. McKinney*. At 813: ". . . [A]n even closer analogy exists between unsafe drinking water and unsafe food. In unsafe water cases, courts have allowed claims to proceed without a showing of present injury."

Federal Officials and Prisons/Rehabilitation/Procedural Due Process

Montalvo v. Snyder, 207 F.Supp.2d 581 (E.D.Ky. 2002). The plaintiff complained he was wrongfully classified as a sex offender based on a prior state conviction for criminal sexual abuse. The court finds that federal prison policy supports the classification, and classification decisions do not present constitutional issues.

The classification based on a prior sex offense does not violate the Ex Post Facto Clause because it is not a punishment.

The classification does not deny due process because there is no protected liberty or property interest in avoiding the classification and the injury (community notification) is speculative.

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

Indelicato v. Suarez, 207 F.Supp.2d 216 (S.D.N.Y. 2002). The plaintiff alleged he was placed on "refusal status" for declining to pay more to the Inmate Financial Responsibility Program.

The plaintiff failed to exhaust his administrative remedies. He said he repeatedly asked for the necessary grievance form and did not get it because *inter alia* his counselor was away for two weeks. However, he made no attempt to request the form when she returned, even though there was time to do so, so he failed to make sufficient reasonable efforts to exhaust. Since the remedies are time-barred, the claim is dismissed with prejudice.

The plaintiff also failed to follow the Federal Tort Claims Act administrative claim requirement, and his FTCA claim is dismissed on that ground.

PLRA--In Forma Pauperis Provisions--Filing Fees

Burke v. Helman, 208 F.R.D. 246 (C.D.Ill. 2002). In a multi-plaintiff case, defendants moved to make each plaintiff pay the entire filing fee, relying on *Hubbard v. Haley*. The court points out that *Hubbard* doesn't support their position, since it holds that the PLRA repeals the joinder provisions of the Federal Rules for prisoners and every prisoner has to file a separate lawsuit. The Sixth Circuit has said that multiple plaintiffs should split the filing fee. At 247:

None of these cases hold that multiple plaintiffs in a single suit must each pay the entire filing fee, which is what the defendants ask here. In fact, such an interpretation would arguably contradict the imprecation of the PLRA that "in no event shall the filing fee collected exceed the amount of fees permitted by statute for the commencement of a civil action." 28 U.S.C. §

1915.

> Inference of Congress' intent to repeal Rule 20's joinder provisions from the Act's use of the singular word "plaintiff" (and nothing more) would be unsound statutory construction. "In determining the meaning of any Act of Congress, . . . words importing the singular include and apply to several persons, parties or things." 1 U.S.C. § 1. I therefore conclude that there is no conflict between the PLRA and Fed.R.Civ.P.20, and I further disagree with the prediction that the Seventh Circuit would adopt the reasoning of the *Hubbard* court.

Religion--Services Within Institution/Religion--Practices--Diet/Color of Law/Grievances and Complaints about Prison/Recreation and Exercise/Procedural Due Process--Property

Allah v. al-Hafeez, 208 F.Supp.2d 520 (E.D.Pa. 2002). The plaintiff, a member of the Nation of Islam, complained that he was barred from services for two months after a dispute with the chaplain. The exclusion met the *Turner* standard. At 529: "In a prison setting, avoiding conflict is critical to maintaining order as well as a safe and secure environment." The plaintiff had alternative means of practicing his religion; he could pray, meditate, study, and discuss religion with other inmates. If he had been allowed to attend services, prison officials would have needed to monitor the services more closely, straining prison resources. The plaintiff has not identified a ready alternative.

The court notes (530 n.7) a conflict between circuits as to whether prison chaplains act under color of state law.

At 531: "The State does not have an affirmative duty to provide every prisoner with the clergy person or the service of his or her choice." The plaintiff alleged significant differences between Nation of Islam beliefs and those of the prison chaplain; defendants said their policy was to keep to a minimum the number of separate inmate religious groups, since having too much fragmentation "was perceived to permit or encourage gang activity and inmate leadership which contributed to incidents of unrest." Prisoners can't be allowed to lead religious groups because their position of authority could be used to exploit others. Defendants' policy of neither recognizing a separate NOI group or hiring another minister meets the *Turner* standard.

The policy prohibiting group exercise in the yard is upheld under the *Turner* standard. Defendants' policy allows no more than 10 inmates in a group in the yard; the purpose is to avoid prisoners' congregating where they cannot be readily overheard. Monitoring larger groups would strain prison resources.

The court rejects the plaintiffs' claim that he received retaliatory disciplinary charges as a result of his complaints, they followed his grievances by two or three months, and he has no other evidence of causal connection. In any case, the defendants showed that they would have taken the same action anyway. Apparently the court relies on the disciplinary reports themselves (i.e., their recitation of the plaintiff's conduct) as sufficient evidence that the defendants would have done the same thing anyway.

Rehabilitation/Mental Health Care/Statutes of Limitations/Equal Protection/Pre-Trial Detention/Transportation to Court

Munoz v. Kolender, 208 F.Supp.2d 1125 (S.D.Cal. 2002). The plaintiff was held after the expiration of his sentence pursuant to the state Sexually Violent Predators Act. He spent some time in a county jail after that point, in connection with hearings on his commitment, and alleges that such confinement is unconstitutional.

The plaintiff was not denied equal protection because sexually violent predators are not similarly situated to others civilly committed. Housing of these civilly committed persons in county jails is not unconstitutional because it is implicitly contemplated by the state statute and "the need to safely produce dangerous detainees for judicial proceedings and associated logistical challenges support the use of local law enforcement detention facilities for that purpose and do not run afoul of any constitutional right Munoz has identified." (1144)

PLRA--Exhaustion of Administrative Remedies

Rodriguez v. Hahn, 209 F.Supp.2d 344 (S.D.N.Y. 2002) (Marrero, J.). The plaintiff did not grieve his medical care complaint, so he failed to exhaust. He grieved and appealed his use of force case, but failed to exhaust because *he did not show that he had received a decision.* The court does not discuss and it can't be determined from the opinion how long he waited for a decision; the court simply says "there must be a final disposition from CORC before such remedies are considered exhausted" (348).

Pleading/Statutes of Limitations

Mosley v. Jablonsky, 209 F.R.D. 48 (E.D.N.Y. 2002) (Wall, M.J.). The plaintiff sued over excessive force and now seeks to amend to add new defendants after the statute of limitations had run.

Claims against new defendants relate back for limitations purposes only if they were not named because of a mistake (i.e., not because their identities weren't known). There is no mistake of fact here, since the plaintiff clearly knew their identities. However, the rule also allows for mistakes of law, and the plaintiff appears to have made them, in that he was apparently not aware that he needed to list individuals in the caption of his complaint to make them parties, or that he needed to make allegations about municipal defendants in order to assert a *Monell* claim.

Rule 15(c) also requires that the defendants have notice of the action and that but for an error they would have been sued. They almost certainly knew this, since they would have to have been consulted or subject to discovery in connection with the defendants who were named, and knowledge of the pendency of an action can be imputed to a new defendant where the defendant's attorney knew that the additional defendant would be added. The Nassau County Attorney's Office "should have known that, given the deficiencies of the original complaint," the new defendants would be named, and would be added when the mispleading became evident, except for one who was not alleged actually to have taken part in the beating and had no reason to think he would be joined.

Protection from Inmate Assault/Class Actions--Certification of Classes

Skinner v. Uphoff, 209 F.R.D. 484 (D.Wyo. 2002). The plaintiff alleged that defendants' policies, practices, and customs created an unreasonable risk of assault, injury, and death at the hands of other prisoners. These include inadequate staffing, inadequate training, failure to investigate inmate assaults and assess possible remedial action, and failure to ensure reporting and documentation of threats. The plaintiff seeks damages for himself and injunctive relief for himself and all other prisoners.

The fact that the state and the Department of Justice have already entered into a settlement agreement addressing inmate-inmate assaults does not preclude class certification. (Plaintiffs argued that "the report was too vague and general to effect any real changes.") The court conditionally certifies the class and says it will revisit certification at the time of the dispositive motions hearing.

Publications/Deference

Dixon v. Kirby, 210 F.Supp.2d 792 (S.D.W.Va. 2002). A prison rule prohibiting prisoners from receiving catalogs does not violate the Constitution. The justification was that permitting catalogs on an "unlimited, unrestricted basis" would swamp the mailrooms in sheer volume, especially since they read and monitor the mail. The defendants stated that they make selected catalogs (J.C. Penney, Land's End) available in the prison commissary and inmates may "suggest" additional catalogs.

There is a valid, rational connection between prohibiting catalogs and the legitimate interest in avoiding overwhelming the mail rooms (also security interests in avoiding smuggling and fires, which the court picks up from other cases and not the defendants' representations). The plaintiff has alternatives, since catalogs are made available in the commissary. Accommodating the plaintiffs' desire to receive catalogs personally would have a major impact on prison staff and resources. The "ready, cost-effective and acceptable alternative" is exactly what they are doing, making catalogs available in the commissary.

Good Time/Religion/Drug Dependency

Treatment

Nusbaum v. Terrangi, 210 F.Supp.2d 784 (E.D.Va. 2002). Prison officials established a "Therapeutic Community Program" emphasizing religion for persons with a substance abuse history and conditioned good time credits on participating in it. The court previously found an Establishment Clause violation. Now prison officials have revised the program to make it more secular, but the plaintiff complains about its continued religious character.

Applying the *per se* rule against religious coercion rather than the *Lemon v. Kurtzman* test, the court holds that there is still an Establishment Clause violation, since inmates must participate in the Program or lose good conduct credits and be unable to earn good conduct credits, and it retains its religious character. At 789: "It may not be possible, nor even necessary from a First Amendment perspective, to remove all mention of God or religion in discussions related to coping skills and overcoming addictions. Nevertheless, it does not appear from the record that staff members have been intervening to negate any proselytizing."

The relevant law is clearly established based on the prior district court decision from the same institution, which the same defendants did not appeal. To rule otherwise would let defendants avoid liability by never appealing. Nonetheless, the defendants have made a good faith effort to comply, even though they failed, and reasonable officers could have believed their conduct lawful.

Use of Force/PLRA--Termination of Judgments/Judicial Disengagement

Sheppard v. Phoenix, 210 F.Supp.2d 450 (S.D.N.Y. 2002) (Patterson, D.J.). The court terminates a consent decree governing use of force in the Rikers Island Central Punitive Segregation Unit and engages in extensive discussion of the remedial measures, their implementation, and the important role of the "joint expert consultants" named by the parties to monitor and report to the court. It quotes the defendants' characterization approvingly (at 452-53):

> The Stipulation comprises 104 paragraphs covering most aspects of the operation of the CPSU, as well as investigations into uses of force and discipline of staff found guilty of misconduct. Not only have defendants fully implemented the provisions of the Stipulation, but DOC personnel, on their own and in conjunction with the expert consultants, have implemented policies and management structures that have furthered the goals of the Stipulation even though not specifically required by its terms. Likewise, the IG has played an oversight role beyond that specified in the Stipulation, consistent with his responsibilities under the City Charter. In short, the success in the operation of the CPSU is not merely a function of the specific provisions of the Stipulation, but is more fundamentally a function of the commitment of DOC personnel and the IG, assisted by the experts, to undertake the difficult work of institutional reform.

Measures taken under the Stipulation included a new use of force policy, a CPSU operating manual, a revised training curriculum, a protocol for evaluating prisoners' mental fitness for housing in CPSU, orders requiring medical screening before the use of chemical agents and the use of hand-held video cameras for some use of force incidents, detailed screening procedures and performance reviews for CPSU staff, protocols for preparing use of force reports, maintenance of a special unit to investigate CPSU use of force, and maintenance and expansion of a wall mounted camera system. In addition, defendants implemented a "progressive inmate disciplinary system" (an incentive program providing privileges for good behavior), a cell study program, segregation of the most problematic and assaultive inmates, measures to deal with refusal to close food slots, assignment of staff to address social services issues, intensive monitoring and tours by the Inspector General's staff. Backlogs of investigative and disciplinary cases were cleared up. Disciplinary penalty guidelines were promulgated.

The court states that the goals of the stipulation have been met, as demonstrated by sharp declines in serious use of force incidents, incidents of self-mutilation, inmate grievances, and staff sick days and compensation claims. Since there is no "current and ongoing violation of the

plaintiff class' constitutional rights" and "the control mechanisms, including departmental and independent oversight, are in place to ensure continued safe operation of the CPSU" (460), the court ends the injunction.

The plaintiffs did not oppose termination, and no formal PLRA motion was filed.

NON-PRISON CASE

Use of Force--Restraints/Qualified Immunity

Threlkeld v. White Castle Systems, Inc., 201 F.Supp.2d 834 (N.D.Ill. 2002). Defendant police officers are not entitled to summary judgment on the plaintiff's claim of excessively tight handcuffing in light of evidence that the cuffs left a mark visible nearly two years later and continuing pain in the plaintiff's wrists; there is no evidence that the plaintiff resisted; the officers did nothing in response to her complaint of pain, not even checking how tight they were. At 841: "A reasonable jury could conclude here that the Officers placed the handcuffs tighter than was reasonably necessary under the circumstances, and that their indifference to Ms. Threlkeld's complaints led to long-term injuries to her wrists."

Defendants are not entitled to summary judgment on qualified immunity absent more information about the training they received and the circumstances of the cuffing.

Know Your Rights While in Prison

Now available on the ACLU's website at www.aclu.org/Prisons/PrisonsMain.cfm is the National Prison Project's latest series of fact sheets on prisoner rights. The information can be easily downloaded by prisoners' friends and family and then mailed to their loved ones in prison. Topics covered include:

Disabled Prisoners
Excessive Heat/Cold in Prison
Exposure to Environmental Hazards
Transfers
Disciplinary Sanctions
Mail
Prison Law Libraries
Medical Care
The Prison Litigation Reform Act
Visitation
Smoking

American Civil Liberties Union Foundation
National Prison Project
733 15th Street, NW, Suite 620
Washington, DC 20005

Non-Profit
U.S. Postage
PAID
Permit No. 5248
Washington, DC