ACLU AMERICAN CIVIL LIBERTIES UNION FOUNDATION NATIONAL PRISON PROJECT

JOURNAL

Challenging Conditions of Confinement at Mississippi's Supermax

By Margaret Winter, Associate Director, ACLU National Prison Project

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Mississippi State Penitentiary, known for nearly a century as the notorious "Parchman Farm," grew out of the Reconstruction era movement to restore white supremacy and ensure a source of cheap free labor to replace slave labor. It was set on 20,000 acres in the Mississippi Delta, and in the words of the state's Governor in 1903 it was run "like an efficient slave plantation," in order to provide young black men with the "proper discipline, strong work habits, and respect for white authority."

For most of the twentieth century Parchman Farm continued to function as a virtual slave plantation, complete with a small army of "trusty shooters," rifle-toting inmates who were overseers for prisoners working in the fields and throughout the prison camp. But in 1971 four prisoners brought suit in federal court to challenge conditions at the Farm. That case was *Gates v. Collier*, and in 1972 the presiding judge found that the mistreatment of prisoners at Parchman was an "offense to present-day concepts of decency and human dignity". *Gates*, 349 F. Supp 881, 895 (N.D. Miss. 1972). The judge ordered an immediate end to all of the unconstitutional conditions and practices – including punishment by putting prisoners naked in a dark hole without a toilet, or by "beating, shooting, administering milk of magnesia, or stripping inmates of their clothes, turning fans on inmates while they are naked and wet, depriving inmates of mattresses, hygienic materials and/or adequate food, handcuffing or otherwise binding inmates to fences, bars, or other fixtures, using a cattle prod to keep inmates standing or moving, or forcing inmates to stand, sit or lie on crates, stumps or otherwise maintain awkward positions for prolonged periods." *Id*. at 900

Big changes resulted from the decree in *Gates v. Collier* and from subsequent enforcement activities over the years. But eventually, active independent monitoring stopped and horrific conditions again prevailed in many parts of the prison, including Unit 32, Mississippi's supermaximum security prison at Parchman.

In January 2002, prisoners on Mississippi's death row, which is located inside Unit 32, went on a hunger strike to protest conditions of confinement. They described profound isolation, unrelieved idleness and monotony, denial of exercise, intolerable stench and pervasive filth, grossly malfunctioning plumbing, and constant exposure to human ex-

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Mississippi State Penitentiary at Parchman

crement. Each and every cell had a "ping-pong" toilet, allowing waste from one cell to back up into the toilet in the adjoining cell. The temperatures in the cells during the long Delta summers were lethal, with heat indexes, we later proved, of over 130 degrees Fahrenheit.

The cells were so infested with mosquitoes that inmates had to keep their windows closed and their bodies completely covered even in the hottest weather. Leaking rain water and foul water from flooded toilets soaked their beds and personal items; they weren't provided clean water, soap, and other basic cleaning supplies, even when they were moved into a cell smeared with excrement by the previous tenants.

Lighting in the cells was so dim that the prisoners couldn't see to read, write, groom themselves or clean their cells. They were denied basic medical, dental and mental health care. They were exposed day and night to the screams, ravings, and hallucinations of severely mentally ill inmates in adjoining cells.

The ACLU decided to take the prisoners' case, knowing that without a doubt this was going to be a hard case in many ways. There is little sympathy for death-sentenced prisoners in the U.S., and in Mississippi it is widely considered altogether fitting that the prisoners should suffer as much as possible before their execution. Holland & Knight, which has one of the best pro bono programs of any law firm in the nation, agreed to co-counsel the case with us.

We filed the Complaint and Motion for Class Certification in July 2002, with an emergency motion for a court order directing Mississippi Department of Corrections to let us tour death row with our medical, mental health, corrections and environmental experts. The judge granted our motion and in early August plaintiffs' lawyers and experts met in Clarksdale, the Birthplace of the Blues, a few miles north of Parchman.

The next day we arrived at the prison at dawn and toured Death Row until past eleven o'clock that night. That long day at the prison proved to us that the prisoners hadn't exaggerated about the hellish conditions in Unit 32. We marveled that anyone could be confined there without going insane.

One of the men we interviewed was our lead plaintiff, Willie Russell. An imposing man, 6'7" tall Willie was being held in a "special punishment cell" covered by a Lexan door, which cut off virtually all airflow to the cell. He was removed from the cell for a few minutes so that we could enter it one by one. Our medical expert said afterwards, "It was just like getting into a car parked in the hot sun and sitting with the windows rolled up. I couldn't understand how anyone could be locked up in that hot box for

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any length of time without losing control."

A few days later, we filed a motion for expedited discovery and trial, which the judge granted. We went to trial in February 2003. The Honorable Jerry A. Davis took care to appear impassive, but there were moments during descriptions of sane men being driven raving mad by the conditions in Unit 32, when he was visibly moved. In May 2003 he entered an opinion and far-reaching injunction granting most of the relief we had asked for. The Fifth Circuit issued a unanimous decision upholding, with a few minor exceptions, all the relief ordered by Judge Davis. *Gates v. Cook,* 376 F.3d 323 (5th Cir. 2004).

As soon as the Fifth Circuit issued its decision, we knew it was time to redeem the pledge we had made to ourselves and to the prisoners: to extend the relief we had won for the death row prisoners to the other 1,000 men in Unit 32. The lethal heat, the filth and stench, the malfunctioning plumbing, the lack of access to exercise, fresh air, and basic medical and mental health care were just as bad as in Death Row; but in some ways conditions were even worse.

The men in Unit 32 in administrative segregation were all permanently locked down in even deeper isolation than on death row. There was a pervasive culture of violence and excessive force. Corrections officers gratuitously beat prisoners already in full restraint gear. Takedown teams forcibly extracted shackled prisoners from their cells, sprayed them with chemical agents that cause vomiting and shortness of breath, and then assaulted them again.

The combination of all these conditions was causing serious mental illness to emerge in previously healthy prisoners, and causing psychosis and complete mental breakdown in less healthy prisoners. Suicides and attempted suicides occurred with alarming frequency.

In some ways, this case would be easy since all of the horrendous conditions we had successfully challenged in the death row case were identical throughout the rest of Unit 32. We knew where the bodies were buried, so to speak, and we had a detailed road-map for trying those issues. The problem was that the additional issues in Unit 32 would not be so easy to resolve: chief among them, the fundamental problem that the overwhelming majority of the 1,000 men in Unit 32 did not belong there at all.

Although Unit 32 is supposedly used to incarcerate the most dangerous and incorrigible offenders in the State, in reality the vast majority of the men housed in Unit 32 – for years, sometimes for decades – did not have the kind of criminal or institutional history that would justify incarceration under "supermax" conditions. Many prisoners were placed in Unit 32 simply because they had special medical needs, were severely mentally ill, or had requested protective custody. And once classified to Unit 32, there was no leaving. Hundreds of prisoners were doomed to stay there forever. "Abandon all hope, ye who enter here" might as well have been carved over the entry gate.

So the Unit 32 case wasn't just a "simple" Eighth Amendment case as the Death Row case had been; it was to be, in addition, and above all, a challenge to classification – to the arbitrary assignment and retention of prisoners in permanent administrative segregation. And that was a daunting task: it was firmly established in the Fifth Circuit that prison officials had essentially unfettered discretion to classify prisoners and to confine them to whatever degree of isolation they saw fit.

We filed the Complaint on June 22, 2005. In August, Judge Davis told the parties that we ought to be able to resolve the Unit 32 case without further discovery or litigation, and asked if we would be willing to sit down together to negotiate. He made it clear that his opinion of the facts had not changed since the death row trial, and that he wanted to extend his remedial order to all of Unit 32. In November 2005, we all met for settlement discussions in Judge Davis' courtroom. By the end of the day we had hammered out a proposed consent decree.

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The proposed settlement incorporated all of the relief upheld by the Fifth Circuit in the death row case, and on that foundation added provisions on excessive force, procedural due process, and classification. The provision on classification was only sixty-five words long. It read, simply, "Defendants will formulate and implement a plan, clearly communicated to prisoners, whereby all prisoners who are assigned to Unit 32 and not sentenced to death may, through good behavior and a step-down system, earn their way to less restrictive housing. The Parties agree to work together to prepare a written plan to effectuate the goals of this paragraph and to present the agreed-upon plan to the Court for approval."

That brief paragraph looked like an awfully fragile little vehicle to carry us to our goal – nothing less than emptying Mississippi's super-max prison of all but a small fraction of the 1,000 prisoners incarcerated there; but we figured this was likely to be the best shot we would ever have. The guarantee that all prisoners in Unit 32 "may, through good behavior, earn their way to less restrictive housing" was the very essence of what the men in Unit 32 wanted.

Judge Davis approved the consent decree, noting that the relief we had obtained for the class went well beyond what he could have ordered had we gone to trial and won. But winning this piece of paper was only the first step – now we had to begin the task of monitoring and enforcement to transform those paper rights into a living reality.

At the core of the problem was Mississippi Department of Corrections' (MDOC) classification system. Our classification expert, Dr. James Austin, did an analysis of the population in Unit 32 and concluded that about eighty percent of the 1000 men did not belong in administrative segregation at all, and should be released from lockdown into the general prison population.

In December 2006, we met with MDOC's Commissioner and classification officials. Dr. Austin presented his findings to MDOC and explained that prisoners should be housed in administrative segregation only when there is evidence of the prisoner's potential for violence resulting in serious injury to others, based on recent acts of assault while in custody. He proposed collaborating with MDOC to help them reform their system within a twelve-month period.

> *"Prisoners with untreated mental illness became more disturbed in isolated confinement, their illness led them to break rules, then they would be routinely sprayed with pepper spray and forcibly subdued, and then they were thrown into unbelievably harsh 'special management isolation cells' where their mental health deteriorated to the point of no return."*
> -Margaret Winter

The Commissioner accepted this proposal, and promptly established a Classification Task Force under the direction of Deputy Commissioner Sparkman to work closely with Dr. Austin and other key MDOC officials. The Classification Task Force spent the next several months considering options for reform of the system.

But we were having less success negotiating with MDOC on mental health. The mental health issues were too complex and far-reaching for any simple fix. The psychosis-inducing effect of permanent administrative segregation, the culture of excessive force in Unit 32, and the lack of basic mental health treatment, made Unit 32 an incubator for serious mental illness and violence. Prisoners with untreated mental illness became more disturbed in isolated confinement, then they would be routinely pepper-sprayed and forcibly subdued, and thrown into unbelievably harsh "special management isolation cells" where their mental health deteriorated to the point of no return.

In April 2007, we had an evidentiary hearing on the mental health issues. Dr. Terry

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Kupers gave vivid testimony about the crazy-making conditions in Unit 32. One case he described was that of James C. James had a long history of bizarre behaviors which the MDOC psychiatrist characterized as merely "manipulative," and which security staff punished with extreme and increasing harshness and brutality. Mr. C's behavior became more and more desperate and he repeatedly tried to kill himself. At last, one of his botched suicide attempts, by hanging, left him in a permanent vegetative state. Dr. Kupers testified that the very same conditions that resulted in this tragedy were bound to result in dozens more such cases unless those conditions were changed.

At the end of six hours of such testimony, Judge Davis said he had had enough. He called the lawyers into chambers and told the state something had to be done, and told us we should start negotiating. We told Judge Davis that the mental health issues could not be solved without addressing classification and use of force provisions issues, too. When we left his courtroom that day, Judge Davis had made it clear to the parties that he feared Unit 32 was a tinder box, about to explode.

And only a few weeks later, Unit 32 did explode. Beginning at the end of May 2007, and continuing throughout June, July, and into August, there was an outburst of gang warfare in which many inmates were stabbed and some died. There was a suicide. A gun was found in one prisoner's cell.

The bloody conflict had a devastating effect on the entire population of Unit 32. The institution was under such stress that for weeks on end during high summer prisoners weren't even let out of their cells to shower or for their daily allotted hour of exercise. There was a breakdown in basic services such as sanitation, maintenance of plumbing, and food service. A mood of anxiety and despair prevailed among the prisoners. The legal team was frustrated and essentially helpless. It appeared that the tremendous progress we had been achieving had been not only halted but reversed.

But then there was a really extraordinary development. Commissioner Epps, instead of allowing MDOC to retreat into its old ways in the face of this deep crisis in security, decided to plow forward to implement the recommendations of Dr. Austin and the Classification Task Force. Deputy Commissioner Sparkman left his home in Jackson in order to be at Parchman round the clock. Sparkman essentially lived in the prison for the next several weeks, overseeing the release of several hundred carefully selected men into general population, walking among them, speaking and interacting with them, getting to know their histories, and showing his staff at the prison that these men were not so dangerous that they needed to be in 23 hour a day lockdown.

Within a very few months, a striking transformation of Unit 32 had taken place. More than eighty percent of Unit 32's total population had been released from administrative segregation. Prisoners with serious mental illness were no longer locked down but were being treated at a psychiatric hospital. Program and recreation areas were being built at Unit 32. General population housing areas had been created, and the inmates were spending several hours a day out of their cells. The Task Force was developing a clearly defined incentive program that would allow prisoners to earn their return to the general population as they met behavior-based criteria. Plans were in the works to offer remedial classes and college courses. There were plans to allow contact visits for the first time. A dining hall was being constructed so that for the first time prisoners would be able to eat meals together rather than in their cells. Prisoners were being allowed for the first time to play sports and to recreate together.

Most remarkable of all, violence and incidents of use of force had plummeted. Monthly statistics showed a drop of almost seventy per cent in incidents of use of force, coinciding with the reforms of the classification system.

When we visited Parchman in October

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2007 and entered the courtyard of Unit 32, we came upon an amazing, almost unbelievable, scene: Dozens of prisoners laughing and shouting as they played basketball in the sunshine.

In November, 2007, we entered into a far-reaching supplemental consent decree with MDOC on classification, mental health and use of force, and took it to Judge Davis in Aberdeen to have him approve the settlement. He greeted us all by saying, "With this Consent Decree I've seen what y'all have been able to agree to, I'm just floored, candidly. I just think it's a tremendous step forward in corrections."

Presley v. Epps, 4:05-cv-148 (United States District Court, Northern District of Mississippi).

Margaret Winter is the lead attorney from the NPP fighting to improve conditions at Mississippi's Parchman Facility.

ACLU Challenges Appalling Health Care at Ely State Prison in Nevada

By Amy Fettig, Staff Attorney, ACLU National Prison Project

Prisoners' letters kept pouring in, each describing an untreated medical problem more horrible than the last. The ACLU of Nevada was convinced that the State's correctional medical care was in crisis. And one of the biggest problems was clearly the care prisoners received – or didn't receive – at Ely State Prison (ESP). ESP is Nevada's only maximum security prison and the site of its death row. Located in the remote mountain town of Ely, Nevada, the facility houses over 1000 men.

The Federal Defender of Nevada, the government agency tasked with defending many of the State's death row inmates, also found that their clients were often so sick and maltreated by the medical staff at ESP that the men could no longer assist in their own defense. In a state where 10 of the 12 men executed by the government have actually volunteered to waive their appeals and proceed straight to lethal injection – the highest rate of "volunteerism" in the nation – the debilitating impact of medical abuse on prisoners was all the more troubling. Seeking relief for their clients, the Federal Defender's office requested the court to intervene in the provision of medical care at ESP, to no avail.

Public attention in Nevada also focused on the issue in the spring of 2006 when the Legislative Commission's Subcommittee to Study Sentencing and Pardons, Parole and Probation heard testimony from a number of Nevada citizens regarding grossly inadequate medical care for seriously ill prisoners, in particular at ESP. As a result of this hearing, on October 6, 2006, the Subcommittee sent a formal request to the Governor's Office to have the Executive Branch carry out an evaluation of the adequacy of inmate access to medical care in Nevada. But the Governor's Office took no action on the Legislature's request.

Faced with governmental inaction and

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indifference, the ACLU of Nevada and Federal Defender sought the assistance of lawyers from the National Prison Project of the ACLU (NPP). In early 2007 NPP began a formal investigation of medical care at ESP.

Initial findings of the investigation revealed deprivations of medical care at ESP so extreme that NPP's lawyer believed that all the men confined there were at significant risk of serious injury, great physical pain and suffering, and even premature death. The 1000 man facility had no medical doctor on staff except a psychiatrist, and instead relied on a Physician's Assistant (PA) for most care. This PA denied a request for pain medications by a prisoner who has advanced joint disease and suffers crippling pain by stating on a medical kite, "nope, gonna let you suffer." On another medical request the same PA wrote to a prisoner that he was being put back on an allegedly dangerous medication so that his "chances of expiring sooner are increased." The level of horrific medical care at ESP was as bad as any NPP lawyers had seen in any of the systems they monitor around the nation.

Given the urgency of the problems at ESP, in May 2007, the ACLU informed the Director of the Nevada Department of Corrections (NDOC), Howard Skolnik, of the grave medical situation at ESP and the need for immediate intervention.

The ACLU then retained a medical expert, Dr. William K. Noel of Boise, Idaho, to review prisoner medical records at ESP. Dr. Noel reviewed the medical records of the thirty-five ESP prisoners that Defendant Skolnik made available for his review, toured the facility speaking with prisoners and medical staff, and produced an expert report on his findings (the "Noel Report"). In December 2007 this report was promptly provided to Director Skolnik and state leaders.

The Noel Report found overwhelming evidence that the grossest possible systemic medical abuses at ESP are occurring and have been occurring there for years. Dr. Noel's review of the records found that not only are prisoners at ESP in imminent danger of death or grave irreparable medical injury, but that they are being callously and wantonly subjected to needless physical agony inflicted by grossly improper medical treatment. Moreover, the medical records themselves were so poorly and unprofessionally maintained that he found the charting practices alone constitute a danger to prisoners at ESP. The Noel Report also found that at least one man has already died an unnecessary, slow and agonizing death and that in all likelihood there will be more such deaths and unnecessary suffering if immediate systemic changes are not made in the provision of health care at ESP.

Among the cases Dr. Noel reviewed is that of Patrick Cavanaugh, who was an insulin-dependent diabetic. He lived in the ESP infirmary for at least two years before his agonizing death on April 10, 2006. Mr. Cavanaugh's cause of death was complications of diabetes mellitus, peripheral gangrene of both lower extremities, hypertension, and congestive heart failure – all untreated. In the best of circumstances (hospitalization, quick antibiotics, and early detection) gangrene has a 30% mortality rate, but untreated, it is essentially 100% fatal. Mr. Cavanaugh received almost no treatment for his illnesses, so his slow, painful death in the ESP infirmary was virtually assured. Given the profound and unmistakable smell of putrefying flesh, there can be no question that every medical provider and correctional officer in that infirmary was acutely aware of Patrick Cavanaugh's condition.

Although Mr. Cavanaugh was an insulin-dependent diabetic, there is an order in his chart stopping all his medications, including his insulin, three years before his death. The medical order is unsigned and there is no indication as to why this was done. Insulin was ordered sporadi-

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cally thereafter but for the next three years until his death was never given. There is no indication that consideration was ever given to surgically removing the gangrenous limbs. This procedure could have saved Mr. Cavanaugh's life. Instead, ESP medical staff literally left him to rot to death.

The records suggest that Mr. Cavanaugh "would not let" people come into his cell and that he started refusing all medications except for aspirin. Even though progress notes in his chart detail increasing paranoia and probable dementia, and even though gangrene is known to derange the mind, there was no order to force life-sustaining medications.

Although a signed and notarized full, non-limited Power of Attorney Authorization giving power to a guardian is present in his chart, there is no indication that prison officials ever contacted Mr. Cavanaugh's guardian to advise her of Mr. Cavanaugh's medical condition and the need to administer medications without his consent because of his inability to make medical decisions for himself.

> *"The medical care provided at Ely State Prison amounts to the grossest possible medical malpractice, and the most shocking and callous disregard for human life and human suffering, that I have ever encountered in the medical profession in my thirty-five years of practice."*
> -Dr. William Noel

Even during his last days before death, when an order was given for 5 mgs. of morphine sulfate every 4 to 5 hours to alleviate his terrible pain and suffering, there is no evidence that this order was ever carried out. Patrick Cavanaugh was left to die in prolonged agony, suffering without palliative care.

The Noel Report also analyzed the case of Greg Leonard, who suffers from HIV, diabetes mellitus, hypertension, two spinal injuries and a botched back surgery resulting in chronic, debilitating pain, and kidney disease. Despite Mr. Leonard's severe and chronic pain, he receives almost no treatment for that pain. He is also an insulin-dependent diabetic who needs daily sugar tests, but he has not received regular sugar checks since 2003. Moreover, when ESP medical placed Mr. Leonard on insulin on April 2, 2003, he was left on metformin (oral agent to lower blood sugar) even though the metformin can cause ketoacidosis in insulin-dependent diabetics.

Like most ESP medical records, Mr. Leonard's chart is frequently illegible. Vital signs are rarely taken or recorded. Like many ESP prisoners, Mr. Leonard also experienced major problems with his multiple medications at ESP. He received his HIV medications sporadically which undermines their efficacy and puts him at great risk for resistance to entire classes of HIV medications, thereby dangerously limiting treatment options. In addition, although Mr. Leonard's health requires tight control of his blood pressure, his prescriptions are rarely refilled in a timely manner and he consistently runs out of his medications despite his vigilant efforts to obtain refills without a lapse. The Noel Report noted that it is astonishing that Mr. Leonard is still alive, given the grossly inadequate medical treatment revealed in his records.

The Noel Report further examined the case of John Snow, an ESP prisoner with severe degenerative hip disease and requires surgery. An orthopedist recommended hip surgery for Mr. Snow years ago but this procedure was denied as "not life-threatening." If he is not given surgery, Mr. Snow's bones will eventually wear through his acetabulae, which are the large sockets at the base of the hip bones into which the head of the femur fits. Because of Mr. Snow's condition, he is in constant, excruciating pain but he is given no pain medications. There is no medically justifiable reason for leaving this man in agony.

Another case reviewed in the Noel Re-

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port is that of Robert Ybarra. Mr. Ybarra suffers from deep vein thrombosis (DVT) and chronic, non-healing venous stasis ulcers on both lower legs and ankles. DVT is extremely painful and Ybarra suffers severe and chronic pain that is not treated. Mr. Ybarra's chronic leg ulcers could be easily cured, but instead his open, draining, painful wounds remained untreated for years. Without adequate treatment, he will lose his feet and legs.

Dr. Noel emphasized in his report that the ESP records "show a system that is so broken and dysfunctional that, in my opinion, every one of the prisoners at Ely State Prison who has serious medical needs, or who may develop serious medical needs, is at enormous risk." He further found that "[b]ased on my review of the medical records and my interviews at Ely State Prison, it is my opinion that the medical care provided at Ely State Prison amounts to the grossest possible medical malpractice, and the most shocking and callous disregard for human life and human suffering, that I have ever encountered in the medical profession in my thirty-five years of practice."

After the Noel Report was published in December 2007, the ACLU went to the Board of State Prison Commissioners (the "Board"), the state governmental body responsible for oversight of all prisons in Nevada. In order to avoid prolonged litigation and to try and prevent the further suffering of the men at ESP, the ACLU offered to enter into a Consent Decree with the Board that would allow for neutral medical monitoring, ensure that a full-time, qualified physician was hired to treat men at ESP, and mandate that the Nevada Department of Corrections (NDOC) comply with the nationally recognized correctional health care standards promulgated by the National Commission on Correctional Health Care (NCCHC). The Board rejected this offer.

During the next two months the ACLU attempted to work with the Department of Corrections to find a non-litigation solution to the medical care crisis at ESP. NDOC moved some medically fragile prisoners to other facilities and made a half-hearted attempt to suggest a "neutral" medical expert to evaluate care at ESP. During this time, however, reports of grossly inadequate medical care continued to stream out of ESP. ACLU lawyers concluded that ESP prisoners remained at substantial risk of injury, great physical pain, deterioration of their health, and possibly premature death. Faced with the ongoing, unmet critical health care needs of the prisoners and the unaddressed, systemic deficiencies in the provision of medical services at ESP, ACLU lawyers concluded that a lawsuit was necessary. The urgent problems at Ely required immediate resolution and it was clear that NDOC would not comply with the law and provide prisoners constitutional medical care unless the courts were involved.

On March 6, 2008, the NPP, the ACLU of Nevada, and Holland & Knight LLC, filed a federal civil rights suit in the District of Nevada alleging deliberate indifference to the serious medical needs of all prisoners incarcerated at ESP and seeking declaratory and injunctive relief under the Eighth and Fourteenth Amendments to the United States Constitution.

(Riker, et al. v. Gibbons, et al., 3:08-CV-115-ECR-VPC, United States District Court, District of Nevada)

Amy Fettig, A staff attorney with the National Prison Project, is spearheading the investigation into conditions at Ely State Prison in Nevada

A Fight for Life

Francisco Castaneda testifying before Congress

In 2006, the ACLU first came in contact with Francisco Castaneda, a detainee at the San Diego Correctional Facility (SDCF) in the custody of U.S. Immigration and Customs Enforcement (ICE). SDCF is a detention center run by Corrections Corporation of America, Inc, the nation's largest for-profit correctional services provider. Throughout his eleven months in immigration custody, Mr. Castaneda suffered from an extremely painful lesion on his penis that many doctors feared was cancer. Despite the opinions of medical experts that Mr. Castaneda required a biopsy, immigration authorities denied this request, stating that it was an "elective procedure" that could be done once he was released from custody or deported. In the meantime, Mr. Castaneda experienced constant pain, bleeding and discharge.

After strong advocacy by the ACLU, Mr. Castaneda was ultimately released from immigration custody in February 2007. Within a matter of days, he was diagnosed with metastatic penile cancer. In the year following his release, Mr. Castaneda became very outspoken about the poor treatment that he and other detainees received in immigration custody. Mr. Castaneda's personal story was featured in several newspaper articles, and on October 4, 2007, he appeared before Congress to testify about this critical issue. His congressional testimony is presented below.

Presentation on Medical Care and Deaths in ICE Custody

by Francisco Castaneda

For a hearing on "Detention and Removal: Immigration Detainee Medical Care" before the House Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law

October 4, 2007

Good afternoon. Thank you to Chairwoman Lofgren for inviting me, and to the Immigration Subcommittee for holding this hearing. My name is Francisco Castaneda. I was held in immigration detention for over 10 months, and was just released this past February due to my medical condition, after many letters from the ACLU were sent on my behalf.

First, I would like to tell you a little bit about myself. I am 35 years old. I came to the United States from El Salvador with my mother and siblings when I was ten years old to escape from the civil war. My family moved to Los Angeles where I went to school and began working at the age of 17. My mother died of cancer when I was pretty young, before she was able to get us all legal immigration status. After my mom died, I looked to my community for support, and found myself wrapped up in drugs instead, which, today, I deeply regret. I worked, doing construction, up until I went to prison on a drug charge, where I spent just four months before I was transferred into ICE detention.

When I entered ICE custody at the San Diego Correctional Facility in March 2006, I immediately told them I had a very painful lesion on my penis. After a day or two, Dr. Walker examined me and recognized that the lesion was a problem. He said he would request that I see a specialist right away.

But instead of sending me directly to a

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specialist, I was forced to wait, and wait, and wait, and wait. All the while, my pain got worse. It started to bleed even more and smell really bad. I also had discharge coming out of it. Apparently the Division of Immigration Health Services was deciding whether to grant the request. Dr. Walker submitted the request more than once and, after more than a month, it was finally granted. When I saw an oncologist he told me it might be cancer and I needed a biopsy. He offered to admit me to a hospital immediately for the biopsy, but ICE refused to permit a biopsy and told the oncologist that they wanted to try a more cost-effective treatment.

I was then referred to a urologist, Dr. Masters, but I only got to see that urologist two-and-a-half months later, after I filed sick call requests and grievances with ICE. The urologist said I needed a circumcision to remove the lesion and stop the pain and bleeding, and also said I needed a biopsy to figure out if I had cancer. ICE and the Division of Immigration Health Services never did either of those things. They said that it was "elective surgery."

My pain was getting worse by the day. When you are in detention, you can't help yourself. I knew I had a problem, but with everything you have to ask for help. I tried to get medical help every day. Sometimes I would show the guards my underwear with blood in it to get them to take me to medical, but then they would say they couldn't do anything for me. All they gave me was Motrin and other pain pills. At one point, the doctor gave me special permission to have more clean underwear and bedsheets, because I was getting blood on everything. A guard from my unit once told me he would pray for me because he could see how much I was suffering.

Several more requests for a biopsy were denied. They told me in writing that I could get the surgery after I left the facility – when I was deported.

In late November 2006, I was transferred from San Diego to the San Pedro Service Processing Center. When I got there I immediately filed sick call slips about my problem. After a few days I saw the doctors. I told them about my pain and showed them the blood in my boxer shorts and asked them to examine my penis. They didn't even look at it -- one of them said I couldn't be helped because I needed "elective surgery." They just gave me more pain pills.

In the middle of December, I noticed a lump in my groin. It hurt a lot and was a little bit smaller than a fist, so I filed a sick call slip about it. Another detainee told me it could be a hernia. I never got any treatment for it, and I later found out that was a tumor, because the cancer had already spread.

In the beginning of January, one of the guards told me I was going to Harbor-UCLA Medical Center. They put me in handcuffs and leg shackles and drove me in a van to the emergency room. When I got there the officer walked all around trying to find someone to see me, but he was told I would have to wait in line like everyone else. After about an hour of following him all chained up, he took me back to San Pedro and I didn't get to see anyone.

Back when I was in San Diego, another detainee gave me the phone number for the ACLU and said they might be able to help me. I called them, and spoke with Mr. Tom Jawetz, here, and told him my story and about how much pain I was in. When I got to San Pedro he sent letters and called the people at the facility to try to help me get medical care. Finally, around the end of January, immigration agreed to let me get a biopsy. They made an appointment with the doctor, but just before the surgery they released me from custody. A doctor actually walked me out of San Pedro and told me I was released because of my serious medical condition and he encouraged me to get medical attention.

The first thing I did was call the doctor to see whether I could still get my biopsy. The secretary told me ICE had cancelled it. I then went

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A Fight for Life

back to the emergency room at Harbor-UCLA—the same place they had left me in the waiting room in shackles—and I waited to see a doctor and finally get my biopsy. A few days later, the doctor told me that I had cancer, and would have to have surgery right away to remove my penis. He said if I didn't have the surgery I would be dead within one year. On February 14—Valentine's Day—nine days after ICE released me from custody, I had the surgery to remove my penis. Since then, I have been through five aggressive week-long rounds of chemotherapy. Doctors said my cancer spreads very fast—it had already spread to my lymph nodes and maybe my stomach.

I'm sure you can at least imagine some of how this feels. I am a 35-year-old man without a penis with my life on the line. I have a young daughter, Vanessa, who is only 14. She is here with me today because she wanted to support me – and because I wanted her to see her father do something for the greater good, so that she will have that memory of me. The thought that her pain – and mine – could have been avoided almost makes this too much to bear.

I had to be here today because I am not the only one who didn't get the medical care I needed. It was routine for detainees to have to wait weeks or months to get even basic care. Who knows how many tragic endings can be avoided if ICE will only remember that, regardless of why a person is in detention and regardless of where they will end up, they are still human and deserve basic, humane medical care.

In many ways, it's too late for me. Short of a miracle, the most I can hope for are some good days with Vanessa and justice. My doctors are working on the good days and, thankfully, my attorneys at Public Justice here in Washington, Mr. Conal Doyle in California, and the ACLU are working on the justice – not just for me, but for the many others who are suffering and will never get help unless ICE is forced to make major changes in the medical care provided to immigrant detainees.

I am here to ask each of you, members of Congress, to bring an end to the unnecessary suffering that I, and too many others, have been forced to endure in ICE detention.

Thank you for your time.

Francisco Castaneda died on February 16, 2008, a year and eleven days after he was released from ICE custody. He will be remembered warmly as a courageous and perseverant advocate for those who suffered, and continue to suffer, unnecessarily, in ICE detention.

Know Your Rights: Religious Freedom

The free exercise of religion principally derives protection from some combination of three federal legal sources: (1) the Free Exercise Clause of the First Amendment to the U.S. Constitution; (2) the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. § 2000bb *et seq*.; and (3) the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. § 2000cc *et seq*. While the Supreme Court has substantially restricted the rights of prisoners when interpreting the First Amendment, Congress has made it easier for prisoners to win cases regarding religious freedom by passing RFRA and RLUIPA.

THE FREE EXERCISE CLAUSE:

When is Religious Exercise Constitutionally Protected?

Generally, beliefs that are "religious" and "sincerely held" are protected by the Free Exercise Clause of the First Amendment to the United States Constitution.

Courts often disagree about what qualifies as a religion or a religious belief. So-called "mainstream" belief systems, such as Christianity, Islam and Judaism, are universally understood to be religions. Less well-known or non-traditional faiths, however, have had less success being recognized as religions. While Rastafari, Native American religions, and various Eastern religions have generally been protected, belief systems such as the Church of the New Song, Satanism, the Aryan Nations, and the Five Percenters have often gone unprotected. The Supreme Court has never defined the term "religion." However, in deciding whether something is a religion, lower courts have asked whether the belief system addresses "fundamental and ultimate questions," is "comprehensive in nature," and presents "certain formal and external signs." *Africa v. Pennsylvania*, 662 F.2d 1025, 1032 (3d Cir. 1981); *see also Dettmer v. Landon*, 799 F.2d 929, 931-32 (4th Cir. 1986). If you want a nontraditional belief system to be recognized as a religion, it may help if you can show how your beliefs are similar to other, better-known religions: Does your religion have many members? Any leaders? A holy book? Other artifacts or symbols? Does it believe in a God or gods? Does it believe that life has a purpose? Does it have a story about the origin of people?

In addition to proving that something is a religion, you must also convince prison administrators or a court that your beliefs are sincerely held. In other words, you must really believe it. In deciding whether a belief is sincere, courts sometimes look to how long a person has believed something and how consistently he or she has followed those beliefs. *See Sourbeer v. Robinson*, 791 F.2d 1094, 1102 (3d Cir. 1986); *Vaughn v. Garrison*, 534 F. Supp. 90, 92 (E.D.N.C. 1981). Just because you have not believed something your entire life, or because you have violated your beliefs in the past, does not automatically mean that a court will find that you are insincere. *See Reed v. Faulkner*, 842 F.2d 960, 963 (7th Cir. 1988); *Weir v. Nix*, 890 F. Supp. 769, 775-76 (S.D. Iowa 1995). However, if you recently converted or if you have repeatedly acted in a manner inconsistent with your beliefs, you will probably have a hard time convincing a court that you are sincere.

When are Prison Restrictions on the Exercise of Religion Constitutionally Permitted?

You have an absolute right to believe anything you want. You do not, however, always have a constitutional right to do things (or not do things) just because of your religious beliefs.

The constitutional right of free exercise does not excuse anyone, including prisoners,

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Know Your Rights: Religious Freedom

from complying with a "neutral" rule (one not intended to restrict religion) of "general applicability" (one that applies to everyone in the same way) simply because it requires them to act in a manner inconsistent with their religious beliefs. *See Employment Div. v. Smith*, 494 U.S. 872, 879 (1990). A rule that applies only to a religious group is not generally applicable. *See Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 543 (1993).

In prison cases, courts permit restrictions on religious exercise as long as such restrictions are "reasonably related to legitimate penological interests." *Turner v. Safley*, 482 U.S. 78, 89 (1987). This standard is not very protective of prisoners' First Amendment rights. In *O'Lone v. Estate of Shabazz*, the Supreme Court upheld two regulations that effectively prohibited Muslim prisoners from attending Friday afternoon congregational services. 482 U.S. 342 (1987). The Court reasoned that although some prisoners were completely unable to attend services, the restrictions were reasonable because prisoners could practice other aspects of their faith. *Id*. at 351-52.

RFRA & RLUIPA: Expanded Statutory Protections for Religious Activities

Congress has passed two statutes providing heightened protection for religious exercise in prison. The Religious Freedom Restoration Act (RFRA) applies to federal and District of Columbia prisoners. *O'Bryan v. Bureau of Prisons*, 349 F.3d 399, 401 (7th Cir. 2003) (federal prisoners); *Kikumura v. Hurley*, 242 F.3d 950, 960 (10th Cir. 2001) (same); *Jama v. U.S.I.N.S.*, 343 F. Supp. 2d 338, 370 (D.N.J. 2004) (immigration detainees); *Gartrell v. Ashcroft*, 191 F. Supp. 2d 23 (D.D.C. 2002) (District of Columbia prisoners). The Religious Land Use and Institutionalized Persons Act (RLUIPA) applies to state or local institutions that receive money from the federal government; this includes most local and every single state prison system. *See Cutter v. Wilkinson*, 544 U.S. 709, 716 n.4 (2005).

Both RFRA and RLUIPA balance a prisoner's right to exercise his or her religion against the government's interests. The general balancing test is that the government may not impose a substantial burden on the religious exercise of prisoners unless that burden (1) is in furtherance of a *compelling governmental interest*; and (2) is the *least restrictive means* of furthering that interest. RLUIPA additionally defines "religious exercise" to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000cc-5 (7)(A).

This test is *more protective* than the *Turner* standard that applies to Free Exercise claims under the First Amendment. Therefore, if a religious practice was protected under the Free Exercise Clause, it will probably be protected under RFRA or RLUIPA. And even if a practice was not protected under the Free Exercise Clause, it may sill be protected under RFRA or RLUIPA. The cases below discuss the application of the First Amendment to various aspects of religious exercise. Cases brought under RFRA and RLUIPA can be expected to yield similar or more favorable results.

Religious foods

Prisoners have enjoyed a fair amount of success with claims protecting religious dietary practices. *Ford v. McGinnis*, 352 F.3d 582, 597 (2d Cir. 2003) ("[A] prisoner has a right to a diet consistent with his or her religious scruples."); *Lomholt v. Holder*, 287 F.3d 683 (8th Cir. 2002) (prisoner's allegation that he was punished for religious fasting stated a First Amendment claim).

Courts have often found that prisoners have a right to avoid eating foods that are forbidden by their religious beliefs. *See Moorish Science Temple of Amer., Inc. v. Smith*, 693 F.2d 987, 990 (2d Cir. 1982). Where reasonable accommodations by the prison can be made to provide religious meals, courts have ordered such

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Know Your Rights: Religious Freedom

diets be made available to prisoners. *See Ashelman v. Wawrzaszek*, 111 F.3d 674, 678 (9th Cir. 1997). Courts have also required accommodations for special religious observances related to meals. *See Makin v. Colorado Dep't of Corrections*, 183 F.3d 1205, 1211-14 (10th Cir. 1999) (failure to accommodate Muslim fasting requirements during Ramadan infringed on First Amendment rights); *Levitan v. Ashcroft*, 281 F.3d 1313, 1322 (D.C. Cir. 2002) (reversing summary judgment for defendants in Catholic prisoners' challenge to denial of communion wine). Some courts have rejected efforts by prison officials to charge prisoners for religious diets. *See Beerheide v. Suthers*, 286 F.3d 1179, 1192 (10th Cir. 2002) (no rational relationship between penological concerns and proposed co-payment for kosher diet).

Prisoners requesting highly individualized diets, however, have rarely been successful. *See DeHart v. Horn*, 390 F.3d 262, 269-72 (3d Cir. 2004).

Religious services

Notwithstanding the Supreme Court's decision in *Estate of Shabazz*, courts have generally protected prisoners from interference with their ability to attend religious services or engage in prayer. *Mayweathers v. Newland*, 258 F.3d 930, 938 (9th Cir. 2001) (upholding injunction against disciplining Muslim prisoners for missing work to attend Friday services); *Omar v. Casterline*, 288 F. Supp. 2d 775, 781 (W.D. La. 2003) (refusal to tell Muslim prisoner the date or time of day to allow him to pray and fast states First Amendment claim); *Youngbear v. Thalacker*, 174 F. Supp. 2d 902, 912-15 (N.D. Iowa 2001) (one year delay in providing sweat lodge for Native American religious activities violates First Amendment).

Sabbath

Courts have also found that restrictions requiring prisoners to violate the Sabbath or other religious duties violate the First Amendment. *McEachin v. McGuinnis*, 357 F.3d 197, 204-05 (2d Cir. 2004) (intentionally giving Muslim prisoner an order during prayer may violate First Amendment); *Hayes v. Long*, 72 F.3d 70 (8th Cir. 1995) (requiring Muslim prisoner to handle pork violated First Amendment); *Murphy v. Carroll*, 202 F. Supp. 2d 421, 423-25 (D. Md. 2002) (prison officials' designation of Saturday as cell-cleaning day violated Free Exercise rights of Orthodox Jewish prisoner).

Religious objects

Courts have often concluded that prison officials may generally ban religious objects if they can make a plausible claim that the objects could pose security problems. *See Spies v. Voinovich*, 173 F.3d 398, 406 (6th Cir. 1999); *Mark v. Nix*, 983 F.2d 138, 139 (8th Cir. 1993). However, prison officials must present evidence that such restrictions responded to valid security concerns. *Boles v. Neet*, 486 F.3d 1177, 1182-83 (10th Cir. 2007). Also, prison officials may not ban some religious objects and not others without any justification. *See Sasnett v. Litscher*, 197 F.3d 290, 292 (7th Cir. 1999) (Free Exercise Clause violated where prison regulation banned the wearing of Protestant crosses but allowed Catholic rosaries without any reasonable justification for distinction). Courts have also concluded that prison officials are not required to provide religious objects as long as prisoners are free to purchase or obtain the objects themselves. *See Frank v. Terrell*, 858 F.2d 1090, 1091 (5th Cir. 1988).

Religious literature

Courts have concluded that although officials may limit the amount of reading material

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Know Your Rights: Religious Freedom

that a prisoner keeps in his or her cell, officials may not bar religious literature when other literature is permitted and prisoners generally have a right to read the primary text of their faith tradition. *See*, *e.g.*, *Sutton v. Rasheed*, 323 F.3d 236, 250-58 (3d Cir. 2003); *Jesus Christ Prison Ministry v. California Dep't of Corrections*, 456 F. Supp. 2d 1188, 1201-02 (E.D. Cal. 2006) (policy barring prisoners from receiving religious books from organizations not on approved vendor list is unconstitutional).

Personal grooming

Prisoners have rarely been successful in challenging grooming and dress regulations. Courts have generally upheld restrictions on haircuts. *See Hines v. South Carolina Dep't of Corrections*, 148 F.3d 353, 356 (4th Cir. 1998); *Sours v. Long*, 978 F.2d 1086, 1087 (8th Cir. 1992). This has also been true with regard to headgear and other religious attire. *See Muhammad v. Lynaugh*, 966 F.2d 901, 902-03 (5th Cir. 1992); *Sutton v. Stewart*, 22 F. Supp. 2d 1097, 1106 (D. Ariz. 1998).

A prison rule about grooming may, however, be vulnerable to attack if it is not enforced equally against all religions. *See Sasnett v. Litscher*, 197 F.3d 290, 292 (7th Cir. 1999); *Swift v. Lewis*, 901 F.2d 730, 731-32 (9th Cir. 1990) (where prison permitted long hair and beards for some religions but not others, it must present evidence justifying this unequal treatment); *Wilson v. Moore*, 270 F. Supp. 2d 1328, 1353 (N.D. Fla. 2003).

SAVE on Capitol Hill

In November of last year, the SAVE Coalition presented testimony before Congress to advocate for fixes to the Prison Litigation Reform Act (PLRA). In that same month, Rep. Bobby Scott (D-VA) introduced H.R. 4109, the "Prison Abuse Remedies Act" to address specific areas of the legislation. The testimony of the SAVE Coalition is included in full below.

Testimony of the Stop Abuse and Violence Everywhere (SAVE) Coalition for the House Judiciary Subcommittees on Crime, Terrorism and Homeland Security and Constitution, Civil Rights and Civil Liberties

November 8, 2007
By the Coalition to Stop Abuse and Violence Everywhere (SAVE)

The SAVE (Stop Abuse and Violence Everywhere) Coalition is a broad, bi-partisan group of organizations and individuals dedicated to protecting the U.S. prison and jail population--a group that is increasingly vulnerable to violence and abuse since the 1996 enactment of the Prison Litigation Reform Act (PLRA). The SAVE Coalition includes faith-based organizations; legal organizations; advocacy organizations for rape victims, children, and the mentally ill; and others. Members of the SAVE Coalition have studied the impact of the PLRA and developed proposed reforms to the law that do not interfere with its stated purpose: to reduce frivolous litigation by prisoners. The SAVE Coalition's proposed reforms, which are described below, seek to preserve the rule of law in America's jails and prisons and better protect prisoners from rape, assault, denials of religious freedom, and other constitutional violations by fixing the unintended consequences of the PLRA. We would like to thank the House Judiciary Subcommittee on Crime, Terrorism, and Homeland Security and the Subcommittee on the Constitution, Civil Rights, and Civil Liberties for holding a hearing on this important issue that requires Congress's attention. In addition to our recommended changes to the PLRA, we have included as an

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SAVE on Capitol Hill

attachment a list of members of the SAVE Coalition, as well as a list of ten cases in which prisoners' constitutional rights were not protected because of the PLRA.

Under the PLRA, prisoners are required to prove a physical injury, regardless of any mental or emotional injury, in order to obtain compensatory damages in federal court. As a result, prisoners can be raped and sexually assaulted but be barred from filing a civil rights action against those responsible because some courts say they've suffered no "physical injury." Other forms of abuse, such as disgusting, unsanitary conditions and degrading treatment, also do not meet the "physical injury" requirement of the PLRA. Many other constitutional violations do not result in physical injuries. As a result of the PLRA's "physical injury" requirement, many courts deny prisoners remedies for violations of their First Amendment rights to freedom of religion. The SAVE Coalition recommends that Congress repeal this provision prohibiting prisoners from bringing lawsuits for mental or emotional injury without demonstrating a "physical injury." (Repeal 42 U.S.C. § 1997e(e).)

The PLRA's exhaustion provisions require courts to dismiss prisoners' suits if they have failed to exhaust their facilities' grievance process, no matter how meritorious the claims, and many prisoners who are ill, hospitalized, intimidated, traumatized, or otherwise incapacitated have meritorious cases dismissed for missing those short deadlines. In addition, prisoners are forced to use internal grievance systems to exhaust administrative remedies regardless of whether use of those systems can even resolve the issue being grieved. While it is essential that prison officials have an opportunity to resolve issues before they are brought to court, exhaustion requirements are an enormous barrier for prisoners because prison and jail grievance systems have created a baffling maze in which a barely literate, mentally ill, physically incapacitated, or juvenile prisoner's procedural misstep in a facility's informal grievance system forever bars even the most meritorious constitutional claims. These grievance systems often have many levels for appeals and grievance deadlines are often a matter of days, with rare exceptions. Exhaustion is especially problematic for the most vulnerable prisoners, who are the least likely to be aware of exhaustion requirements and grievance procedures, even though they are frequently the victims of sexual abuse and other violations. For these reasons the SAVE Coalition calls on Congress to amend the requirement for exhaustion of administrative remedies to require prisoners to present their claims to responsible prison officials before filing suit, and, if they fail to do so, require the court to stay the case for up to 90 days and return it to prison officials to provide them the opportunity to resolve the complaint administratively. (Amend 42 U.S.C. § 1997e(a).)

The power imbalance inherent in prison leaves incarcerated people, and especially children, concerned about experiencing retaliation if they file grievances. This means that many prisoners, including youth, will not take part in the grievance system because they fear its consequences. For example, children detained by the Texas Youth Commission were subject to sexual abuse by staff for years and could not safely

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SAVE on Capitol Hill

complain. In one facility, a supervisor who forced children to perform sexual acts on him also held the key to the complaint box, leaving children with no where to go for help and the courts powerless to intervene. Once the scandal broke and the Texas legislature stepped in, detained children and their parents were able to come forward and over 1,000 complaints of sexual abuse have now been alleged. But such atrocities should never have happened. Because of the PLRA, federal courts frequently cannot protect incarcerated children from rape and other forms of abuse. Therefore, children must be exempted from the PLRA. (Amend 18 U.S.C. § 3626(g), 42 U.S.C. § 1997e(h), 28 U.S.C. § 1915 (h), 28 U.S.C. § 1915A(c).)

The PLRA's "three strikes" provision, intended to prevent prisoners from filing more than three frivolous cases in a lifetime, bars not only cases that are frivolous or malicious, but also those filed by prisoners who make mistakes in their legal documents due to their lack of access to counsel or legal training. The SAVE Coalition calls on Congress to amend the "three-strikes provision" (which requires certain indigent prisoners who have previously had three cases dismissed to pay the full filing fee up front) by limiting it to prisoners who have had 3 lawsuits or appeals dismissed as malicious within the past 5 years. (Amend 28 U.S.C. § 1915(g).)

Courts must be able to decide on the best remedies for constitutional violations, and their authority to ensure that violations do not recur should not be curtailed when hearing cases brought by prisoners. Although the purpose of the PLRA was to lessen the burden of prisoner suits on the courts, many of its provisions actually increase that litigation burden. For example, the PLRA requires defendants to admit that they violated the Constitution in order to enter into a settlement agreement. Because defendants are understandably reluctant to admit such liability, even the strongest cases rarely settle. As a result, parties often find themselves going to trial where they would preferably have settled the case prior to the implementation of the PLRA. Congress should restore judicial discretion to grant the same range of remedies in prisoners' civil rights actions that they possess in other civil rights cases. (Repeal 18 U.S.C. § 3626.)

The PLRA's attorney's fee restrictions make it cost-prohibitive for attorneys to represent prisoners. Ironically, this places greater burdens on courts to process cases in which prisoners, who are not conversant with the law and court rules, must represent themselves. The PLRA needs to be fixed to allow prisoners who prevail on civil rights claims to recover reasonable attorney's fees to the same extent as others whose civil rights have been violated. (Repeal 42 U.S.C. § 1997e(d).)

The PLRA's filing-fee provisions may deter indigent prisoners whose constitutional rights have been violated from seeking the legal redress to which they are entitled. On average, prisoners who are given the opportunity to work while in prison make less than $1-$2/day. Congress should change the PLRA to allow indigent prisoners whose cases are found to state a valid claim at the preliminary screening stage to pay a partial filing fee rather than the full filing fee, now $350 in district courts and $450 in appellate courts. (Amend 28 U.S.C. § 1915(a), (b).)

The screening provision of the PLRA allows the courts to dismiss a case that appears to be frivolous before the case is served on defendants or entered into the docket. This provision is the core of the law and these recommended reforms will leave the core unchanged. With the screening provision in place, and the adoption of amendments we have recommended, the PLRA will still serve its purpose and not open the flood gates to frivolous litigation. Instead, our recommendations, if adopted, will allow meritorious constitutional claims to be heard while continuing to protect the courts from frivolous litigation.

Case Law Review: U.S. Supreme Court Cases

By John Boston
Director, Prisoners' Rights Project of the New York City Legal Aid Society

PLRA—Exhaustion of Administrative Remedies

Jones v. Bock, 127 S.Ct. 910 (2007). The Supreme Court held that the PLRA exhaustion requirement is an affirmative defense, not a pleading requirement. Therefore, although exhaustion is necessary, prisoners are not required to specially plead or demonstrate exhaustion in their complaints. *Id*. at 919.

Additionally, the Sixth Circuit below dismissed two of the prisoners' suits because those prisoners had not identified each defendant they later sued in their initial grievances. The Supreme Court did not determine whether the grievances filed by the petitioners satisfied the requirement of "proper exhaustion," but concluded that exhaustion is not per se inadequate simply because an individual later sued was not named in the original grievance. *Id*. at 923.

Finally, the Court rejected the "total exhaustion rule" and held that while no unexhausted claims may be heard under the PLRA, a court may not dismiss an entire action simply because the Complaint includes both exhausted and unexhausted claims. *Id*. at 923. The Court rejected the respondent's analogy that the PLRA is similar to the total exhaustion rule in habeas corpus. The Court found that the PLRA's language does not support total exhaustion, stating that: "As a general matter, if a complaint contains both good and bad claims, the court proceeds with the good and leaves the bad." *Id*. at 924.

The Court essentially held in this case that the PLRA exhaustion requirement is not intended to overturn the ordinary practices of litigation except where it says so. It said that the statute's failure to make exhaustion a pleading requirement is strong evidence that the usual practice should be followed, and the usual practice under the Federal Rules of Civil Procedure is to regard exhaustion as an affirmative defense.

In a series of recent cases, we have explained that "[c]ourts should generally not depart from the usual practice under the Federal Rules on the basis of perceived policy concerns. . . ." *Id.* at 919. With respect to "total exhaustion," the Court said that the usual practice in litigation should prevail even though the subject is not addressed in the Federal Rules: "As a general matter, if a complaint contains both good and bad claims, the court proceeds with the good and leaves the bad." *Id.* at 924.

Pro Se Litigation

Erickson v. Pardus, 127 S.Ct. 2197 (2007). The Plaintiff's suit alleges that prison officials violated the Eighth Amendment by withholding from him Hepatitis C treatment, and thereby subjecting him to potential further liver damage and endangering his life. The district court dismissed the claim on the ground that the prisoner failed to allege "substantial harm." The Court of Appeals affirmed, stating that the prisoner's allegations were too conclusory for pleading purposes.

The Supreme Court reversed, noting that while the district court may ultimately find no substantial harm and dismiss the case, the Court of Appeals erred in finding that the allegations in question were too conclusory. *Id*. at 2199. The Complaint stated that the prisoner had been prescribed Hepatitis C medication, which was to last for one year. However, shortly after it was prescribed, the prison officials refused him treatment while he was "still in need of treatment for this disease." *Id.* at 2200

The Supreme Court found that the Court of Appeals had departed from the liberal pleadings standards laid out in Federal Rule of Civil Procedure 8(a)(2). *Id*. at 2200. The Court emphasized that a document filed pro se should be construed even more liberally, "however inart-

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Case Law Review: U.S. Supreme Court Cases

fully pleaded . . . ." *Id*. As a result, the Court reversed and remanded the case for further consideration.

Bowles v. Russell, 127 S. Ct. 2360 (2007). The district court granted petitioner's motion to reopen and extend his time to appeal his previously denied habeas corpus petition. Without explanation, the district court gave petitioner 17 days to file the appeal, rather than the statutory 14 days. Relying on the district court's order, petitioner filed his appeal to the Sixth Circuit within 17 days, but after 14 days. His appeal was denied because it was not timely. The Sixth Circuit stated that, because a timely filing has been long held as "mandatory and jurisdictional," his appeal had to be denied. *Id*. at 2363.

In a split decision, the Supreme Court affirmed the Sixth Circuit ruling, declaring that the rule has been long-standing and the Court had no authority to create equitable exceptions to jurisdictional requirements. *Id*. at 2366. The dissenting opinion, in which four Justices joined, stated that: "It is intolerable for the judicial system to treat people this way, and there is not even a technical justification for condoning this bait and switch." *Id*. at 2367 (Souter, J., dissenting).

Federal Officials and Prisons

Osborn v. Haley, 127 S.Ct. 881 (2007). This case involves a federal statute commonly known as the Westfall Act, which gives federal employees absolute immunity from tort claims arising out of actions taken in the course of their official duties. Under the Westfall Act, once the Attorney General certifies that an action is within the scope of the defendant federal employee's official duties, the employee is dismissed from the action, the United States is substituted as a defendant, and the case proceeds under the Federal Tort Claims Act.

In this instance, the plaintiff sued a federal officer in state court for allegedly interfering with her employment with a private contractor. She claimed that the federal officer conspired to cause her wrongful discharge and that his efforts to bring about her discharge were outside the scope of his employment. The local United States Attorney filed a Westfall Act certification and had the action removed to federal district court. The District Court relied on the Plaintiff's allegations -- which stated that the federal officer's actions arose outside of the scope of his federal employment -- and entered an order rejecting the Westfall Act certification and remanding the case to state court.

The Sixth Circuit vacated the District Court's order, and held that a Westfall Act certification is not improper simply because the Attorney General so certifies that the employee acted within the scope of federal employment based on a different understanding of the facts that the Plaintiff alleges. *Id*. at 891-92. The Supreme Court agreed, finding that once the Attorney General so certifies, the Westfall Act applies and the federal district court has exclusive jurisdiction to hear the case. *Id*. at 899. The federal court can reinstate the employee as a defendant, but only after factual finding that the employee did not act within the scope of federal employment. *Id*. at 899-90. Although this process calls for a non-jury determination of a central fact, it does not violate the Seventh Amendment because there is no constitutional right to a jury trial in an action against the sovereign. *Id*. at 900.

Statute of Limitations/False Imprisonment

Wallace v. Kato, 127 S.Ct. 1091 (2007). Plaintiff brought suit for false arrest in violation of the Fourth Amendment based on his arrest and conviction on murder charges that were later dropped. Plaintiff argued that his claim accrued upon his release from incarceration, and he sought damages up to that point, but the Court

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Case Law Review: U.S. Supreme Court Cases

held that his cause of action accrued once his detention was authorized by the legal process (*i.e.*, when he appeared before the magistrate and was bound over for trial). Because more than two years elapsed between that date and the date of filing, the claim was time-barred. *Id*. at 1097.

The Supreme Court stated that "there can be no dispute that petitioner could have filed suit as soon as the allegedly wrongful arrest occurred, subjecting him to involuntary detention, so the statute of limitations would normally commence to run from that date." *Id*. at 1095. The majority decision rejected Justice Breyer's suggestion in his dissent that equitable tolling should be applied until the state proceedings are finished. *Id*. at 1100.

Wilkie v. Robbins, 127 S.Ct. 2588 (2007).
Plaintiff brought *Bivens* claims against employees of the Bureau of Land Management, alleging that they had engaged in extortion and a campaign of harassment to force him to grant an easement through his land. The Court held that the Plaintiff did not have a private action for damages for the sort of claims recognized in *Bivens*.

In *Bivens*, the Court held that a victim of a Fourth Amendment violation by federal officers could bring a claim for damages. Here, the Court describes the two-step analysis it goes through to decide whether to recognize additional *Bivens* claims: (1) the Court considers whether any alternative process exists for protecting the interest that amounts to a convincing reason for the Judiciary Branch to refrain from providing a new remedy, and (2) the Court weighs reasons for and against the creation of a new cause of action, the way common law judges do. *Id*. at 2598-2600.

After the two-step analysis, the Court found that there is no *Bivens* remedy in this case. The government's purpose in pursuing the easement was legitimate, even if the employees were unduly zealous. *Id*. at 2604. Additionally, the Court noted that a judicial standard to identify illegitimate pressure beyond "legitimately hard bargaining" would be very difficult to establish. *Id*. Finally, the Plaintiff had administrative and other judicial remedies for the majority of his grievances.

Panetti v. Quarterman, 127 S.Ct. 2842 (2007).
A prisoner convicted of capital murder sought a writ of habeas corpus arguing that he was not competent to be executed. The Court found that the state court failed to provide the procedures to which the petitioner was entitled because the state court had reached its competency determination without holding a hearing or providing petitioner with a sufficient opportunity to present expert evidence. Additionally, the Court found that the Fifth Circuit's incompetency standard was too restrictive to afford a prisoner Eighth Amendment protection.

A prisoner is entitled a "fair hearing" once he has made "a substantial threshold showing of insanity" and requested a stay of execution. *Id*. at 2856. The standard for competency to execute is not simply an ability to understand that one is going to be executed because of his conviction, but rather it must be a rational understanding of that fact. "A prisoner's awareness of the State's rationale for an execution is not the same as a rational understanding of it." *Id*. at 2862. In this case, the prisoner made a substantial threshold showing of insanity, and was therefore entitled to a competency hearing to present evidence of his alleged incompetency under the Eighth Amendment. The Court also held that a habeas petition based on present incompetency, brought when the claim is first ripe, is not barred by the statutory prohibition on "second or successive" habeas petitions. *Id*. at 2855.

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