
PRISONERS' RIGHTS HANDBOOK

**A GUIDE TO CORRECTIONAL LAW DECISIONS
OF THE UNITED STATES SUPREME COURT AND THE
UNITED STATES COURT OF THE THIRD JUDICIAL DISTRICT**

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INTRODUCTION

Prior to the 1960s, the federal courts refused to review prisoner complaints regarding conditions of confinement. Even in the face of allegations involving flagrant mistreatment, most judges assumed that prisoners had forfeited their constitutional rights as a result of their criminal convictions. Typical of this era was a Ninth Circuit Court of Appeals decision holding that it is not the function of the courts to superintend the treatment and discipline of prisoners in penitentiaries, but only to deliver from imprisonment those who are illegally confined. See Stroud v. Swope, 187 F.2d 850, 851 (9th Cir. 1951). This policy, known as the "hands off" doctrine, effectively insulated prison guards from judicial oversight, resulting in widespread abuse and horrendous conditions. See Ruiz v. Estelle, 503 F.Supp. 1265, 1303 (S.D.Tex. 1980) (finding that Texas prison staff have committed widespread, pervasive, and unwarranted acts of brutality upon many of the system's inmates); Holt v. Sarver, 309 F.Supp. 362, 377 (E.D.Ark. 1970) (sexual assaults, fights, and stabbings in the barracks put some inmates in such fear that it is not unusual for them to come to the front of the barracks and cling to the bars all night).

During the tumultuous 1960s and early 1970s, the Supreme Court formally abandoned its "hands off" posture towards prisoners. Some point to the civil rights movement as the prime force behind the extension of constitutional protections to prisoners. Others contend that in light of the Attica rebellion, the Supreme Court could no longer ignore the squalor and inhumanity existing in many prisons and jails. Still others point to an activist Supreme Court led by Chief Justice Earl Warren as the mainspring behind extending democratic principles to the poor and powerless in American society. Whatever the cause, the Supreme Court began recognizing constitutional rights for prisoners as long as they were not inconsistent with the legitimate penological objectives of the corrections system. See Wolff v. McDonnell, 418 U.S. 539, 555 (1974) (**But though his rights may be diminished by the needs and exigencies of the institutional environment, a prisoner is not wholly stripped of constitutional protections when he is imprisoned for crime. There is no iron curtain drawn between the Constitution and the**

prisons of this country.

There can be no doubt that judicial intervention resulted in profound improvements in the living conditions existing in our nation's prisons and jails. Within a short span of fifteen years, the vast majority of State correctional systems had one or more prisons operating under court order or consent decree to improve conditions and reduce overcrowding. See Rhodes v. Chapman, 452 U.S. 337, 353-354 (1981) (Brennan, J., concurring) (individual prisons or entire prison systems in at least 24 States have been declared unconstitutional under the Eighth and Fourteenth Amendments, with litigation underway in many others). At SCI-Pittsburgh, for example, it was a federal judge's finding of cruel and unusual punishment which led to massive and costly renovations, prompting State authorities' decision to begin closure of the century-old penitentiary beginning in 2003. See Tillery v. Owens, 719 F.Supp. 1256 (W.D.PA 1989). Similarly, it was judicial intervention in the operations of the Philadelphia and Allegheny County prison systems which pressured locally-elected officials to replace their antiquated jails with modern facilities. See Inmates of Allegheny County Jail v. Wecht, 565 F.Supp. 1278 (W.D.PA 1983); Jackson v. Hendrick, 321 A.2d 603 [Pa. Sup. Ct. 1974]

Such substantial victories on behalf of an unpopular, scorned and outcast group was bound sooner or later to trigger political and constitutional backlash. Indeed, in recent years, constitutional scholars have noticed a resurgence of the "hands off" doctrine. This is not the primitive version where a prisoner was considered nothing more than a mere slave of the State. See Ruffin v. Commonwealth, 62 VA 790, 796 (1871). Of course, such crude extremism still exists; witness, for example, Justice Thomas' dissenting opinion in Hudson v. McMillian, 503 U.S. 1, 28 (1992) concluding that it was not cruel and unusual punishment when two guards repeatedly punched and kicked a handcuffed prisoner, cracking his dental plate and swelling his mouth and lips.

Today's "hands off" doctrine is a more subtle, Machiavellian-like version. Make no mistake, it is the same old disease but disguised in a new sophisticated strain. For example, prisoners can still challenge State interference

with their access to the courts, but must first prove actual injury. See **Lewis v. Casey**, 518 U.S. 343 (1996). Prisoners can still challenge biased decision-making during prison disciplinary proceedings but must first prove that solitary confinement constitutes an atypical and significant hardship. See **Sandin v. Conner**, 515 U.S. 472 (1995). Prisoners can still challenge overcrowded, violent and unsanitary conditions as cruel and unusual punishment, but must first prove that State officials possessed a culpable state of mind. See **Wilson v. Seiter**, 501 U.S. 294 (1991). A conservative bloc of Supreme Court Justices has raised the constitutional hurdle so high that prisoners can reach it only in the most egregious cases of State cruelty. In addition, unless prisoners now meticulously comply with the exhaustion, filing and relief requirements of the **Prison Litigation Reform Act of 1995**, their complaints will be dismissed despite substantial proof of brutal treatment by prison guards. See **McCoy v. Gilbert**, 270 F.3d 503, 506 (7th Cir. 2001) (prisoners suit alleging physical beating by prison guards dismissed for failure to exhaust administrative remedies despite fact that guards were cited by Department of Justice for misconduct including abusing prisoners and filing false statements with FBI).

There can be no doubt that many of these restrictions were self-inflicted by prisoners themselves. Some so-called jailhouse lawyers attempted to wreak vengeance on the criminal justice system by repeatedly filing frivolous '1983 litigation. See **Procup v. Strickland**, 792 F.2d 1069, 1071 (11th Cir. 1986) (Occasionally a particularly abusive prisoner, taking advantage of his unique situation, will come along with a flood of claims designed to either harass those in positions of authority or to grind the wheels of the judicial system to a halt.); **Washington v. Alaimo**, 934 F.Supp. 1395, 1396 (S.D.GA 1996) (pro se prisoner enjoined from filing further cases and sanctioned \$1500 fine as a result of his pending Motion to Kiss My Ass); **Green v. Camper** 477 F.Supp. 758, 759-768 (W.D.MO 1979) (listing over 500 cases filed by notorious jailhouse lawyer Clovis Carl Green). Other prisoners, sickened by mental illness, often filed cases containing rambling and incoherent claims. See **Lee v. Clinton**, 209 F.3d 1025 (7th Cir. 2000) (prisoners appeal was frivolous where he alleged that United States and China had conspired to bio-chemically infect and invade people with

mind-reading and mental torture device). Such conduct has done a tremendous disservice to all prisoners seeking a just resolution of legitimate constitutional claims. It simply provided reactionary members of Congress the very ammunition needed to pass the **Prison Litigation Reform Act**.

Because of these vast changes, prisoners' rights litigation has become a highly complex and specialized area of law during the past few years. While there does exist judges with vehement anti-prisoner bias, the basic reason that prisoners have low success rates in '1983 litigation is because they lack professional representation or, proceeding *pro se*, they fail to make realistic judgments about which claims can be meritoriously prosecuted.

The purpose of this manual is to help prisoners avoid miscalculations regarding their chances of prevailing in the courts by presenting a balanced perspective of prisoners' rights, as interpreted by the United States Supreme Court and the United States Courts of Appeals. The Supreme Court, of course, is our nation's highest court. Its constitutional interpretations are the supreme law of the land. Although it will occasionally reach out to correct an individual case of injustice, the Supreme Court is more concerned with developing the broad tests and framework which will be used by the lower courts in resolving nationwide conflicts between prisoners and corrections officials.

The United States Courts of Appeals are also policy-setting institutions primarily involved in issues of pure law. They do not hear testimony, receive new evidence, and rarely engage in credibility evaluations of witnesses. The Third Circuit Court of Appeals and its sister circuits predominantly apply those constitutional precepts established by the Supreme Court to the factual records of cases before them. Just how broadly or narrowly these appellate courts interpret Supreme Court decisions has a huge impact on prisoners' constitutional protections. Moreover, since Pennsylvania prisons and jails are within the jurisdiction of the Third Circuit, it is important to closely examine that Court's specific approach to correctional law.

Before beginning our review, a cautionary note is in order. This manual should

only be used as an initial guide or starting reference point. Given the evolutionary nature of prisoners' rights, what is settled law today can be drastically changed by a simple 5-4 decision in the Supreme Court tomorrow. For example, when our last manual was published in January of 1996, the law was clear that prisoners denied access to an adequate law library were not required to show actual injury. See **Peterkin v. Jeffes**, 855 F.2d 1021,1041 (3d Cir. 1988). Unfortunately, within six months, the Supreme Court overruled **Peterkin** with its conclusion that an actual injury requirement was mandatory in all prisoner access-to-the-courts claims. See **Lewis v. Casey**, 518 U.S. 343 (1996). Those prisoners who failed to conduct research, choosing instead to rely solely upon this manual, likely lost their cases as a result. Consequently, diligent research is absolutely mandatory in prisoner constitutional tort litigation. Bearing that in mind, we begin our journey into the constitutional protections of incarcerated citizens.

I. ACCESS TO THE COURTS

In **Bounds v. Smith**, 430 U.S. 817 (1977) the U. S. Supreme Court held that **the fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law.** *Id.* at 828. Just what constitutes an adequate law library or adequate assistance, however, was left for the lower courts to settle. Prisoners sought expansive readings of **Bounds** and urged federal judges to issue remedial injunctions mandating massive changes in prison access programs. See **Tillery v. Owens**, 719 F.Supp. 1256, 1283-1284 (W.D.Pa. 1989)(finding SCI-Pittsburgh law library system in violation of **Bounds** and ordering State officials to propose corrective remedies), *affirmed*, 907 F.2d 418 (3d Cir. 1990). Prison officials, on the other hand, offered restrictive interpretations of **Bounds** and vehemently opposed federal intrusion into their day-to-day operations. Rather than conclude the access to courts issue, **Bounds** became a major source of confusion and litigation, requiring the federal judiciary to examine prison access programs on a case-by-case basis. See **Abdul-Akbar v. Watson**, 4 F.3d 195, 204 (3d Cir. 1993)(**A court's task in**

applying the teaching of Bounds to any penal institution is not to prescribe the maximum requirements of an optimum law library and legal resource facility, but only to determine, as best it can, whether the resources provided satisfy the minimum that Bounds requires.)

Nineteen years after **Bounds**, the U.S. Supreme Court revisited the access to courts controversy, this time reversing both the lower court's finding of a system-wide **Bounds** violation and its injunctive order, mandating sweeping changes in the Arizona State prison system. See **Lewis v. Casey**, 518 U.S. 343 (1996). In **Casey**, the Supreme Court found that prisoners had no standing to bring a system-wide class action suit, having shown insufficient actual injury resulting from the alleged inadequacies in Arizona's access programs. *Id.* at 349. According to the Court, the prisoners' **systemic challenge was dependent on their ability to show widespread actual injury, and that the (lower) court's failure to identify anything more than isolated instances of actual injury renders its findings of a systemic Bounds violation invalid.** *Id.* at 349.

Casey is the Supreme Court's first post-**Bounds** case to clarify the scope and requirements of the constitutional right of access to the courts. Prisoners, according to the **Casey** majority, do not have a constitutional right to a law library or to legal assistance; rather, they only have a constitutional right of access to the courts. *Id.* at 350. Prison law libraries or legal assistance programs are merely the means by which the States provide access to the courts. *Id.* at 351. **Casey's** most important finding is the recognition of an actual injury requirement for all prisoners challenging the adequacy of their State's prison access programs. *Id.* at 349. Only those prisoners demonstrating actual injury have standing to bring an access to courts suit. *Id.* at 349-31.

In this section, we examine the history of prisoner access to the courts from the 1940s until today. We shall also review common prisoner access grievances in light of **Casey**, pointing out the key findings of that decision.

A. Prisoner Access to The Courts: From Hull to Casey

Traditionally prisoner access to the courts has been received by State officials with less than open arms. The mere thought that criminals can use the legal system to challenge their convictions and question State authority aggravates the vast majority of prison guards and State politicians. It is not surprising, therefore, that the federal judiciary has invalidated numerous State regulations designed solely (or as a pretext) to hinder and obstruct a prisoners efforts to seek legal redress in our nation's courts.

Ex Parte Hull, 312 U.S. 546 (1941) is considered by constitutional scholars to be the genesis of prisoner access to the courts. In **Hull**, the prisoner challenged a Michigan prison regulation prohibiting prisoners from filing legal documents with the courts unless they were found Aproperly drawn@ by the legal investigator for the parole board. Id. at 548. Refusing to submit to State censorship, Hull smuggled the petition to his father, who in turn delivered it to the Supreme Court. Striking down the regulation, the **Hull** Court held that **Athe State and its officers may not abridge or impair petitioner's right to apply to a federal court for a writ of habeas corpus.**@ Id. at 549. Furthermore, whether or not a petition has merit and is properly drawn are matters for the courts B not State officials B to decide. Id.

During the 1950s, the Supreme Court began removing State-enacted economic barriers to judicial review of prisoner petitions. In **Griffin v. Illinois**, 351 U.S. 12 (1956), the Supreme Court struck down, on equal protection grounds, an Illinois rule that charged prisoners a fee for a trial transcript necessary for appellate review of their criminal convictions. Id. at 16. The Court reasoned that such a rule excludes indigent prisoners from judicial review solely on the basis of their poverty. Id. at 18-19. If the States provide appellate review of criminal convictions, they must do so equally and not exclude indigent prisoners from participating simply because of their poverty. Id. See also, **Burns v. Ohio**, 360 U.S. 252 (1959)(requiring States to waive filing fees for indigent prisoners).

In 1969 the Supreme Court removed yet another State barrier, this time striking down a

Tennessee regulation which prohibited inmates from assisting each other in preparation of habeas corpus petitions. The majority emphasized the fact that prisoners, many of whom are illiterate, are frequently unable to obtain legal assistance from any source other than fellow prisoners. Thus, **Auntil the State provides some reasonable alternative to assist inmates in the preparation of petitions for postconviction relief, it may not validly enforce a regulation such as that here in issue, barring inmates from furnishing such assistance to other prisoners.**@ Id. at 490. The Court did hold, however, that the States may impose reasonable restrictions on jailhouse lawyers to prevent abuse. Id. at 490.

Decided in 1977, **Bounds v. Smith**, 430 U.S. 817 (1977) significantly expanded the right of access to the courts. Instead of merely refraining from obstructing prisoner petitions to the courts, **Bounds** concluded that the States **Ashoulder affirmative obligations to assure all prisoners meaningful access to the courts.**@ Id. at 824. The Supreme Court held that prison officials must **Aassist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law.**@ Id. at 828. The **Bounds** majority went to great lengths to point out, however, that while law libraries are one constitutionally acceptable method to assure meaningful access to the courts, other methods B including volunteer or paid attorneys, bar association programs, and the use of paraprofessionals B were also permissible. Id. at 830-831. **AAny plan, however, must be evaluated as a whole to ascertain its compliance with constitutional standards.**@ Id. at 832.

Bounds changed forever the face of prisoner access law. Pre-**Bounds** case law merely demanded that State authorities not interfere with prisoners= legal efforts to draft petitions and file them in a court of law. The States, however, were not obligated to spend funds and provide legal resources to prisoners. **Bounds** expanded the constitutional right of access to the courts by requiring State officials to supply prisoners with **Aadequate@ law libraries or Aadequate@ assistance.** Prison officials may not interfere with a prisoners access to the courts,

and due to **Bounds**, must take affirmative steps toward ensuring this right. The Supreme Court's decision in **Casey**, however, would prove that even **Bounds** has limitations.

In **Lewis v. Casey**, 518 U.S. 343 (1996), Arizona inmates brought suit, alleging that prisons throughout the Arizona Department of Corrections (ADOC) deprived them of their constitutional right of access to the courts. *Id.* at 346. Following a 3-month trial, the lower court agreed that the ADOC violated **Bounds** due to a variety of deficiencies, including: untrained library staff, delayed legal materials to lockdown prisoners, failure to upgrade law libraries, and denial of legal assistance to illiterate and non-English speaking inmates. *Id.* A 25-page injunctive order was issued, requiring the ADOC to improve its access programs throughout its prisons. *Id.*

The Supreme Court reversed both the finding of a systemwide **Bounds** violation and the injunction imposed upon the ADOC to correct its deficiencies. *Id.* at 349. The Court reasoned that the prisoners' **systemic challenge was dependent on their ability to show widespread actual injury, and that the court's failure to identify anything more than isolated instances of actual injury renders its finding of a systemic Bounds violation invalid.** *Id.* at 349. Requiring prisoners alleging **Bounds** violations to prove actual injury stems from the doctrine of Article III standing B the constitutional principle that restricts the power of the federal courts to issue relief only to those plaintiffs **who have suffered, or will imminently suffer, actual harm.** *Id.* at 349. In **Casey**, the Supreme Court found that only two inmates (of the entire class of Arizona State prisoners) had shown sufficient actual injury to confer standing to sue. *Id.* at 356-357. **These two instances were a patently inadequate basis for a conclusion of systemwide violation and imposition of systemwide relief.** *Id.* at 359.

According to **Casey**, prisoners do **not** have a constitutional right to a law library or to legal assistance. *Id.* at 350. Rather, prisoners only have a constitutional right to access to the courts. *Id.* Prison law libraries and legal assistance programs are merely the means by which the States ensure prisoners have an adequate opportunity to present their

constitutional grievances into the courts. *Id.* at 351. Accordingly, **Aan inmate cannot establish relevant actual injury simply by establishing that his prison's law library or legal assistance program is sub-par in some theoretical sense.** *Id.* at 351. Rather, **Athe inmate therefore must go one step further and demonstrate that the alleged shortcomings in the library or legal assistance program hindered his efforts to pursue a legal claim.** *Id.* at 351.

The **Casey** majority described its **actual injury** standard as a **constitutional prerequisite.** *Id.* at 351. In light of such remarks, it is abundantly clear that no matter the nature of a prisoner's law-related grievance B inadequate law books, insufficient library time, untrained inmate law clerks, lack of photocopying services, or delayed delivery of legal material to isolation prisoners B **actual injury** must be satisfied or the claim will be dismissed. Post-**Casey** Third Circuit decisions confirm this reality.

For example, at issue in **Reynolds v. Wagner**, 128 F.3d 166 (3d Cir. 1997) was the constitutionality of a county jail's medical co-payment policy under which inmates were charged a small fee for health care services. *Id.* at 170. Prisoners alleged, in part, that their access to the courts had been stymied as a result of having to pay for medical services and thereby having less money to pay for legal mail and photocopying. *Id.* at 183. The Third Circuit rejected the claim, noting that the prisoners failed to point to any evidence that the co-payment policy actually interfered with their right to access to the courts. *Id.*

Similarly, in **Tourscher v. McCullough**, 184 F.3d 236 (3d Cir. 1999), the plaintiff alleged that prison officials deprived him of access to the courts by compelling him to work in the prison cafeteria while his criminal appeal was pending. *Id.* at 242. Citing **Casey's** actual injury standard, the Third Circuit rejected the claim, stating that Tourscher failed to allege any facts demonstrating that the number of hours he was required to work denied him sufficient time to prepare his appeal. *Id.* at 242.

Any prisoner alleging denial of access to the courts must allege in their complaints and prove in court **actual injury.** Under **Casey**, only

those prisoners who sustain actual injury have standing to bring suit challenging the adequacy of their States access program. We shall next review common access grievances in light of the **Casey** actual injury test, and hopefully offer a few constructive solutions.

B. Range of Access to the Courts

The Supreme Court in **Bounds** required State officials to assist inmates in the preparation and filing of meaningful legal papers through the provision of adequate law libraries or adequate assistance from trained personnel. 430 U.S. at 828. The **Bounds** majority noted that **We are concerned in large part with original actions seeking new trials, release from confinement, or vindication of fundamental civil rights.** 430 U.S. at 827.

In **Casey**, the Supreme Court flatly rejected any attempt to extend the constitutional right of access to the courts to legal matters beyond habeas corpus and civil rights actions. 518 U.S. at 355. The **Casey** Court stated that, **Bounds does not guarantee inmates the wherewithal to transform themselves into litigating engines capable of filing everything from shareholder derivative actions to slip-and-fall claims. The tools it requires to be provided are those that the inmates need in order to attack their sentences, directly or collaterally, and in order to challenge the conditions of their confinement. Impairment of any other litigating capacity is simply one of the incidental (and perfectly constitutional) consequences of conviction and incarceration.** 518 U.S. at 355. Prisoners with other types of legal grievances B for example, divorce actions, deportation notices, malpractice claims, and other civil litigation B accordingly, have no entitlement to any **Bounds** assistance.

The **Casey** Court also made clear that the right of access to the courts applies only to the pleading stage of habeas corpus and civil rights actions. 518 U.S. at 354. In other words, prisoners are entitled access to law libraries or trained assistance to develop their petitions and file them with the appropriate court. They are not entitled to access to law libraries or trained assistance to litigate effectively once in court. 518 U.S. at 354. **(We now disclaim** statements that **Athe State must enable the prisoner to**

discover grievances, and to litigate effectively once in court.). The Court reasoned that to require the States to provide **Bounds** assistance beyond the pleading stage to a **largely illiterate prison population is effectively to demand permanent provision of counsel, which we do not believe the Constitution requires.** 518 U.S. at 354.

Having stressed the importance of habeas corpus and civil rights actions in our constitutional scheme of government, see **Casey**, 518 U.S. at 354-355, it seems utterly bizarre for the Supreme Court to require the States to spend taxpayer revenue to fund law libraries and trained assistance programs to help prisoners develop petitions, only to completely abandon them once those petitions are filed in court. Moreover, such a conclusion ignores the overwhelming complexity of federal habeas corpus and civil rights litigation, and the difficulty prisoners face mounting effective responses to highly trained State attorneys. Nonetheless, that is the law. Prisoners have no access to courts rights for the purpose of litigating petitions and complaints already filed with the appropriate court.

C. Law Libraries

In **Peterkin v. Jeffes**, 855 F.2d 1021 (3d Cir. 1988) the Third Circuit held that an actual injury test was inappropriate where prisoners alleged denial of access to a law library or trained assistance. *Id.* at 1041. The Third Circuit reasoned that legal assistance is the core element of **Bounds** and actual injury necessarily occurs by virtue of a prison's failure to provide the level of assistance required under **Bounds**. *Id.*

The Supreme Court's adoption of an actual injury test in **Casey** has rendered the Third Circuit's decision in **Peterkin** obsolete. See **Oliver v. Fauver**, 118 F.3d 175, 177-178 (3d Cir. 1997) **(Athere is no question that after Casey, even claims involving so-called central aspects of the right to court access require a showing of actual injury.)** Prisoners should therefore exclude or use extreme caution in resting their **Bounds** access litigation upon any pre-**Casey** decision.

For example, prior to the 1996 **Casey** decision, federal judges found **Bounds** violations

due to prison law libraries lacking material considered essential in the preparation of habeas corpus and civil rights petitions. See Morrow v. Harwell, 768 F.2d 619, 623 (5th Cir. 1985)(bookmobile law library lacking federal case law inadequate); Turiano v. Schnarrs, 904 F.Supp. 400, 411 (M.D.Pa. 1995)(county prison law library missing federal case reporter system inadequate); Wade v. Kane, 448 F.Supp. (E.D.Pa. 1978),aff-d at 591 F.d 1883 [3rd Cir.1979] (law library missing Federal Reporter inadequate). Other courts found **Bounds** violations based on unreasonable restrictions on prisoner access to the law library. See Johnson El v. Schoemehl, 878 F.2d 1043, 1053 (8th Cir. 1989)(two hours law library time per week insufficient); Williams v. Leeke, 584 F.2d 1336, 1340 (4th Cir. 1978)(45 minutes library time every three days inadequate); Tillery v. Owens, 719 F.Supp. At 1282 (limiting inmates to 4 hours library time each month unconstitutional). The Supreme Court's decision in Casey has rendered all these cases null and void. Keep in mind that **An inmate cannot establish relevant actual injury simply by establishing that his prison's law library or legal assistance program is sub-par in some theoretical sense.** @ Casey, 581 U.S. at 351. Rather, the prisoner **must go one step further and demonstrate that the alleged shortcomings in the library or legal assistance program hindered his efforts to pursue a legal claim.** @ Casey, 518 U.S. at 351.

Take, for example, Benjamin v. Kerik, 102 F.Supp.2d 157 (S.D.N.Y. 2000), where New York City prison authorities sought termination to a 20-year-old consent decree regulating prison law libraries. The district judge found that library typewriters were **deplorable**, that law books were routinely unavailable, missing or mutilated, that model forms were **often missing**, and that the city's prison law libraries were overall **clearly inadequate**. Id. at 167-168. Despite such factual findings, the district judge sided with prison officials and terminated the consent decree because only **three inmate witnesses** out of an average daily city prison population of 16,562 **could show an injury-in-fact.** @ Id. at 168. Citing Casey, the district judge held that a systemwide injunction required proof of systemwide injury, id. at 163, and three cases of actual injury were insufficient to justify continued judicial supervision of the entire city prison system. Id. at 167.

In Ingalls v. Florio, 968 F.Supp. 193 (D.N.J. 1997) New Jersey prisoners brought a denial of court access suit, claiming they could not go to the library, or were not permitted to go as often as they would have liked. Id. at 203. Citing Casey, the district court dismissed the claim, holding that the plaintiffs failed to prove actual injury. Id. **Some of these plaintiffs fail to demonstrate that they were working on any cases in particular or were barred from filing a complaint. Others fail to claim that their inability to go to the law library had any effect whatsoever on any pending legal matter.** @ Id.

In Miller v. Marr, 141 F.3d 976 (10th Cir. 1998) a Colorado State prisoner alleged that he was denied access to the courts because while confined at a facility in Minnesota he lacked access to federal statutes and Colorado law. Id. at 978. Citing Casey, the Tenth Circuit held that it **is not enough to say that the Minnesota facility lacked all relevant statutes and case law.** @ Id. at 978. Rather, the petitioner must explain with specificity how the alleged lack of access to materials hindered his ability to diligently pursue his federal claims. Id. at 978.

The requirement that an inmate alleging a violation of **Bounds** must show actual injury derives ultimately from the doctrine of standing, a constitutional principle that prevents courts of law from undertaking tasks assigned to the political branches. It is the role of courts to provide relief to claimants, in individual or class actions, who have suffered, or will imminently suffer, actual harm; it is not the role of courts, but that of the political branches, to shape the institutions of government in such fashion as to comply with the laws and the Constitution.

Lewis v. Casey, 518 U.S. 343, 349 (1996) (citations omitted).

These three cases confirm that even a poorly-stocked and disorganized prison law library does not **by itself** constitute an access to courts violation. Likewise, the refusal of prison officials to grant a prisoner direct access to the law library does not **by itself** constitute an access to courts violation. Under Casey, a violation of access to courts occurs only when the prisoner sustains **actual injury**, that is, when the

shortcomings in the law library hinder or block a prisoner's efforts to bring a legal claim into court. 518 U.S. at 351. It is **the capacity of bringing contemplated challenges to sentences or conditions of confinement before the courts** that is the touchstone of a court access violation rather than **the capability of turning pages in a law library**. 518 U.S. at 356.

Establishing actual injury and, hence, a violation of access to courts under **Casey**, requires proof of the following elements: (a) First, he or she must have a nonfrivolous legal claim^o challenging his or her criminal conviction and sentence or the conditions of confinement, 518 U.S. at 353-355; and (b) secondly, that such nonfrivolous claim of this nature has been lost or rejected^o or is currently being prevented^o from presentation to the appropriate court because of alleged shortcomings in the library or legal assistance program. 518 U.S. at 356.

According to **Casey**, the degree of proof required to sustain a finding of actual injury varies with the progress of the litigation. When a **Bounds** lawsuit is first filed, general factual allegations of actual injury to a meritorious legal claim will suffice. See **Casey**, 518 U.S. at 358. At the summary judgment stage, the prisoner can no longer rest on mere allegations of actual injury in his pleading, but must come forward with affidavits and other documentary evidence showing that there is a genuine issue of actual injury for trial. 518 U.S. at 358. At the final stage, evidence establishing actual injury must be introduced at trial through the testimony of witnesses. 518 U.S. at 358.

The first step in proving a **Bounds** violation is establishing that the prisoner had a nonfrivolous legal claim^o concerning either his or her conviction and sentence or the conditions of confinement. **Casey's** requirement of a nonfrivolous legal claim **is not satisfied by just any type of frustrated legal claim**^o. 518 U.S. at 354. The Supreme Court restricted the constitutional right of access to the courts to only those actions challenging their criminal convictions and sentences (federal habeas corpus and State post-conviction petitions) or their conditions of confinement (civil rights complaints.). 518 U.S. at 354-355. **Impairment of any other litigating capacity is simply one of the incidental (and perfectly constitutional)**

consequences of conviction and incarceration^o. 518 U.S. at 355; see also **Canell v. Multnomah County**, 141 F.Supp.2d 1046, 1056 (D.Or. 2001)(prisoner has no right of court access to pursue claims against BurgerKing because jail authorities are not under any affirmative constitutional obligation to assist inmates in general civil matters.^o).

Casey also restricted the constitutional right of access to the courts to only those habeas corpus and civil rights claims that are nonfrivolous^o. The Court reasoned that depriving someone of a nonfrivolous claim inflicts actual injury because the claims are settled, bought and sold^o. 518 U.S. at 353 n.3. In contrast, depriving someone of a frivolous claim deprives him of nothing at all except perhaps the punishment of Rule 11 sanctions. **Id.** See **Ruiz v. United States**, 160 F.3d 273, 275 (5th Cir. 1998) (prisoner not denied access to courts where his legal claim was frivolous).

What is a nonfrivolous^o legal claim within the meaning of **Casey**? A nonfrivolous legal claim is simply a claim that has arguable merit. 518 U.S. at 353 n.3. A nonfrivolous legal claim would survive a motion to dismiss for failure to state a claim upon which relief may be granted. See Fed.R.Civ.P. 12(b)(6). A frivolous claim, on the other hand, would not. A frivolous claim lacks a recognizable legal theory or lacks sufficient facts under a cognizable legal theory. See **Neitzke v. Williams**, 490 U.S. 319, 325 (1989)(a frivolous claim embraces not only the **inarguable legal conclusion, but also the fanciful factual allegation**^o). A claim lacks an arguable basis in fact if it contains factual allegations that are fantastic, totally implausible or even delusional. See **Dekoven v. Bell**, 140 F.Supp.2d 748, 756 (E.D.Mich. 2001)(prisoner's allegation that he is a messiah-God^o whom prison officials refuse to acknowledge is frivolous). A claim lacks an arguable basis in law if it is based on an indisputably meritless legal theory, such as if the complaint alleges the violation of a legal interest which clearly does not exist. See **Berry v. Brady**, 192 F.3d 504, 508 (5th Cir. 1999)(prisoner's claim that he was denied a visit is legally frivolous since prisoners have no constitutional right to visitation); **Walters v. Edger**, 973 F.Supp. 793, 800 (N.D.Ill. 1997)(prisoner failed to demonstrate nonfrivolous claim, where his grievance concerned denial of

counsel at prison disciplinary hearing, since there is no constitutional right to counsel at prison disciplinary hearings).

Proving that a prisoner had a nonfrivolous legal claim (concerning his criminal condition and sentence or his conditions of confinement) that he wished to bring before the courts is only half of the **Casey** actual injury test. The second half involves alleging in the complaint (and proving in court) that the prisoner was hindered or impeded or stymied in bringing this nonfrivolous claim before a court because of the deficiencies in the prison's legal assistance facilities. **Casey**, 518 U.S. at 351. The Supreme Court provided two explicit examples of actual injury:

He might show, for example, that a complaint he prepared was dismissed for failure to satisfy some technical requirement which, because of deficiencies in the prison's legal assistance facilities, he could not have known. Or that he had suffered arguably actionable harm that he wished to bring before the courts, but was so stymied by inadequacies of the law library that he was unable even to file a complaint.

Casey, 518 U.S. at 351.

State attorneys, always vigilant for lawsuit deficiencies, will contend from the initial filing of the **Bounds** complaint until closing argument at trial, that **Casey's** actual injury standard has not been satisfied. At the pleading stage, the Court must accept as true all factual allegations of actual injury and view them in a light most favorable to the plaintiff. See **Casey**, 518 U.S. at 358; **Scheuer v. Rhodes**, 416 U.S. 232 236 (1974); **Conley v. Gibson**, 355 U.S. 41 45-46 (1957); **Kost v. Kozakiewicz**, 1 F.3d 176, 183 (3d Cir. 1993). Prisoners should anticipate State attorneys filing a Rule 12(b)(6) motion to dismiss, claiming that the complaint contains insufficient allegations of actual injury. They may argue that the prisoner's underlying legal claim is insufficiently pled, or is sufficiently pled but is frivolous and not worthy of **Bounds** protection.

Or they may contend that the prisoner has not adequately linked the failure to bring the legal claim into court with deficiencies in the prison's law library. For these reasons, prisoners should draft their **Bounds** lawsuits with considerable care, paying particular attention to establishing the essential **Casey** elements: (1) that the underlying grievance pertaining to his conviction or conditions of confinement has arguable merit in both fact and law; and (2) that the shortcomings in the prison's law library hindered or blocked presentation of this meritorious claim into court.

At the summary judgment stage, see Fed.R.Civ.P. 56, a prisoner can no longer rest on mere allegations of actual injury in his pleading and sit back and poke holes in the State's summary judgment motion. Rather, he must put up or shut up by coming forward with affidavits and other documentary evidence demonstrating that there is a genuine issue of actual injury for trial. See **Casey**, 518 U.S. at 358; **Anderson v. Liberty Lobby Inc.**, 477 U.S. 242 (1986); **Celotex Corp. v. Catrett**, 477 U.S. 317 (1986). All prisoners claiming actual injury should submit affidavits based on personal knowledge as required by Fed.R.Civ.P. 56(e). Such affidavits must be stripped of hearsay, conclusory statements and legal conclusions to qualify for summary judgment consideration. See **Moldonado v. Ramirez**, 757 F.2d 48, 51 (3d Cir. 1985)(affidavit that is essentially conclusory and lacking in specific facts not adequate on summary judgment); **APT Pittsburgh Ltd. Partnership v. Lower Yoder Township**, 111 F.Supp.2d 664, 669 (W.D.PA 2000)(Statements made only on belief or on information and belief may not be considered); **Turiano v. Schnarrs**, 904 F.Supp. 400, 407 (M.D.PA 1995)(personal knowledge requirement means that affidavits must be devoid of hearsay and conclusory language). The affidavits should contain specific facts establishing the actual injury elements of **Casey**: (1) that he or she had a habeas corpus or civil rights claim that was meritorious; and (2) that such meritorious claim could not be brought before the courts (or was lost) due to deficiencies in the prison law library.

Finally, at the trial stage, any prisoner claiming denial of access to the courts should be prepared to testify regarding his claim of actual injury. On cross-examination, State attorneys will

attempt to establish that the prisoners' underlying legal claim lacked arguable merit in fact or law, and that the prisoners' legal assistance program did not hinder or block presentation of this claim into court.

Proving that a prisoner's meritorious habeas corpus or civil rights claim was lost or rejected or that the presentation of such a claim is currently being prevented, Casey, 518 U.S. at 356, is difficult even in prisons and county jails where law libraries and trained assistance are nonexistent. Admittedly, a complete absence of legal resources would prevent any prisoner from researching the merits of a claim, and foreclose any appreciation of such basic pleading issues as proper party plaintiffs and defendants, standing, statute of limitations, exhaustion of State remedies and relief available. However, not every prisoner can bring suit due to the lack of legal resources. He or she must first prove that a meritorious legal claim was at stake.

The Pennsylvania Department of Corrections provides State prisoners with law libraries stocked with federal and State case reporters, Pennsylvania Purdon's Statutes, federal and State rules of court, federal and State digests, Shepard's Citations, and a host of legal reference material. See Legal Reference Materials - Main Law Library, DC-ADM 007, Attachment A (May 1999). Such contents reveal a library both adequate in law books and specifically tailored for federal habeas corpus, State post-conviction petitions, and civil rights complaints. With the exception of illiterate and non-English speaking prisoners (which we address later), it is difficult to imagine how a prisoner can prove that a law library with such contents and properly maintained could by itself hinder his efforts to pursue a legal claim. Casey, 518 U.S. at 351.

Of course, a prison law library even one resembling the vast collection of Yale University may, nonetheless, result in actual injury if access to use the facility is unreasonably restricted. Once again, however, this is a difficult task under Casey. First off, the Supreme Court has consistently given wide deference to the security concerns of prison administrators. See Casey, 518 U.S. 361 (deferential treatment is necessary because prison administrators, not courts, make the difficult judgments concerning institutional

operations); Turner v. Safley, 482 U.S. 78, 89 (1987) (when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests). Accordingly, prison authorities have the right to regulate law library use through reasonable time, place and manner restrictions. See McDonald v. Steward, 132 F.3d 225, 231 (5th Cir. 1998) (requiring prisoners to state their work hours on request slips for library use is reasonable regulation); Oliver v. Marks, 587 F.Supp. 884, 886 (E.D.PA 1989) (prison policy not allowing entry into law library after 8:00 P.M. reasonable regulation); Kendrick v. Bland, 586 F.Supp. 1536, 1550 (W.D.Ky. 1984) (15-prisoner library limit reasonable regulation); Collins v. Ward, 544 F.Supp. 408, 414 (S.D.N.Y. 1982) (suspension of law library during emergency reasonable response).

Secondly, a prisoner alleging denial of access to the courts would not only have to rebut the State's position that such library restrictions are reasonably related to prison security, but would also have to prove that the restrictions resulted in actual injury to existing or contemplated meritorious litigation. In making this requisite proof, bear in mind that mere delay or inconvenience in presenting a meritorious claim to the courts does not qualify as actual injury. See Farver v. Vilches, 155 F.3d 978, 979-980 (8th Cir. 1998) (one-day denial of access to law library is not access violation where the neither claimed nor demonstrated that he suffered any actual prejudice); Jones-Bey v. Cohn, 115 F.Supp.2d 936, 941 (N.D.Ind. 2000) (delay and inconvenience do not rise to the level of a constitutional deficiency); Benjamin v. Kerik, 102 F.Supp.2d 157, 164 (S.D.N.Y. 2000) (if an inmate experienced delays in pursuing a civil claim but files acceptable legal pleadings within court deadlines, he cannot claim that he was prejudiced by shortcomings in a facility's law library, because he has sustained no relevant actual injury); Muhammad v. Hilbert, 906 F.Supp. 267, 271 (E.D.PA 1995) (one-time denial of library access is not unreasonable since plaintiff failed to show how the denial affected his impending litigation).

D. Legal Assistance Programs

Bounds noted that while law libraries are

an acceptable means to ensure prisoner access to the courts, they are not the only one. **Bounds**, 430 U.S. at 830-831. **One such experiment**, according to the **Casey** majority, **might replace libraries with some minimal access to legal advice and a system of court-provided forms**. **Casey**, 518 U.S. at 352. States which operate adequate legal assistance programs are under no constitutional obligation to provide law libraries. See **Carter v. Kamka**, 511 F.Supp. 825, 827 (D.Md. 1980)(Maryland state prisoners not entitled to law libraries where attorneys provided). States providing trained legal assistance may also constitutionally ban jailhouse lawyers. See **Johnson v. Avery**, 393 U.S. 483, 490-491 (1969) (noting that public defender system and other volunteer and paid attorneys are available to provide alternatives if the State elects to prohibit mutual assistance among inmates); **Wetmore v. Fields**, 458 F.Supp. 1131, 1142 (W.D.Wis. 1978)(where trained assistance is provided, a prison can restrict inmates from giving legal assistance to other prisoners and the prison is not required to provide an adequate law library).

It is well settled that the States must provide counsel to indigent defendants in criminal trials. **Gideon v. Wainwright**, 372 U.S. 335 (1963). Occasionally, however, pretrial detainees held in county jails waive their Sixth Amendment right to counsel, electing to represent themselves at trial. See **Faretta v. California**, 422 U.S. 806 (1975)(defendants enjoy constitutional right to represent themselves at trial after valid waiver of counsel). Pretrial detainees considering such drastic action should understand that a **Faretta** waiver of counsel does not simultaneously grant special entitlement to law library resources. **Bounds** requires the provision of adequate law libraries or adequate trained assistance to ensure access to the courts, not both. Since Pennsylvania Courts of Common Pleas appoint counsel to indigent criminal defendants, county prisons are under no constitutional obligation to provide **Faretta** detainees with law libraries. See **United States v. Kind**, 194 F.3d 900, 905 (8th Cir. 1999)(We have serious doubts whether a pretrial detainee who exercises his constitutional right to represent himself at trial thereby becomes entitled to legal resources over and above what are provided to the general inmate population.); **United States v. Taylor**, 183 F.3d 1199, 1204 (10th Cir. 1999)(it

is well established that providing legal counsel is a constitutionally acceptable alternative to a prisoner's demand to access a law library).

While the Department of Corrections has chosen law libraries as its principal means of providing access to the courts for State prisoners, a few county jails in Pennsylvania have legal assistance programs. Evaluation of these programs must begin with recognition that the judiciary will not find a violation of access to the courts unless and until a prisoner proves actual injury due to deficiencies in the trained assistance program. See **Casey**, 518 U.S. at 353 (a prison's trained assistance program will remain in place at least until some inmate could demonstrate that a nonfrivolous legal claim had been frustrated or was being impeded).

Prisoners alleging denial of access to the courts must allege in their complaints and subsequently prove in court the following **Casey** elements: (a) First, they had a nonfrivolous legal claim that they wished to bring before the courts concerning their criminal convictions and sentences or their conditions of confinement, **Casey**, 518 U.S. at 353-354; and (b) Secondly, that this nonfrivolous legal claim has been lost or rejected, or that the presentation of such a claim is currently being prevented due to deficiencies in the legal assistance program. **Casey**, 518 U.S. at 356.

The vast majority of county prisoners are either awaiting trial (pretrial detainees) or convicted but awaiting sentencing. Such prisoners do not have a sufficient nonfrivolous legal claim concerning their criminal cases because Pennsylvania State courts appoint counsel to represent criminal defendants at trial and on direct appeal. See **Canell v. Multnomah County**, 141 F.Supp.2d 1046, 1056 (D.Or. 2001)(Plaintiff's denial of access claims fail to the extent they arise out of his prosecution on criminal charges because he was represented by counsel in those matters). For most county prisoners, the only nonfrivolous legal claim sufficient to trigger **Bounds** access protection would pertain to their conditions of confinement. For example, if a county prisoner was denied access to medical treatment for serious illness, see **Estelle v. Gamble**, 429 U.S. 97 (1976)(deliberate indifference to serious medical

needs violates Eighth Amendment), and wished to bring the matter before the courts, he or she would have a nonfrivolous civil rights claim. Likewise, if a non-resisting handcuffed prisoner is beaten by guards and wished to bring litigation, he or she would have a nonfrivolous claim of excessive force. See Hudson v. McMillian, 503 U.S. 1 (1992)(malicious and sadistic use of force violates Eighth Amendment). The facts surrounding the underlying grievance must be specified in the Bounds complaint to allow the Court to ascertain its merit.

Because Bounds did not create an abstract, freestanding right to a law library or legal assistance, an inmate cannot establish relevant actual injury simply by establishing that his prison's law library or legal assistance program is subpar in some theoretical sense. That would be the precise analogy of the healthy inmate claiming constitutional violation because of the inadequacy of the prison infirmary. Insofar as the right vindicated by Bounds is concerned, meaningful access to the courts is the touchstone,⁶ and the inmate therefore must go one step further and demonstrate that the alleged shortcomings in the library or legal assistance program hindered his efforts to pursue a legal claim.

Lewis v. Casey, 518 U.S. 343, 351 (1996) (citations omitted)

Proving that the prisoner had a meritorious civil rights complaint challenging his conditions of confinement is only half of Casey's actual injury test. The remaining half requires the prisoner to allege in his or her complaint and prove later in court that such nonfrivolous or meritorious claim was lost or rejected, or that the presentation of such a claim is currently being prevented⁶ due to deficiencies in the trained assistance program. Casey, 518 U.S. at 356.

Only those prisoners who sustain actual injury to existing or contemplated litigation have standing to bring a Bounds lawsuit. Casey, 518 U.S. at 349. As the Bounds litigation advances from complaint filing to trial so does the requisite proof of actual injury rise from mere allegation to court testimony.

At the pleading stage, the issue is not whether the prisoner will succeed or prevail in his

Bounds lawsuit, but simply whether his complaint states a claim for relief. See Scheuer v. Rhodes 416 U.S. at 236. In making this assessment, the courts will accept the factual allegations of actual injury as true, and view them in the light most favorable to the prisoner. Casey, 518 U.S. at 358; Rocks v. Philadelphia, 868 F.2d 644, 645 (3d Cir. 1989). To survive a motion to dismiss, a prisoner need only make factual allegations of actual injury in his complaint which reasonably infer that: (a) he had an underlying meritorious legal claim regarding his conviction or conditions of confinement; and (b) he was blocked or hindered in presenting this meritorious legal claim to the courts due to deficiencies in the prison's trained assistance program.

At the summary judgment stage, the prisoner can no longer rely upon mere allegations of actual injury. Now he must present affidavits and other documentary evidence showing that there is a genuine issue of actual injury for trial. Casey, 518 U.S. at 358. The purpose of summary judgment is to eliminate unnecessary trials by isolating and disposing of factually unsupported claims and defenses. Celotex Corp. v. Catrett, 477 U.S. 317, 323-324 (1986). If the prisoner fails to present affidavits and other evidence demonstrating actual injury to a meritorious legal claim, summary judgment will be entered against him. Therefore, a prisoner's affidavit should carefully detail the factual circumstances surrounding the claim he wished to bring before the courts and explain why the prison's legal assistance program prevented him from doing so. These affidavits must be based upon personal knowledge, and devoid of hearsay and legal conclusions. See Fed.R.Civ.P. 56(e).

Finally, at the trial stage, the prisoner must prove actual injury through testimony and the introduction of evidence. Casey, 518 U.S. at 358. He should be prepared to explain not only all the circumstances surrounding the claim he wish to bring before the courts, but also answer why the prison's legal assistance program prevented or hindered him from doing so.

Although a pre-Casey decision, Ward v. Kort, 762 F.2d 856 (10th Cir. 1985) is a perfect illustration of a deficient trained assistance program. In Ward, the Colorado State Hospital contracted a private law firm to provide legal

services for its patients. *Id.* at 857. The contracting attorney testified, however, that he did not draft pleadings or perform research in the areas of federal habeas corpus and civil rights actions. *Id.* at 859. The Tenth Circuit held that such a legal assistance program was constitutionally deficient because it deprived patients of the opportunity to present such important grievances to the appropriate courts. *Id.* at 860.

County prison authorities in Pennsylvania, facing lawsuits alleging denial of access to the courts, frequently claim that their **Bounds** obligations are satisfied because trained legal assistance is provided by the local public defenders office and/or the local legal services agency. At best this is nothing more than wishful thinking. Pennsylvania public defenders are statutorily-regulated and primarily involved in criminal defense assistance to indigent defendants. See Public Defender Act, 16 P.S. '9960.6. Civil rights lawsuits challenging jail conditions are not approved legal services for public defender offices. See also **Bounds v. Smith**, 430 U.S. at 828 n.17 (it is irrelevant that North Carolina authorizes expenditure of funds for appointed counsel in some State post-conviction proceedings when this statute does not cover appointment of counsel in federal habeas corpus or State or federal civil rights actions, all of which are encompassed by the right of access.).

As for local legal services agencies, these are independent nonprofit organizations (with scarce staff and resources) and under no contractual obligation to provide legal assistance to every county prisoner claiming a civil rights violation. See **Leeds v. Watson**, 630 F.2d 674, 676 (9th Cir. 1980)(Idaho Legal Aid Services does not have the staff to provide legal representation to inmates at county facility). County prisoners alleging **Bounds** violations would be wise to contact the local public defender and legal services office (before filing suit) to obtain verification that such public law firms do not provide adequate assistance to prisoners claiming civil rights violations. See **Turiano v. Schnarrs**, 904 F.Supp. 400, 402 (M.D.PA 1995)(pro se prisoner introduced public defenders letter into evidence stating that his office handles only State-level criminal defense work and not any civil litigation). During the

discovery phase of any **Bounds** litigation, prisoners can also submit interrogatories and requests for production of documents (see Fed.R.Civ.P. 33 and 34) probing the existence of any legal services contract and the claimed assistance provided by such organizations. See **Turiano**, 904 F.Supp. At 402.

Legal assistance programs which exclude the preparation of civil rights actions challenging conditions of confinement are constitutionally suspect (if actual injury to a meritorious claim can be demonstrated). See **Casteel v. Pieschek**, 3 F.3d 1050, 1054 n.4 (7th Cir. 1993)(The provision of criminal defense counsel, unable or unwilling to assist inmates with a habeas corpus petition or a civil rights complaint, is inadequate under **Bounds**). The use of only untrained inmates as paralegals is likewise questionable. See **Valentine v. Beyer**, 850 F.2d 951, 956 (3d Cir. 1988). The critical question is whether the prisoner lacks **the capability of bringing contemplated challenges to sentences or conditions of confinement before the courts** because **the State has failed to furnish adequate law libraries or adequate assistance from persons trained in the law**. **Casey**, 518 U.S. at 356.

In conclusion, trained legal assistance programs are a constitutionally-accepted alternative to law libraries. Prisoners claiming denial of access to the courts due to inadequate trained assistance programs must demonstrate actual injury through proof that a meritorious habeas corpus or civil rights claim could not be presented to court because of deficiencies in the assistance program.

E. Disadvantaged Prisoners

1. Illiterate and non-English Speaking Prisoners

In July of 2001 the Pennsylvania Department of Corrections announced a new educational initiative requiring State prisoners to reach an eighth grade reading level to qualify for employment in its correctional industries program. See **Education Goal Rises At Prisons**, Harrisburg Patriot News, July 5, 2001. Previously, only a fifth grade reading level was required for such inmate jobs. *Id.* Such statements strongly suggest large numbers of

illiterate and semiliterate prisoners in Pennsylvania State prisons.

Law libraries provide access to the courts for those prisoners who can read and comprehend the English language. For the illiterate and non-English speaking prisoner, law books are basically worthless. For this reason, a number of federal courts have concluded that an adequate law library, by itself, cannot satisfy **Bounds**- requirement of **A**adequate, effective and meaningful[®] access to the courts. **Bounds**, 430 U.S. at 822; see also, **Cornett v. Donovan**, 51 F.3d 894, 899 (9th Cir. 1995)(**A**the right of access requires provision of attorneys or legal assistants, rather than law libraries, for institutionalized persons who lack the capacity to research the law independently.[®]); **DeMallory v. Cullen**, 855 F.2d 442, 451 (7th Cir. 1988)(providing illiterate prisoner with a law book is the same as providing the anorexic with a free meal at three-star restaurant); **U.S. ex rel. Para-Professional Law Clinic v. Kane**, 656 F.Supp. 1099, 1104 (E.D.PA 1987)(law library **A**is useless to those who are functionally illiterate[®]), affirmed, 835 F.2d 285 (3d Cir. 1987), cert. denied, 485 U.S. 993 (1986); **Wade v. Kane**, 448 F.Supp. 678, 684 (E.D.PA 1978)(illiterate inmates have constitutional right to legal assistance from other inmates even where prison makes available an adequate law library).

All of the above-cited decisions were rendered prior to **Casey**. However, the principle behind these cases **B** that prison law libraries by themselves do not provide adequate access to the courts for illiterate and non-English speaking prisoners **B** remains sound with one important caveat: that the plaintiff-prisoner must first prove that he or she suffered **A**actual injury[®] to existing or contemplated litigation due to the prison's failure to provide legal assistance. A federal judge, no matter how sympathetic, cannot find prison authorities in violation of **Bounds** simply because illiterate prisoners cannot use a law library. **Casey**, 518 U.S. at 360(**A**the Constitution does not require that prisoners (literate or illiterate) be able to conduct generalized research, but only that they be able to present their grievances to the courts[®]). A federal judge can only find prison officials in violation of **Bounds** when prisoners cannot file their habeas corpus or civil rights claims in court due to inadequacies in the prison's legal access program.

In **Casey**, the Supreme Court reversed the trial judge's injunction mandating Statewide changes in all Arizona prisons because the prisoners failed to show corresponding **A**widespread actual injury[®]. 518 U.S. at 349. The **Casey** majority pointed out that the trial judge only found **A**actual injury[®] for two inmates, both handicapped by illiteracy. 518 U.S. at 356. Inmate Bartholic's lawsuit was dismissed with prejudice because the prison failed to provide special services to avoid dismissal of his case due to his illiteracy. 518 U.S. at 359. Similarly, inmate Harris suffered actual injury because his illiteracy rendered him unable to even file a legal claim. 516 U.S. at 359. **A**These two instances,[®] concluded the majority, **A**were a patently inadequate basis for a conclusion of systemwide violation and imposition of systemwide relief.[®] 518 U.S. at 359. Accordingly, **A**granting a remedy beyond what was necessary to provide relief to Harris and Bartholic was therefore improper.[®] 518 U.S. at 360.

That law libraries are of no practical use to illiterate and non-English speaking prisoners is undeniable. However, the federal judiciary will not find a violation of access to the courts simply due to illiteracy or language barriers. A federal judge can only find a violation of access to the courts when a prisoner, literate or illiterate, English-speaking or non-English-speaking, is unable to bring a nonfrivolous habeas corpus or civil rights claim into court or whose claim is dismissed due to inadequacies in the prison's access program. See **Casey**, 518 U.S. at 360 (prisoners do not have a constitutional right to use a law library but only enjoy a constitutional right to present claimed violations of constitutional rights to the courts).

In **United States v. Martinez**, 120 F.Supp.2d 509 (W.D.PA 2000), an Hispanic prisoner alleged that he was denied access to the courts because **A**the institutions where he had been housed do not provide legal research documents in his native language or legal assistance per se to non-English speaking inmates.[®] **I**d. at 516. Citing **Casey**, the district judge dismissed the claim, holding that Martinez **A**failed to point to any evidence of a direct injury to his right of access to the courts.[®] **I**d. at 516.

Prisons which provide only a law library ignore the access needs of illiterate and non-English speaking prisoners. Such prisoners cannot bring meritorious claims into court through law books they cannot read. Jailhouse lawyers B often few in number, barred from isolation units and lacking formal research and writing skills B are unable to realistically fill this assistance void. The only salvation for the illiterate and non-English speaking prisoner is a legal aid organization or private attorney willing to bring a **Bounds** lawsuit challenging the States refusal to provide legal assistance. Under **Casey**, however, this first requires a reading- or language-impaired prisoner who can prove that a lack of legal assistance prevented him from bringing a meritorious claim into court.

2. Segregated Prisoners

Illiterate and non-English speaking prisoners are not the only disadvantaged inmates in corrections. Death-row prisoners spend decades in isolation units as do inmates separated from the general prison population for administrative or disciplinary reasons. See e.g., **Shoats v. Horn**, 213 F.3d 140 (3d Cir. 2000)(eight years solitary confinement for prison escapes). Attempting civil rights or habeas corpus litigation from *Athe hole* is no different than playing chess through the mail: a frustrating, painfully slow process, the exception being that one's liberty or life is at stake.

The Third Circuit has reviewed denial of court access claims by segregated prisoners in two cases B both preceding **Casey**. In **Peterkin v. Jeffes**, 855 F.2d 1021 (3d Cir. 1988) segregated prisoners alleged they did not have physical access to the law library but instead could only obtain law books through a *Arequest slip* system under which they must know exact case citations beforehand. *Id.* at 1034. The Third Circuit expressed doubt that such a system was constitutional but remanded **Peterkin** back to the lower court for further proceedings. There the case was settled when the State agreed to provide small *Asatellite* law libraries in isolation units to help prisoners identify relevant cases and statutes (which they could request from the prison's main library).

In the second case, the Third Circuit rejected a New Jersey prisoner's claim that he

was denied access to the courts while confined in segregation. **Abdul-Akbar v. Watson**, 4 F.3d 195 (3d Cir. 1993). The Court held that where a *Arequest slip* or *Apaging* system was supplemented with a satellite law library and limited paralegal assistance *Aeven* a prisoner in a segregated unit such as the MSU would not be denied legal access to the courts. *Id.* at 203.

Both **Peterkin** and **Abdul-Akbar** are pre-**Casey** decisions, and for that reason alone, should be ignored. **Casey** makes clear that prisoners have no constitutional right to a law library or legal assistance; rather, they have only a constitutional right of access to the courts. 518 U.S. at 350. Law libraries and legal assistance are merely the means by which a State provides access to the courts. 518 U.S. at 351. Consequently, a segregated prisoner is not denied access to the courts simply because the staff librarian failed to bring him a requested law book. A segregated prisoner is denied access to the courts only when a meritorious legal claim he wished to present to the court is blocked, hindered or lost due to some inadequacy in the States legal assistance program. The latter proposition, of course, is exceedingly difficult to prove.

In **Allah v. Seiverling**, 229 F.3d 220 (3d Cir. 2000), the Third Circuit held that in order to have standing to bring litigation alleging denial of access to the courts, a prisoner must plead facts to demonstrate that the alleged shortcomings in the States access program hindered his efforts to pursue a legal claim. *Id.* at 224 n.5. In this case, Allah alleged that while in administrative segregation he did not have access to trained legal aides, and as a result, was unable to file a timely brief in his post-conviction appeal. *Id.* at 224 n.5. Construing the complaint liberally, the Third Circuit held that Allah's complaint B at the pleading stage B had sufficiently alleged actual injury to state a claim under **Casey**. *Id.* at 224 n.5.

In **Williams v. Lehigh Department of Corrections**, 79 F.Supp.2d 517 (E.D.PA 1999), a segregated prisoner brought suit, alleging that instead of direct access to the prison law library, he must use a request form to obtain law books. *Id.* at 516. Citing **Casey**, the district court dismissed the case, noting that Williams *Amakes* no argument that he was unable to raise a claim

he wished to raise or that his efforts in any pending action were prejudiced because of his inability to acquire needed materials. @ Id. at 518.

In Graham v. Perez, 121 F.Supp.2d 317 (S.D.N.Y. 2000) a protective custody inmate housed in a special housing unit alleged that he was restricted to receiving only photocopies of legal materials, denied access to typewriters, and permitted to meet law library personnel only during his one hour of recreation. Id. at 323. Citing Casey's actual injury standard, the district judge dismissed the case, stating that Graham failed to allege that any of his legal claims were prejudiced due to his limited access to legal materials. @ Id. at 324. See also: Arce v. Walker, 58 F.Supp.2d 39, 45 (W.D.N.Y. 1999)(prisoner's claim that he was denied law library access for 18 days while confined in isolation unit not violation of access to courts absent indication how it affected the outcome of his case); Caldwell v. Hammonds, 53 F.Supp.2d 1, 9 (D.D.C. 1999)(dismissing access to courts claim where segregated prisoner failed to explain how his limited access to legal materials caused him specific injury in connection with two pending cases).

These cases make clear that all prisoners, segregated or general population, must prove actual injury to a meritorious legal claim before the courts will sustain a denial of access to the courts lawsuit. Keep in mind that mere delay in receiving law books or legal assistance is not actual injury. See Casey, 518 U.S. at 302 (fact that lockdown prisoners routinely experience delays in receiving legal materials or legal assistance, some as long as 16 days is not of constitutional significance, even where they result in actual injury so long as the delays are reasonably related to legitimate penological interests). Failure to prove actual injury to a meritorious legal claim deprives a prisoner of standing to challenge the States legal access program.

F. Prisoner-to-Prisoner Legal Assistance

Johnson v. Avery, 393 U.S. 483 (1969) established the right of prisoners to receive assistance from fellow inmates in the preparation of legal documents. At issue was a Tennessee prison rule prohibiting prisoners from assisting each other in the preparation of habeas corpus

petitions. Id. at 484. The Johnson majority struck down the rule, noting that prisoners, many of whom are illiterate, are frequently unable to obtain legal assistance from any source other than fellow inmates. Id. at 488. There can be no doubt that Tennessee could not constitutionally adopt and enforce a rule forbidding illiterate or poorly educated prisoners to file habeas corpus petitions. Here Tennessee has adopted a rule which, in the absence of any other source of assistance for such prisoners, effectively does just that. @ Id. at 487. Thus, **Until the State provides some reasonable alternative to assist inmates in the preparation of petitions for post-conviction relief, it may not validly enforce a regulation such as that here in issue, barring inmates from furnishing such assistance to other prisoners.** @ Id. at 490.

The Johnson Court did not give inmate paralegals or writ writers or jailhouse lawyers unchecked freedom in the course of providing legal assistance. The States may impose reasonable restrictions and restraints upon the acknowledged propensity of prisoners to abuse both the giving and the seeking of assistance in the preparation of applications for relief. @ Id. at 490. Among the restrictions deemed reasonable by Johnson are time and location rules governing the giving and receiving of legal assistance and the imposition of punishment for the giving or receipt of consideration in connection with such activities. @ Id. at 490; see also: Williams v. Nix, 1 F.3d 712, 716 (8th Cir. 1993)(prohibiting prisoner from furnishing legal assistance upheld as sanction for charging fees); Little v. Norris, 787 F.2d 1241, 1244 (8th Cir. 1986)(prohibiting segregated prisoner access to writ-writer upheld where he could consult other segregated prisoners); Bellamy v. Bradley, 729 F.2d 416, 421 (6th Cir. 1984)(prohibiting in-cell legal assistance upheld where prisoners can meet in library); Simmons v. Russell, 352 F.Supp. 572, 579 n.7 (M.D.PA 1972)(prisoner confined in segregation for violating prison rules forfeited right to provide assistance). The Johnson Court also made clear that the States have the option to totally ban mutual legal assistance between prisoners if they can provide a reasonable alternative such as attorney assistance. 393 U.S. at 490-491.

Following in the wake of Johnson was the Third Circuit's decision in Bryan v. Werner,

516 F.2d 233 (3d Cir. 1975). In **Bryan**, prisoners brought suit challenging a regulation prohibiting prisoners assigned to the SCI-Dallas Law Clinic from assisting other inmates in the preparation of lawsuits against the institution. *Id.* at 236. Citing **Johnson**, the Third Circuit held that the regulation was valid only if there exists a reasonable alternative for obtaining assistance in such lawsuits. *Id.* at 237.

Prisons and county jails which provide law libraries as the sole means to ensure prisoner access to the courts can regulate but not prohibit mutual inmate legal assistance. This does not mean, however, that when prisoner-to-prisoner legal assistance is curtailed or interrupted there exists an automatic violation of access to the courts. **Johnson** must be read in light of subsequent Supreme Court activity in this area, most notably **Lewis v. Casey**, 518 U.S. 350 (1996). **Casey** made clear that prisoners have no constitutional right to law libraries or legal assistance. 518 U.S. at 350. Rather, they enjoy only a constitutional right of access to the courts. 518 U.S. at 350. Law libraries and legal assistance are merely the means through which prison authorities ensure prisoner access to the courts. 518 U.S. at 351.

Assistance from an inmate law clerk or writ-writer is still legal assistance. In the eyes of **Casey**, it is simply one of several means at the pleasure of prison officials to ensure prisoner access to the courts. Only when deprivation or curtailment of prisoner-to-prisoner legal assistance prevents or hinders an inmate from bringing a meritorious legal claim (challenging his or her conviction or conditions of confinement) into court does there exist a violation of access to the courts. See **Casey**, 518 U.S. at 356-357; **Shaw v. Murphy**, 532 U.S.223, 121 S.Ct. 1475, 1480 (2001)(**Under our right-of-access precedents, inmates have a right to receive legal advice from other inmates only when it is a necessary means for ensuring a reasonably adequate opportunity to present claimed violations of fundamental constitutional rights to the courts.**)(citations omitted).

In conclusion, prisoners can bring a denial of access suit challenging the prohibition or curtailment of mutual legal assistance between prisoners only in prisons which provide no

reasonable alternatives such as attorney aid. However, establishing prohibition or curtailment of prisoner-to-prisoner legal assistance is not sufficient by itself to proving a violation of access to the courts. Rather, the prisoner receiving the assistance must establish actual injury. That is, he or she must prove that the State's prohibition or curtailment of mutual legal assistance hindered or prevented a meritorious legal claim from being filed with the courts. 518 U.S. at 356. Only those prisoners who prove actual injury to a meritorious claim have standing to bring a denial of court access lawsuit. 518 U.S. at 349. In making this requisite proof, bear in mind that mere delay or temporary interruptions in prisoner-to-prisoner legal assistance will not qualify as actual injury.

Johnson's invalidation of Tennessee's prison rule banning prisoner-to-prisoner legal assistance rested upon the needs of illiterate prisoners to receive legal assistance. **Johnson** did not explicitly recognize an independent constitutional right of prisoner paralegals to provide legal assistance. As a result, a split emerged between the lower courts as to whether prisoner paralegals enjoy a constitutional right to provide legal assistance. See **Rhodes v. Robinson**, 612 F.2d 766, 769 (3d Cir. 1979)(law library clerk had standing to challenge prison rule prohibiting him from assisting other prisoners while on duty); **Gassler v. Rayl**, 862 F.2d 706, 707 (8th Cir. 1988)(prisoner has no constitutional right to provide legal assistance); **Gibbs v. Hopkins**, 10 F.3d 373, 378 (6th Cir. 1993)(while there is technically no independent right to assist, prison officials may not prevent such assistance or retaliate for providing such assistance where no reasonable alternatives are available.®). This issue is an important one because of the propensity of prison authorities to target jailhouse lawyers to deter both criticism of institutional operations and the filing of grievances and civil rights complaints. See **Abu-Jamal v. Price**, 154 F.3d 128 (3d Cir. 1998)(prison officials opened, read and sent copies of activist death-row prisoner's attorney-client mail to government lawyers charged with advising Governor in signing death warrants); **Castle v. Clymer**, 15 F.Supp.2d 640 (E.D.PA 1998)(prison officials liable for retaliatory transfer of inmate law clerk for his statements to the media regarding SCI-Dallas).

In **Shaw v. Murphy**, 532 U.S.223, 121

S.Ct. 1475 (2001) the Supreme Court held that the provision of legal advice from one prisoner to another is not entitled to any special First Amendment protection. *Id.* at 1478-1479. In **Murphy**, an inmate law clerk attempted to provide criminal defense advice in a letter to a segregated prisoner accused of assaulting a corrections officer. *Id.* at 1477. Murphy's letter, however, was intercepted by prison authorities and he was charged with violating prison rules. *Id.* at 1478. The Supreme Court held that inmate-to-inmate correspondence must be analyzed under the standards of **Turner v. Safley**, 482 U.S. 78, 89 (1987) (when prison regulation infringes on prisoners' constitutional rights, the regulation is valid if reasonably related to prison security or other legitimate government interests) and was not entitled to any special protection under the First Amendment simply because it contained legal advice. *Id.* at 1479-1480. The Supreme Court specifically rejected the proposition **that the right to provide legal advice follows from a right to receive legal advice.** *Id.* at 1480 n.3.

While the **Murphy** court did not recognize a constitutional right to provide legal assistance, this does not mean that those who use their legal research and writing skills to help other prisoners are completely stripped of constitutional protection. The **Murphy** Court merely declined **to cloak the provision of legal assistance with any First Amendment protection above and beyond the protection normally accorded prisoner's speech.** *Id.* at 1480. This statement seems to suggest that prisoner legal assistance remains a protected activity under the First Amendment; it is simply not entitled to any enhanced or special protection. If this is indeed the correct interpretation (we must await further case law in this matter), retaliatory transfers and punishment of prisoners for providing legal assistance to other inmates would remain a viable First Amendment claim if such assistance is necessary to enable other inmates receiving their assistance to gain access to the courts. See **Herron v. Harrison**, 203 F.3d 410, 415 (6th Cir. 2000) (while prisoners do not have an independent right to help other prisoners with their legal claims, such assistance is protected **when the inmate receiving the assistance would otherwise be unable to pursue legal redress**); see also **Smith v. Campbell**, 250 F.3d 1032, 1037 (6th Cir.

2001); **Thaddeus-X v. Blatter**, 175 F.3d 378, 395 (6th Cir. 1999).

G. Secondary Access to Courts Issues

Prior to this point we have discussed the core elements of **Bounds**: the provision of adequate law libraries or adequate assistance from persons trained in the law to ensure prisoner access to the courts. **Casey** makes clear that only those prisoners proving **actual injury** to a meritorious legal claim they wished to bring before the courts have standing to bring a **Bounds** lawsuit.

Here we address secondary access to courts issues, including delivery of legal correspondence, attorney-client visitation and telephone calls, notary services, photocopies and confiscation of legal materials. What post-**Casey** decisions that have emerged in these diverse areas suggest that **Bounds** lawsuits are, once again, much easier said than done, given **Casey's** actual injury requirement.

1. Attorney-client mail

Confidential communications between a prisoner and his lawyer are absolutely essential to effective representation. When prison guards read legal mail or listen to telephone and visiting room conversations, prisoners will not engage in full and frank conversations that are indispensable to the attorney-client relationship. In **Wolff v. McDonnell**, 418 U.S. 539 (1974) the Supreme Court upheld a Nebraska prison policy under which prison officials would open legal mail, but only in the prisoner's presence and without reading it. Noting that **freedom from censorship is not equivalent from inspection or perusal**, 418 U.S. at 576, the Court concluded that prison officials **have done all, and perhaps even more, than the Constitution requires**. *Id.* at 577. The **Wolff** Court also approved prison policy requiring lawyers to mark their incoming correspondence **privileged** or **Attorney-client** mail to alert prison staff to the need for special handling. 418 U.S. at 576; see also: **Lavado v. Keohane**, 1992 F.2d 601, 608 (6th Cir. 1993) (opening legal mail outside prisoner's presence upheld where envelope was not specially marked); **Henthorn v. Swinson**, 955 F.2d 351, 353-354 (5th Cir. 1992) (same); **O'Donnell v. Thomas**, 826 F.2d 788, 790 (8th

Cir. 1987)(same).

In **Bieregu v. Reno**, 59 F.3d 1445 (3d Cir. 1995) a federal prisoner brought suit claiming that prison officials repeatedly opened his legal mail outside his presence. Id. at 1448. The Third Circuit held that while a single isolated incident of opening a prisoner's legal mail outside his presence is not a constitutional violation, repeated violations of the confidentiality of a prisoner's incoming court mail do state a claim for relief. Id. at 1455. The **Bieregu** decision was rendered prior to **Casey** and thus held that no showing of actual injury is necessary. Id.

In **Oliver v. Fauver**, 118 F.3d 175 (3d Cir. 1997) a prisoner alleged that prison officials refused to send his outgoing legal mail to the courts and had opened one letter outside his presence. Id. at 176. The Third Circuit dismissed the denial of court access claim, noting that Oliver suffered no injury as a result of the alleged interference with his legal mail. Id. at 178. The Third Circuit acknowledged that **Casey** had overruled **Biergeru** and that all prisoner claims alleging denial of access to the courts require a showing of actual injury. Id. at 177-178.

In **McCain v. Reno**, 98 F.Supp.2d 5 (D.D.C. 2000) a federal prisoner alleged denial of access to the courts when prison officials opened incoming correspondence from the courts outside his presence. Id. at 5. Noting that copies of court orders and notices are public information, often simultaneously sent to defendant prison authorities, the district judge dismissed the case for failure to show actual injury. Id. at 8. There is nothing about a prison policy that permits opening incoming mail from a court that would result in an actionable claim being lost or rejected. Id. at 8.

In **Newman v. Holder**, 101 F.Supp.2d 103 (E.D.N.Y. 2000) a State prisoner alleged that the contents of his outgoing legal mail were removed by mailroom staff. Id. at 105. Citing **Casey**, the district judge dismissed the case, holding that a plaintiff must show that the alleged interference with his legal mail resulted in actual injury. Id. at 107. The Court cannot possibly perceive how an isolated incident of interference with his legal mail construed broadly and assuming the truth of the allegations could have prejudiced (the prisoner's) defense. Id. at

107.

All of these decisions strongly suggest that while proving that prison authorities opened and read a prisoner's legal mail outside his presence is often easy, establishing injury or prejudice to existing or contemplated litigation as the result of that interference is not. The same is true with attorney-client visitation and telephone calls.

2. Attorney-client visitation and telephone calls

At issue in **Moore v. Lehman**, 940 F.Supp. 704 (M.D.PA 1996) was whether SCI-Muncy prison authorities violated a prisoner's access to the courts when they denied visitation from her attorneys because their names were not listed on the prisoner's visiting list. Id. at 706. Noting that Moore was permitted to visit with her attorneys once the problem was rectified and that her legal documents were timely filed despite rejection of the visit, the district court dismissed the claim. Id. at 711. Citing **Casey**, the district court held that mere delay does not constitute an injury for an access to the courts claim. Id. at 711.

In **Procunier v. Martinez**, 416 U.S. 396 (1974) the Supreme Court invalidated a California regulation barring visitation by law students and paraprofessionals employed by attorneys. Id. at 420. Noting that prisoners must have a reasonable opportunity to seek and receive the assistance of attorneys, the **Martinez** Court held that, **Regulations and practices that unjustifiably obstruct the availability of professional representation or other aspects of the right of access to the courts are invalid.** Id. at 419. **Martinez**, however, was decided long before **Casey** and, therefore, its validity absent proof of actual injury is suspect.

For example, in **Abu-Jamal v. Price**, 154 F.3d 128 (3d Cir. 1998) a death-row prisoner brought suit, claiming (among other matters) denial of access to the courts when prison officials denied paralegal visitation due to a prison policy requiring verification that a paralegal does in fact work under contract with an attorney. Id. at 130. The Third Circuit upheld the policy first as a rational response to a legitimate security threat. Id. at 136. Secondly, the Third Circuit

rejected the denial of access to courts claim, noting that Jamal Ahas not demonstrated that the paralegal visitation restriction delayed or hindered his State court appeal.@ Id. at 136. Finally, the Third Circuit distinguished Martinez, noting that in the California case the ban on paralegals was absolute, while in Jamal, prison officials merely sought verification that the paralegal was employed by an attorney. Id. at 136.

In Arney v. Simmons, 26 F.Supp.2d 1288 (D.Kan. 1998) prisoners brought a denial of access to the courts claim, alleging that installation of a new APIN@ (personal identification number) telephone system permitted the recording and monitoring of attorney-client telephone calls. Id. at 129. The district court dismissed the claim, first finding that telephone calls to attorneys on the new telephone system were not monitored or recorded. Id. at 1296. Secondly, the prisoners failed to show actual injury as required by Casey. APlaintiffs have made no showing of prejudice to pending or contemplated litigation B no court dates missed; no inability to make timely filings; no denial of legal assistance to which a plaintiff was entitled; and no loss of a case which could have been won.@ Id. at 1296.

Prisoners claiming denial of access to the courts as the result of interference in confidential communications with their lawyers through the mail, telephone system, or visits must prove actual injury to a meritorious claim B a difficult if not impossible task. Prisoners should make realistic factual assessments of this burden, and if it cannot be satisfied, explore whether another constitutional basis can be substituted for an access to courts claim. For example, in Williams v. Price, 25 F.Supp.2d 605 (W.D.PA 1997) death-row prisoners brought suit, claiming that SCI-Greene prison guards could overhear confidential attorney-client conversations because visiting room booths were not soundproof. Id. at 615. The plaintiffs did not ground their claim on the basis of access to the courts, but rather upon the right to privacy in their communications with counsel. Id. at 616. ANow that the constitutional right of access to court is no longer available to prisoners to preserve the confidentiality of their communication with their counsel unless they can meet the difficult test of injury set forth in (Casey), or unless the Sixth Amendment is available, they will reasonably look

to the right of privacy to assure their right to confidential communications with counsel.@ Id. at 619. See also Mann v. Reynolds, 46 F.3d 1055, 1060-1061 (10th Cir. 1995)(prison regulations prohibiting death-row prisoners from having barrier-free or contact visits with counsel violated Sixth Amendment).

Likewise, in Abu-Jamal v. Price, 154 F.3d 128 (3d Cir. 1998), a death-row prisoners incoming letters from counsel were repeatedly opened and read and some letters containing A sensitive information regarding defense strategy@ were copied and sent to government attorneys charged with advising the Governor on signing death warrants. Id. at 132. The State undertook these actions as part of an investigation as to whether one of Jamal-s attorneys was assisting him in violating a prison rule prohibiting prisoners from engaging in a business or profession while incarcerated. Id. at 131. Jamal brought suit against the opening of his legal mail not on the basis of denial of access to the courts (which requires proof that the openings of legal mail hindered or blocked his State court appeals), but rather because it Ainvades the privacy of his legal mail@ and Aviolates his right to free speech@. Id. at 136.

Finally, in Benjamin v. Fraser, 264 F.3d 178 (2d Cir. 2001) prisoners brought suit, claiming their Sixth Amendment constitutional rights to counsel were violated because Adefense attorneys routinely face unpredictable, substantial delays in meeting with clients detained at Department facilities.@ 264 F.3d at 179. The Second Circuit rejected the States contention that the prisoners must prove Aactual injury@ to rise to the level of a Sixth Amendment violation. 264 F.3d at 185. AWhile a prisoner complaining of poor law libraries does not have standing unless he can demonstrate that a direct right B namely his right of access to the courts B has been impaired, in the context of the right to counsel, unreasonable interference with the accused persons ability to consult counsel is itself an impairment of the right.@ 264 F.3d at 185. The Second Circuit went on to hold that the undue delays in producing detainees for attorney-client visitation violated the Sixth Amendment and required injunctive relief. 264 F.3d at 187.

3. Notary services

The Supreme Court in **Bounds** held that indigent inmates must be provided **with notarial services to authenticate** legal documents. 430 U.S. at 824-825. However, it is extremely remote that any delay or outright refusal by prison officials to supply notarial services will result in actual injury. In **Hudson v. Robinson**, 678 F.2d 462 (3d Cir. 1982), the Third Circuit rejected a prisoner's claim that he was denied access to the courts when he was required to wait ten days for notary services. *Id.* at 466. Mere delay, according to **Hudson**, does not satisfy the actual injury requirement. *Id.* at 466. Moreover, in support of its finding of no injury or prejudice to Hudson's pending litigation, the Third Circuit cited 28 U.S.C. § 1746 which allows an unsworn statement to be used in place of an affidavit if it is based under penalty of perjury. *Id.* at 466 n.5. See also **Roberson v. Hayti Police Department**, 241 F.3d 992, 994 (8th Cir. 2001) (verified complaint is equivalent of affidavit for summary judgment purposes); **Reese v. Sparks**, 760 F.2d 64, 67 n.3 (3d Cir. 1985) (verified pro se complaint may be treated as an affidavit for purposes of summary judgment); **London v. Pennsylvania Board of Probation and Parole**, 135 F.Supp.2d 612, 613 n.5 (E.D.PA 2001) (same). Since unsworn declarations and verified complaints are perfectly acceptable substitutes for notarized affidavits in federal court, it is unlikely that any prisoner can make the requisite proof of actual injury to any existing or contemplated litigation due to prison officials' refusal to provide notarial services.

4. Legal supplies and photocopies

Bounds also held that **indigent inmates must be provided at State expense with paper and pen to draft legal documents** and **with stamps to mail them**. 430 U.S. at 824-825. This does not mean, however, that prisoners without funds are entitled to unlimited legal supplies and postage for the courts have agreed that the States may impose reasonable restrictions. See **Hershberger v. Scaletta**, 33 F.2d 955, 956 (8th Cir. 1994) (indigent prisoners entitled to one free stamp and envelope per week for legal mail); **Smith v. Erickson**, 961 F.2d 1387, 1388 (8th Cir. 1992) (providing indigent prisoner with one free mailing per week for legal correspondence satisfies **Bounds**); **Chandler v.**

Coughlin, 763 F.2d 110, 114 (2d Cir. 1985) (A State is entitled to adopt reasonable postage regulations in light of, for example, prison budgetary considerations). Additionally, indigent prisoners denied free legal supplies and postage have no cognizable claim absent proof of actual injury. See **Casey**, 518 U.S. at 349; **Blaise v. Feen**, 48 F.3d 337, 340 (8th Cir. 1995) (prisoner's claim that postage regulation violated access to courts rejected because he failed to show actual injury); **Kershner v. Mazurkiewicz**, 670 F.2d 440, 442 (3d Cir. 1982) (affirming dismissal of **Bounds** suit where prisoners failed to establish that they were unable to pursue any legal action because of the cost of legal supplies and photocopying). Finally, there is no national standard of indigency, the Supreme Court having left the matter to the States for regulatory action. See **Kershner**, 670 F.2d at 444 (noting that **Bounds** proffered no definition of indigency). In **Gluth v. Kangas**, 951 F.2d 1504 (9th Cir. 1991) prisoners were deemed indigent if they had less than \$12 on their prison accounts for a thirty-day period. *Id.* at 1508. The Ninth Circuit concluded that this policy forces prisoners to choose between purchasing hygienic supplies and legal supplies and, hence, was unacceptable. *Id.* at 1508. On the other hand, the Tenth Circuit affirmed an Oklahoma prison regulation under which a prisoner must have \$5 or less in his prison account to qualify for free postage. See **Twyman v. Crisp**, 584 F.2d 352, 358-359 (10th Cir. 1980). Clearly, definitions of indigency will vary from one prison system to the next, although some courts have generally concluded that indigency should not be established so low that it forces prisoners to choose between legal supplies and hygienic needs. See **Souder v. McGuire**, 516 F.2d 820, 824 (3d Cir. 1975). Bear in mind, however, that proof of actual injury is mandatory in all denial of access to the courts litigation.

Photocopying services were not discussed in **Bounds**. Once again, prisoners claiming denial of access to the courts due to the lack of photocopying services must establish actual injury. In **Scott v. Kelly**, 107 F.Supp.2d 706 (E.D.VA 2001) the prisoner alleged that he was denied access to the courts because prison officials delayed photocopying his legal documents. *Id.* at 708. The district judge dismissed the case, noting that the legal documents were eventually copied, filed and

considered by the Virginia Court. *Id.* at 709. Thus, Scott has not sufficiently alleged that the delay in photocopies impeded his habeas proceeding and therefore his claim of denial of access to the courts fails. *Id.* at 709. See also **Fortes v. Harding**, 19 F.Supp.2d 323, 327 (M.D.PA 1998)(access to courts claim rejected because Fortes cannot show any cognizable injury as a result of his inability to make photocopies, use the library to the extent he desired, or obtain postage.); **Hoover v. Watson**, 886 F.Supp. 410, 420 (D.Del. 1995)(failure of prisoner to allege actual injury stemming from lack of photocopier requires dismissal of access to courts claim).

Finally, we turn to the conflict between prisoners and staff concerning the amount of legal material stored in a cell. In **Cosco v. Uphoff**, 195 F.3d 1221 (10th Cir. 1999), prisoners brought suit alleging they were denied access to the courts as a result of a new prison policy restricting the amount of property allowed in cells, including legal material. *Id.* at 1222. The Tenth Circuit dismissed the claim, noting that appellants have merely set forth conclusory allegations of injury. There is no evidence to indicate that (prison officials) hindered (inmates) efforts to pursue a legal claim. *Id.* at 1224. In **Wilson v. Shannon**, 982 F.Supp. 337 (E.D.PA 1997) a prisoner alleged that prison officials interfered with his right of access to the courts by confiscating his legal materials for almost a month and by not making copies for him at the law library due to insufficient funds in his account. *Id.* at 338. The district judge dismissed the claim, noting that while prisoners do have a constitutional right to access to the courts, in order to establish a violation of that right, Wilson must demonstrate some actual injury, such as the loss or rejection of a legal claim. *Id.* at 339. See also **Zenanko v. LaFleur**, 228 F.3d 933 (8th Cir. 2000)(enforcement of property-exchange policy did not violate prisoner access to the courts); **Robinson v. Ridge**, 996 F.Supp. 447, 449-450 (E.D.PA 1997)(confiscation of notes of testimony, legal briefs and attorney correspondence not access to courts violation where plaintiff has not alleged the requisite actual damage from the loss of his legal documents); **Hackett v. Horn**, 751 A.2d 272, 275 (PA Cmwlth. 2000)(State prison regulation limiting each prisoner to ten books and one box of legal materials did not deprive plaintiff of access to the courts).

II. FIRST AMENDMENT ISSUES

The First Amendment to the United States Constitution guarantees the right of individuals to freedom of speech, religion and assembly. See U.S. Constitution Amend. I. Considered essential to a democratic society, these freedoms are passionately cherished by the American people, **New York Times Co. v. Sullivan**, 376 U.S. 254, 270 (1964)(recognizing a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open), and vigorously protected by the courts). See **Elrod v. Burns**, 427 U.S. 347, 373 (1976)(loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury); **Nebraska Press Association v. Stuart**, 427 U.S. 539, 558 (1976)(any prior restraint on expression gives rise to a heavy presumption against its validity). Speech that would land you in prison or close a newspaper in many countries throughout the world is shielded here by the First Amendment. See **Texas v. Johnson**, 491 U.S. 397 (1989)(defendant's burning of American flag during protest rally was expressive conduct protected by First Amendment); **Hustler Magazine v. Falwell**, 485 U.S. 46 (1988)(advertisement parody portraying nationally-known minister having drunken incestuous rendezvous with his mother is protected under First Amendment); **New York Times Company v. United States**, 403 U.S. 713 (1971)(U.S. Government's attempt to enjoin newspapers from publishing classified study of Vietnam War rejected).

Behind prison walls, however, First Amendment freedoms are not subject to the same degree of respect. Whereas some still cling to the idea that prisoners are entitled to no rights and remain at the whim and mercy of their jailers, most citizens believe that prisoners retain some First Amendment protection. The courts have likewise evolved from a hands-off approach to granting the incarcerated those First Amendment rights not inconsistent with the security, order and rehabilitative needs of the correctional system. In **Turner v. Safley**, 482 U.S. 78 (1987) the Supreme Court announced its definitive ruling regarding prisoners' First Amendment rights: **When a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably**

related to legitimate penological interests. 482 U.S. at 89. Applying a reasonable test is necessary, according to the Turner majority, to give prison administrators the deference required to make the difficult decisions concerning institutional operations. 482 U.S. at 89.

While the Supreme Court insists that the Turner standard is not toothless, see Thornburg v. Abbott, 490 U.S. 401, 414 (1989), the fact remains that when applying Turner, the lower courts almost always find in favor of prison regulations restricting First Amendment freedoms.

In the following sections, we consider those aspects of prison life which present First Amendment concerns.

A. Mail and Publications

Procunier v. Martinez, 416 U.S. 396 (1974) was the first case in which the Supreme Court reviewed prison mail regulations. In Martinez, prisoners challenged censorship regulations which authorized staff to reject letters that unduly complain, expressed inflammatory political, racial, religious or other views or contained lewd, obscene or defamatory material. 416 U.S. at 399-400. The Supreme Court held that such regulations are valid only if they further an important or substantial governmental interest unrelated to the suppression of expression. 416 U.S. at 413. Thus, prison officials may not censor prisoner correspondence simply to eliminate unflattering or unwelcome opinions or factually inaccurate statements. 416 U.S. at 413. Rather, they must show that censorship furthers one or more substantial governmental interests of security, order and rehabilitation. 416 U.S. at 413. Secondly, the limitation of First Amendment freedoms must be no greater than is necessary or essential to the protection of the particular governmental interest involved. 416 U.S. at 413. Thus a restriction on inmate correspondence that furthers prison security will nevertheless be invalid if its sweep is unnecessarily broad. 416 U.S. at 413-414.

Applying this two-part strict scrutiny standard, the Martinez Court found the California regulations invalid. The Court reasoned that the vague language of the regulations encouraged

prison staff to apply self-determined standards reflecting their individual prejudices and opinions. 416 U.S. at 413. Additionally, the Martinez Court held that the restrictions on prisoner mail were in no way necessary to the furtherance of legitimate governmental interests, 416 U.S. at 415, or were broader than any legitimate interest of penal administration demands. 416 U.S. at 416. Although a substantial victory for free speech advocates, many commentators were disappointed because the Martinez Court based its decision not upon the free speech rights of prisoners, but rather upon the First Amendment concerns of free citizens who sought to communicate with prisoners. 416 U.S. at 408-409.

Two months after Martinez, the Supreme Court in Pell v. Procunier, 417 U.S. 817 (1974) upheld California regulations which prohibited face-to-face interviews between the media and individual prisoners. Although Pell did not deal specifically with mail restrictions, it shed some light on the proper analysis of prisoners' First Amendment rights. The Court held that **challenges to prison regulations that are asserted to inhibit First Amendment interests must be analyzed in terms of the legitimate policies and goals of the corrections system.** 417 U.S. at 822. Furthermore, absent substantial evidence that a regulation is an exaggerated response to security and rehabilitative concerns, courts should ordinarily defer to the expert judgment of prison officials. 417 U.S. at 827. Because the restrictions on interviews were reasonably linked to maintaining prison security and order, the regulation was upheld. 417 U.S. at 828. In addition, the Pell Court noted the existence of alternative means of communicating with the media through the mail. 417 U.S. at 827-828.

The different standards of review in Pell and Martinez increased confusion in the lower courts. While both required that prison restrictions on First Amendment rights must further important governmental interests (security, order and rehabilitation), the strict scrutiny test of Martinez was not mandated in Pell. This resulted in diverging lower court decisions, with some requiring prison officials to demonstrate that restrictions were no broader than necessary to achieve governmental interests, while others simply deferred to the

expert opinions of corrections officials absent substantial evidence of an exaggerated response to security and rehabilitative concerns.

In 1979 the Supreme Court handed down **Bell v. Wolfish**, 441 U.S. 520 (1979) where federal pretrial detainees challenged on First Amendment grounds a publishers-only regulation which disallowed receipt of all hardback books unless they were sent directly from a bookstore, publisher or book club. 441 U.S. at 548-549. The **Bell** Court upheld the regulation based upon prison officials' security concerns that hardback books are especially serviceable for smuggling contraband into an institution. 441 U.S. at 551. The Court concluded that the regulation was a rational response by prison officials to an obvious security problem. 441 U.S. at 550. Additionally, the **Bell** majority observed that the regulation operated in a neutral fashion, without regard to the content of expression, and there existed alternative means of obtaining reading material. 441 U.S. at 551.

During the late 1980s the Supreme Court issued two decisions which finally clarified the proper standards of review for regulations limiting prisoners' First Amendment rights. At issue in the first case, **Turner v. Safley**, 482 U.S. 78 (1987) were two Missouri prison regulations: The first regulation permitted inmates to correspond with other inmates at different facilities if they were immediate family members or concerned legal matters. 482 U.S. at 81. All other inmate-to-inmate correspondence was barred absent approval by prison officials. 482 U.S. at 82. The second regulation allowed prisoners to marry but only upon both demonstration of compelling reasons for marriage and approval by the Superintendent of the prison. 482 U.S. at 82.

Apparently tiring of the confusion over prisoners' First Amendment rights, the **Turner** Court boldly announced its standard: **If Pell, Jones and Bell have not already resolved the question posed in Martinez, we resolve it now: when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests.** 482 U.S. at 89. The Court explained that a reasonableness standard is necessary if prison administrators, and not the courts, are to make the difficult judgments concerning institutional operations. 482 U.S. at

89. **Subjecting the day-to-day judgments of prison officials to an inflexible strict scrutiny analysis would seriously hamper their ability to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration.** 482 U.S. at 89.

The **Turner** Court went on to enunciate four factors to determine whether a prison regulation was reasonable:

(1) First, there must be a valid, rational connection between the prison regulation and a neutral legitimate governmental interest put forward to justify it. 482 U.S. at 89-90. A regulation cannot be sustained where the logical connection between the regulation and the asserted goal is so remote as to render the policy arbitrary or irrational. 482 U.S. at 89-90. Additionally, the governmental objective must operate in a neutral fashion, without regard to the content of expression. 482 U.S. at 90.

(2) Secondly, the courts must inquire whether there are alternative means of exercising the right in question. 482 U.S. at 90. Where other avenues remain available for the exercise of the asserted rights, courts should be particularly conscious of the degree of judicial deference owed to prison officials. 482 U.S. at 90.

(3) Third, the courts must determine whether the accommodation of the asserted right will have an adverse impact upon guards, other inmates, and prison resources. 482 U.S. 90. When accommodation of an asserted right will have a significant ripple effect on other inmates and prison staff, courts should be particularly deferential to corrections officials' judgment. 482 U.S. at 90.

(4) Finally, the fourth factor inquires whether there is an obvious alternative to the regulation which fully accommodates the prisoner's rights at de minimis cost to valid penological interests. 482 U.S. at 90. The Supreme Court explained this is not a least restrictive means test because prison officials do not have to set up and then shoot down every conceivable alternative method of accommodation. 482 U.S. at 90-91. But if a prisoner can point to an alternative that would

fully accommodate the First Amendment right at de minimis cost to the government interest, that is evidence that the regulation is unreasonable. 482 U.S. at 191.

Applying this four-factor test, the Court concluded that the inmate-to-inmate correspondence regulation passed constitutional scrutiny. First, the Court noted that a neutral penological interest B prison security B was at stake and there was a rational connection between this interest and banning inmate-to-inmate correspondence which facilitates escape plans, assaults and gang activity. 482 U.S. at 91. Secondly, the ban on inmate-to-inmate correspondence did not deprive prisoners of all avenues of communication but simply prohibited correspondence with a small class of incarcerated people. 482 U.S. at 92. Thirdly, the Court observed that permitting inmate-to-inmate correspondence would have an adverse impact on the safety of both prisoners and guards. 482 U.S. at 92. Finally, the alternative of monitoring every piece of inmate mail would require more than de minimis cost. 482 U.S. at 93. The marriage regulation, however, was held unconstitutional because it was not reasonably related to a legitimate penological interest. The Supreme Court concluded that prison officials=fear of Alove triangles@ causing violent confrontations and of female prisoners being abused or becoming Aoverly dependent@, represented an Aexaggerated response@ to security and rehabilitative concerns. 482 U.S. at 97-98.

In 1989 the Supreme Court extended **Turner** and further limited **Martinez** in yet another First Amendment case. In **Thornburgh v. Abbott**, 490 U.S. 401 (1989) a group of prisoners and publishers brought suit challenging a Federal Bureau of Prison=s regulation which authorized the warden to reject incoming publications found Adetrimental to the security, good order, or discipline of the institution or if it might facilitate criminal activity.@ 490 U.S. at 404.

Central to the **Abbott** decision is the distinction between incoming correspondence and publications from outgoing correspondence. Incoming publications, according to the Court, pose serious security problems because of their circulation among prisoners. 490 U.S. at 412. The Court therefore held Athat regulations

affecting the sending of a publication to a prisoner must be analyzed under the Turner reasonableness standard.@ 490 U.S. at 413. In contrast, outgoing mail is categorically less likely to implicate significant security concerns. Thus, prison regulations affecting outgoing mail are to be analyzed under the **Martinez** strict scrutiny standard. 490 U.S. at 413.

Applying the four-factor **Turner** reasonableness test, the **Abbott** Court found the censorship regulation constitutional. 490 U.S. at 419. First, the Court found that a regulation banning incoming publications that are Adetrimental to the security, good order or discipline of the institution@ was Abeyond question@ rationally related to the legitimate penological interest of prison security. 490 U.S. at 415. The Court also held that the regulations operated in neutral fashion since all incoming publications are evaluated Aon the basis of their potential implications for prison security@. 490 U.S. at 415-416. Secondly, the **Abbott** Court found that although some publications would be banned under the regulations, many other alternatives existed to the inmates because the regulations permitted Aa broad range of publications to be sent, received and read.@ 490 U.S. at 417-418. Analyzing the third factor B impact on third parties B the Supreme Court concluded that allowing publications detrimental to prison security would adversely impact the safety of both guards and other inmates. 490 U.S. 418. Finally, the prisoners failed to establish that an Aobvious, easy alternative@ existed which would permit introduction of the publications at de minimis cost to prison security. 490 U.S. at 418. The Court also upheld the Aall-or-nothing@ rule which permitted prison officials to reject an entire publication because of one offensive article, rather than merely tearing out the rejected portion. 490 U.S. at 418-419. The Court accepted prison officials= views that such an alternative would Acreate more discontent@ and was administratively inconvenient. 490 U.S. at 418-419.

The **Turner** Court=s adoption of a Areasonableness@ standard and emphasis on deferring to the judgment of prison officials regarding institutional needs and interests makes it extremely difficult for prisoners to establish First Amendment violations. Under **Martinez** prison officials must show how a regulation restricting

First Amendment freedoms will further a legitimate penological interest. Under Turner, prison officials need only show the regulation is reasonably related to a legitimate penological interest. The difference is that while prison officials need evidence in Martinez, they need only opinions and speculation in Turner. See Turner, 482 U.S. at 89 (reasonableness test makes it much too easy to uphold restrictions on prisoners' First Amendment rights on the basis of administrative concerns and speculation about possible security risks rather than on the basis of evidence that the restrictions are needed to further an important governmental interest.) (Stevens, J., concurring in part and dissenting in part). Additionally, under Turner, as long as the regulation is reasonably related to a legitimate penological interest, it is valid. Under Martinez, a regulation that furthers a legitimate prison interest would still be unconstitutional if a less restrictive alternative existed that would protect the State's interest while permitting exercise of the First Amendment right. The bottom line is simple: prison regulations that would be struck down under Martinez are now routinely upheld under Turner.

Take, for example, the controversy over sexually-oriented material in prisons. We are not speaking here of obscene material or child pornography which is illegal both in and out of prison. See Miller v. California, 413 U.S. 15, 23 (1973) (obscene material is unprotected by the First Amendment); New York v. Ferber, 458 U.S. 747, 764 (1982) (child pornography is unprotected under the First Amendment). Rather, we are dealing with publications such as Playboy and Penthouse that are sexually-oriented but not legally obscene. See Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115, 126 (1989) (sexual expression which is indecent but not obscene is protected by the First Amendment). State legislators, ever eager to use prisoners as political stepping stones to higher office, have passed statute after statute banning prisoner access to such material, usually under the pretext that it inhibits inmate rehabilitation. Although the relationship between sexually-oriented material and criminality is inconclusive at best, the extremely deferential Turner standard allows the lower courts to uphold these bans.

In Waterman v. Farmer, 183 F.3d 208 (3d Cir. 1999), two prisoners confined at a New

Jersey facility for sex offenders brought suit, claiming that a State statute restricting their access to sexually-oriented material violated the First Amendment. 183 F.3d at 209. Applying the four-pronged Turner test, the Third Circuit upheld the statute and rejected the free speech challenge. 183 F.3d at 220. The Third Circuit noted first that the statute was based on a legitimate penological interest (rehabilitation of sex offenders) and was content-neutral (since rehabilitation of criminals is unrelated to the suppression of expression). 183 F.3d at 214-215. The Court also held that the statute was rationally related to this legitimate penological interest since prison experts testified that sexually-oriented material can thwart the effectiveness of sex offender treatment. 183 F.3d at 215-217. The Third Circuit made this remarkable conclusion notwithstanding a lack of consensus among psychologists on how sexually-oriented publications affect the treatment of sex offenders. 183 F.3d at 216. The Court explained that under Turner, as long as the asserted link between the statute and the penological interest is rational, it is not necessarily a perfect fit; it must defer to the judgment of State officials. 183 F.3d at 216-217. As to the second factor, whether there exists alternative means of exercising the right in question, the Third Circuit noted that the New Jersey legislature had sufficiently narrowed the scope of the statute to only those publications that are predominantly oriented to the depiction of sexual activity on a routine or regular basis, thus providing prisoners access to other reading material. As for Turner's third factor (impact accommodation on guards, inmates and prison resources) and fourth factors (whether an alternative readily exists which would protect the penological interest while permitting access to the material), the prisoners proposed that incoming publications be reviewed and selectively distributed on a case-by-case basis to only those prisoners whose rehabilitation would not be adversely affected. 183 F.3d at 219. The Third Circuit rejected this proposal, noting that the costs of making case-by-case assessments would be substantial and would have an unduly burdensome effect on guards and the allocation of prison resources. 183 F.3d at 220. Other courts have likewise upheld similar restrictions on prisoner access to sexually-oriented material. See Frost v. Symington, 197 F.3d 348, 357 (9th Cir. 1999) (upholding ban on sexually-oriented

publications as rationally related to prevention of harassment of female guards and safety of inmates); **Mauro v. Arpaio**, 188 F.3d 1054, 1060 (9th Cir. 1999)(finding rational connection between banning publications showing frontal nudity and safety and rehabilitation of prisoners and reduction of sexual harassment of female staff despite acknowledging that the fit between the policy and objectives was not exact); **Amatel v. Reno**, 156 F.3d 192, 199 (D.C. Cir. 1998)(upholding ban on sexually-explicit materials under **Turner** despite conceding that available scientific data is inconclusive as to link between pornography and rehabilitation); **Dawson v. Scurr**, 986 F.2d 257, 261-262 (8th Cir. 1993)(upholding prison rule requiring viewing of sexually-oriented material in reading room and only by psychologically fit prisoners); **Thompson v. Patterson**, 985 F.2d 202, 207 (5th Cir. 1993)(upholding ban of sexually-explicit materials based on finding that publications were detrimental to prisoner rehabilitation).

Although it is uphill work mounting a successful free speech challenge to prison regulations under **Turner**, it is not impossible. **Turner** itself struck down the Missouri restriction on prisoner marriages. 482 U.S. at 97-98. Regulations which restrict prisoners' rights to receive incoming mail and publications will be declared unconstitutional in the absence of a legitimate and neutral penological interest or, more likely, where the connection between the regulation and the penological interest is so remote as to render the policy arbitrary or irrational. For example, in **Crofton v. Roe**, 170 F.3d 957 (9th Cir. 1999) the Ninth Circuit held unconstitutional a prison regulation prohibiting receipt of subscription publications unless they are paid for in advance by the inmate. 170 F.3d at 959. The Court noted that the State has offered no justification for a blanket ban on the receipt of all gift publications, nor has it described any particular risk created by prisoners receiving such publications. 170 F.3d at 960-961. In **Thongvanh v. Thalacker**, 17 F.3d 256 (8th Cir. 1994) the Eighth Circuit held unconstitutional an English-only prison rule requiring all incoming and outgoing correspondence be written in English. 17 F.3d at 259. Applying **Turner**, the Court noted that several German and Spanish-speaking prisoners were excepted from the rule. 17 F.3d at 259. Moreover, the security argument advanced by prison officials was undermined by

the fact that few letters B whether in English or another language B were actually read by prison officials, although all were inspected for contraband. 17 F.3d at 259. And in **Spellman v. Hopper**, 95 F.Supp.2d 1267 (M.D. Ala. 1999) a district court held unconstitutional a prison regulation barring prisoners' receipt of subscription magazines and newspapers while confined in administrative segregation. 95 F.Supp.2d at 1268. Applying **Turner**, the district judge held that the restriction was not rationally related to the State's interests or was an exaggerated response to those interests. 95 F.Supp.2d at 1272-1286.

If **Pell**, **Jones**, and **Bell** have not already resolved the question posed in **Martinez**, we resolve it now: when a prison regulation infringes on inmates' institutional rights, the regulation is valid if it is reasonably related to legitimate penological interests.

Turner v. Safley, 482 U.S. 85, 89 (1987).

Prisoners' receipt of bulk mail (third or fourth class mail) has received increased judicial attention as State authorities implemented new mail regulations during the 1990s to cope with ever-increasing prisoners. Generally, bulk mail of a commercial nature such as advertising material, sales catalogs, and merchandise fliers (often called junk mail) can be banned. In **Sheets v. Moore**, 97 F.3d 164 (6th Cir. 1996) the Sixth Circuit upheld a Michigan regulation prohibiting free advertising material, fliers and other bulk rate mail except that received from a recognized religious organization sent in care of the institutional chaplain. 97 F.3d at 165 n.1. Citing **Turner**, the Court held that the regulation was reasonably related to legitimate penological interests, noting that such bulk mail results in a huge influx of incoming mail which jeopardizes prison security and poses fire hazard and safety problems. 97 F.3d at 168. See also, **Kalasho v. Kapture**, 868 F.Supp. 882, 887 (E.D. Mich. 1994)(prisoners' First Amendment rights not violated by refusal to deliver running shoe catalog sent by third class/bulk mail).

Bulk mail of an informational nature, such as subscription organizational newsletters (e.g., Pennsylvania Prison Society), should be treated as regular mail, regardless of its postage rate. In

Prison Legal News v. Cook, 238 F.3d 1145 (9th Cir. 2001) the Ninth Circuit struck down an Oregon regulation which prohibited all incoming mail except express mail, priority mail, first class mail or periodicals mail. 238 F.3d at 1146. In that case, prisoners were barred from receiving their paid subscriptions to a non-profit organization's newsletter strictly because of the Standard A postage rate. 238 F.3d at 1148. Citing **Turner**, the Ninth Circuit held that rejecting the newsletter because of its bulk rate postal classification is not rationally related to any legitimate penological interest put forth by the Department. 238 F.3d at 1149-1150. The Court rejected as irrational prison officials contention that banning subscription newsletters reduces fire hazards and increases the efficiency of cell searches when property regulations, already in operation, restrict the amount of material prisoners are permitted in their cells. 238 F.3d at 1150-1151. Finally, the Court noted that while Oregon officials claimed they cannot process incoming paid newsletters, they were inconsistently able to process improperly addressed bulk mail sent by the Oregon Attorney General's Office. 238 F.3d at 1151. See also, **Miniken v. Walter**, 978 F.Supp. 1356, 1363 (E.D. Wash. 1997)(striking down a ban on bulk mail as applied to subscription non-profit organization mail); **Morrison v. Hall**, 261 F.3d 896, 904-905 (9th Cir. 2001)(striking down under **Turner**, prison regulation prohibiting incoming mail sent by bulk rate, third and fourth class as applied to prisoners' pre-paid subscription publications).

As noted earlier, the Supreme Court in **Abbott** established different standards governing communications between prisoners and outsiders. Incoming mail and publications are analyzed under the **Turner** reasonableness test while outgoing prisoner mail is judged under the **Martinez** least restrictive means or strict scrutiny standard. Both require the presence of a legitimate penological interest to justify restrictions on prisoner mail; however, the link between the restriction and the penological interest need only be rational under **Turner** whereas it must further a valid interest and be no greater than necessary under **Martinez**.

Whether using the **Turner** or **Martinez** standard, courts have agreed that prisoners' First Amendment rights are not violated by the inspection and reading of incoming and outgoing

nonprivileged mail. In **Witherow v. Paff**, 52 F.3d 264 (9th Cir. 1995) the Ninth Circuit upheld a regulation prohibiting prisoners from sending mail to the Nevada Attorney General without a cursory visual inspection of the contents to check for offensive or dangerous materials. 52 F.3d at 265. Citing **Martinez**, the Court held that the regulation advanced legitimate governmental interests (security of those receiving the material) while [it] still allows prisoners to send confidential information to public officials. 52 F.3d at 266.

In **Stow v. Grimaldi**, 993 F.2d 1002 (1st Cir. 1993), the First Circuit upheld a New Hampshire regulation requiring that outgoing letters to schools and universities remain unsealed for mailroom inspection. 993 F.2d at 1003. Citing **Martinez**, the Court held that the restriction furthered prison security (by making sure escape plans or contraband were not being sent) and was no greater than necessary. 993 F.2d at 1004.

In **Bell-Bey v. Williams**, 87 F.3d 832 (6th Cir. 1996) the Sixth Circuit held that Michigan prison officials did not violate the First Amendment when they inspected legal mail of a prisoner who had exhausted his allotted postage and needed a postage loan. 87 F.3d at 838-840. Citing **Martinez**, the Court held that the regulation furthered a legitimate governmental interest (management of limited prison resources) by preventing prisoners from filing new lawsuits with subsidized postage and was no greater than necessary. 87 F.3d at 838. See also, **Altizer v. Deeds**, 191 F.3d 540, 549 (4th Cir. 1999)(upholding under **Turner** prison practice of opening and inspecting outgoing mail for contraband); **Belville v. Ednie**, 74 F.3d 210, 214 (10th Cir. 1996)(upholding under **Turner** regulation that outgoing mail may be read but not censored as reasonable security measure); **Glasser v. Wood**, 14 F.3d 406, 409-410 (8th Cir. 1994)(upholding under **Martinez** prison officials' sending of photocopies of prisoner's outgoing mail to law enforcement officer investigating potential threats to witnesses); **Smith v. Delo**, 995 F.2d 827, 832 (8th Cir. 1993)(upholding under **Turner** prison regulation requiring outgoing mail to clergy and media be sent to mailroom unsealed to detect escape plans and threats); **Knight v. Lombardi**, 952 F.2d 177, 179 (8th Cir. 1991)(withholding incoming mail from former prison guard upheld as reasonably related to

prison security); **Rodriguez v. James**, 823 F.2d 8, 12 (2nd Cir. 1987)(upholding under **Turner** regulation requiring inspection of outgoing business mail due to valid interest in preventing fraud).

These cases confirm that the courts will uphold prison regulations requiring the inspection of incoming and outgoing correspondence, and some legal mail, to further valid penological interests in detecting contraband, escape plans, threats, and other criminal activity. If prison officials limited their intrusions to these legitimate areas, they would remain on firm constitutional ground. Occasionally, however, they fly off at a tangent and engage in unconstitutional conduct. In **Abu-Jamal v. Price**, 154 F.3d 128 (3d Cir. 1998) the Third Circuit held that SCI-Greene prison officials violated a prisoner's free speech rights when they opened, read, and sent to government lawyers copies of confidential attorney-client mail. 154 F.3d at 136. Prison officials did so pursuant to an investigation as to whether Jamal, a former journalist who continued to write while on death row, was violating a prison regulation barring inmates from carrying on a business or profession while incarcerated. 154 F.3d 131. Citing **Turner**, the Third Circuit held there was no valid, rational connection between the prison regulation and a legitimate penological interest. 154 F.3d at 135-136. Moreover, the Court found that prison officials were motivated, at least in part, by the content of his articles and mounting public pressure to do something about them. 154 F.3d at 134.

In **Brooks v. Andolina**, 826 F.2d 1266 (3d Cir. 1987) an SCI-Pittsburgh prisoner wrote a letter to the NAACP complaining that a female prison guard had searched one of his visitors in a very seductive manner. 826 F.2d at 1267. The prison guard filed a misconduct report against Brooks charging him with insolence and disrespect towards a staff member based on the letter. 826 F.2d at 1267. Brooks was found guilty and sentenced to thirty days segregation. 826 F.2d at 1267. The Third Circuit affirmed the lower court's finding of a First Amendment violation, noting that Brooks was not disciplined for communicating with other inmates, but for the contents of his letter to a person outside the prison system. 826 F.2d at 1268. Since Brooks' outgoing letter presented no threat to prison security, the security concerns raised by the

defendants are merely a belated attempt to justify their actions. 826 F.2d at 1268. Other courts have likewise found constitutional violations when prison officials engage in censorship or disciplinary reprisals for prisoners' private comments in outgoing mail. See **Loggins v. Delo**, 999 F.2d 364, 367 (8th Cir. 1993)(prisoner's outgoing letter to his brother stating that mailroom clerk was a lady did not implicate security interests under **Martinez**); **McNamara v. Moody**, 606 F.2d 621, 624 (5th Cir. 1979)(prison officials' refusal to send prisoner's outgoing letter to girlfriend because he wrote that mailroom clerk had sex with a cat violated **Martinez**); **Bressman v. Farrier**, 825 F.Supp. 231, 234 (N.D. Iowa 1993)(disciplining prisoner for abusive comments in outgoing letter to his brother did not implicate prison security and violated **Martinez**).

Finally, the decision to withhold or censor prisoner mail and publications must be accompanied by procedural due process to both the prisoner and his or her correspondent. See **Martinez**, 416 U.S. at 417. Even if a magazine, newspaper or personal letter is considered a threat to prison security, prison officials must provide due process safeguards to **both** parties, including notice of the rejection and an opportunity to present objections. 416 U.S. at 418-419.

In conclusion, the Supreme Court's attempt to balance prisoners' First Amendment rights against institutional needs has shifted from the more protective strict scrutiny standards of **Martinez** (which mandated that First Amendment restrictions further penological interests and be no greater than necessary) to the extremely deferential reasonableness of **Turner** (requiring only a rational connection to a legitimate penological interest).

B. Religious-Based Issues

In addition to protecting freedom of speech, the First Amendment also requires that Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . . U.S. Const. Amend. I. While the right to hold religious beliefs is absolute, see **Sherbert v. Verner**, 374 U.S. 398, 402 (1963), the freedom to act, even when the action is in accord with one's religious convictions, is not totally free from legislative

restrictions. @ **Braunfeld v. Brown**, 366 U.S. 599, 603 (1961). Outside the prison context, the Supreme Court allows a State to restrict religious freedom only if it demonstrates a compelling governmental interest and the method implemented was the least restrictive means to accomplish that interest. See **Thomas v. Review Board**, 450 U.S. 707, 718 (1981) (The State may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling State interest.); **Wisconsin v. Yoder**, 406 U.S. 205, 219-234 (1972) (conviction of Amish parents for violating Wisconsin's compulsory school-attendance law violated free exercise clause because States' interests in requiring children to receive high school education were not compelling interests which would justify substantial burden on right to religious freedom); **Sherbert v. Verner**, 374 U.S. 398, 406-409 (1963) (denial of unemployment benefits to Seventh-Day Adventist member fired for refusing work on Sabbath violated free exercise clause because there was no compelling State interest which would justify the substantial burden on her right to religious freedom).

In **Employment Division v. Smith**, 494 U.S. 872 (1990) the Rehnquist Court reversed **Sherbert** and abandoned almost thirty years precedent in using a compelling interest standard to evaluate free exercise claims. In **Smith**, two rehabilitation drug counselors were fired from their jobs and denied unemployment compensation because they admitted ingesting peyote during a religious ceremony. 494 U.S. at 874. The Supreme Court held that Oregon laws prohibited ingestion of peyote, even for religious purposes, and a neutral law of general applicability that effectively burdens religion need not be justified by a compelling governmental interest. 494 U.S. at 884-885.

In response to overwhelming criticism of **Smith**, Congress passed the **Religious Freedom Restoration Act** (RFRA) with widespread bipartisan support in 1993. See 42 U.S.C. § 2000bb. The purpose of RFRA was to reinstate the compelling interest test of **Sherbert** and **Yoder** and to guarantee its application in all cases where free exercise of religion was substantially burdened. See 42 U.S.C. § 2000bb(b). The protection RFRA provided free exercise plaintiffs was short-lived, however, because the Supreme Court ruled in 1997 that

RFRA was unconstitutional since Congress had exceeded its power under the Enforcement Clause of the Fourteenth Amendment. See **City of Bourne v. Flores**, 521 U.S. 507, 536 (1997) (Broad as the power of Congress is under the Enforcement Clause of the Fourteenth Amendment, RFRA contradicts vital principles necessary to maintain separation of powers and the federal balance.). The **Bourne** decision essentially reinstated **Smith's** low-level scrutiny of free exercise claims.

We relate this constitutional history because it has direct consequences for prisoners' free exercise claims. First, if ordinary citizens are not entitled to **Sherbert's** compelling governmental interest test, neither are prisoners whose incarceration triggers important State interests in security and order. Secondly, if fluctuation and confusion reign in free exercise law outside the prison context, we can expect no less confusion and fluctuation concerning free exercise law behind prison walls. As we shall see later, this constitutional turmoil concerning the appropriate standard of review in religious free exercise cases has not abated, and in fact, will likely intensify in the coming years.

Before addressing judicial standards governing prisoners' free exercise of religion claims, plaintiffs challenging State restrictions on religious practices must satisfy two threshold issues: the existence of a bona fide religion and sincerely-held religious beliefs. See **Thomas v. Review Board of Indiana Employment Security Division**, 450 U.S. 707, 713 (1981) (Only beliefs rooted in religions are protected by the Free Exercise Clause.); **United States v. Seeger**, 380 U.S. 163, 185 (1965) (While the truth of a belief is not open to question, there remains the significant question whether the belief is truly held.). If either of these two requirements is not satisfied, the court need not reach the question, often quite difficult in the penological setting, whether a legitimate and reasonably exercised State interest outweighs the proffered First Amendment claim. @ **Africa v. Commonwealth of Pennsylvania**, 662 F.2d 1025, 1030 (3d Cir. 1981), cert. denied, 456 U.S. 908 (1982).

1. Bona fide Religion

The threshold issue in every free

exercise claim is whether there is a religion within the meaning of the First Amendment at stake. See **Deport v. Horn**, 227 F.3d 47, 51 (3d Cir. 2000)(only those beliefs that are Areligious in nature are entitled to constitutional protection@); **Wilson v. Schillinger**, 761 F.2d 921, 925 (3d Cir. 1985)(before particular beliefs are accorded First Amendment protection, a court must determine that the avowed beliefs are Areligious in nature in the claimant-s scheme of things@). While religious beliefs Aneed not be acceptable, logical, consistent, or comprehensible to others to merit First Amendment protection,@ **Thomas**, 450 U.S. at 714, the Supreme Court has made clear that beliefs which are philosophical and personal rather than religious do not merit constitutional protection. See **Wisconsin v. Yoder**, 406 U.S. 205, 216 (1972). (AA way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable State regulation. . . .if it is based on purely secular considerations; to have the protection of the Religion Clauses, the claims must be rooted in religious belief.@).In **Africa v. Commonwealth of Pennsylvania**, the Third Circuit identified three factors for determining the existence of a religion: (1) a religion addresses fundamental and ultimate questions having to do with deep and imponderable matters; (2) a religion is comprehensive in nature, consisting of a belief system as opposed to an isolated teaching; and (3) a religion can be recognized by certain structural characteristics such as formal ceremonies, clergy, etc. 662 F.2d at 1032. Applying these factors in **Africa**, the Third Circuit concluded that the AMOVE@ organization was not a religion entitled to the protection of the First Amendment. 662 F.2d at 1036; see also: **United States v. Meyers**, 95 F.3d 1475, 1483 (10th Cir. 1996)(whether or not a system of beliefs constitute a religion turns on a variety of factors including: (a) whether the beliefs constitute ultimate ideas addressing fundamental questions of life; (b) whether the beliefs are a moral and ethical system of a way of life; (c) whether the belief system is sufficiently comprehensive; and (d) whether the beliefs are accompanied by accouterments of religion such as holy places, holy ceremonies, a prophet or teacher who is considered divine).

No one would seriously contend that Christianity, Buddhism, Islam or Judaism are not religions within the meaning of the First Amendment. Such belief systems, followed by

millions of people around the world, have existed since time immemorial. It is only when the individual practices a unique or unrecognized system of belief (such as AMOVE@) or practices a personal variation of a recognized faith does there arise conflicts between the State and the individual over First Amendment application. For example, in **Frazer v. Illinois Dept. of Employment Security**, 489 U.S. 829 (1989) the State of Illinois denied unemployment benefits to the plaintiff because, in light of his particular Christian beliefs, he refused a temporary retail job which would have required him to work on Athe Lord-s Day@. 489 U.S. at 830. Illinois argued that Frazer-s rejection of Sunday employment was not based on a specific tenet or belief of Christianity, and hence, was not protected by the First Amendment. 489 U.S. at 831. The Supreme Court reversed, holding that Illinois had violated Frazer-s free exercise rights by conditioning the receipt of unemployment benefits on his abandonment of sincerely-held religious beliefs. 489 U.S. at 835. The Court noted that while it Ais also true that there are assorted Christian denominations that do not profess to be compelled by their religion to refuse Sunday work,@that fact alone Adoes not diminish Frazer-s protection flowing from the Free Exercise Clause.@ 489 U.S. at 834. The Court emphasized that, Awe reject the notion that to claim the protection of the Free Exercise Clause, one must be responding to the commands of a particular religious organization.@ 489 U.S. at 834. Other Supreme Court and Third Circuit decisions have likewise held that religious beliefs need not be Aorthodox@ or Amainstream@ to deserve First Amendment recognition. See **Employment Division v. Smith**, 494 U.S. at 887 (it is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigant-s interpretations of those creeds); **Thomas v. Review Board**, 450 U.S. at 715-716 (the guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect); **Deport v. Horn**, 227 F.3d at 55 (finding that the lower court-s inquiry into whether prisoner-s religious-based request for a strict vegetarian diet was shared by Buddhist doctrine Ais simply unacceptable@).

The mere assertion of a religious belief does not automatically trigger First Amendment protections, however. To the contrary, only those

beliefs which are both sincerely held and religious in nature are entitled to constitutional protection.

Depart v. Horn, 227 F.3d 47, 51 (3d Cir. 2000)

Prisoners seeking religious status for unconventional faiths must prove their systems of belief and worship satisfy the **Africa** definition of religion. See **Depart v. Horn**, 227 F.3d at 52 n.3 (in determining whether a non-traditional belief or practice is religious, the courts will look to familiar religions as models to ascertain, by comparison, whether the new set of ideas or beliefs is confronting the same concerns, or serving the same purposes, as unquestioned and accepted religions). Since religions tend to have certain elements in common (such as rituals to perform; prayers to recite; holy days to observe; sacred literature to read; and personal codes of behavior to follow), courts will examine these tenets, traditions and practices of the disputed faith in light of the **Africa** criteria to determine whether there is indeed a religion at stake. Non-traditional belief and worship systems will be granted First Amendment protection as long as they are rooted in legitimate religious beliefs. See **Church of the Lukumi Babacu Aye v. City of Hialeah**, 508 U.S. 520, 531 (1993)(Santeria and animal sacrifices are protected); **Love v. Reed**, 216 F.3d 682, 687-688 (8th Cir. 2000)(belief system of prisoner who was self-proclaimed adherent of Hebrew religion and derived his beliefs from Old Testament was a religion within the meaning of First Amendment); **Dettmer v. Landon**, 799 F.2d 929, 932 (4th Cir. 1986)(witchcraft is protected religion); **Cole v. Flick**, 588 F.Supp. 772, 774 (M.D.PA 1984)(Native American culture is protected religion), reversed on other grounds, 758 F.2d 124 (3d Cir. 1985), cert. denied, 474 U.S. 921 (1985); **Luckette v. Lewis**, 883 F.Supp. 471, 478 (D. Ariz. 1995)(Freedom Church of Revelation is legitimate religion, noting Although plaintiff's religion may not be an established religion in the sense that it has millions of adherents or has been in existence for centuries, plaintiff has demonstrated that his religion is principled and legitimate.®).

Belief systems not religious in nature will be denied free exercise protection. See **Africa**, 662 F.2d at 1036 (MOVE organization not a religion); **Stafford v. Harrison**, 766 F.Supp. 1014, 1017 (D. Kan. 1991)(chemical dependency

recovery program was not a religion); **Johnson v. Pennsylvania Bureau of Correction**, 661 F.Supp. 425, 436-437 (W.D.PA 1987)(applying **Africa** criteria, Spiritual Order of Universal Beings was not a religion); **Jacques v. Hilton**, 569 F.Supp. 730, 736 (D.N.J. 1983)(applying **Africa** criteria, Church of Saint Dennis does not rise to the level of a religion), affirmed, 738 F.2d 422 (3d Cir. 1984).

2. Sincerity of Beliefs

It is not sufficient to establish that a particular set of beliefs constitutes a religion with the meaning of the First Amendment. There is also the threshold requirement of sincerity B whether the religious beliefs professed are sincerely held. If a prisoner's faith-motivated request for special or different treatment Ais not the result of sincerely held religious beliefs, the First Amendment imposes no obligation on the prison to honor that request. . . .@ **Depart v. Horn** 227 F.3d at 52.

In **Depart v. Horn**, the Third Circuit held that prison officials are entitled to make a judgment about the sincerity and the legitimacy of a prisoner's religious beliefs and act in accordance with that judgment. 227 F.3d at 52 n.3. If a prisoner's religious beliefs are Anot a constituent part of a larger pattern of religious observance on the part of the inmate®, prison officials may regard it as a pretext that is not sincere. 227 F.3d at 52 n.3. In **Sourbeer v. Robinson**, 791 F.2d 1094 (3d Cir. 1986) a prisoner contended that his First Amendment rights were violated when he was denied congregational services while confined in administrative segregation. 791 F.2d at 1102. Noting that the prisoner attended religious services only five times after his release from administrative segregation, the Third Circuit dismissed the case, finding that the prisoner's religious beliefs were insincere. 791 F.2d at 1102. Similarly, in **Johnson v. Pennsylvania Bureau of Correction**, 661 F.Supp. 425 (W.D.PA 1987), a Muslim prisoner claimed his free exercise rights were violated when female prison guards were assigned areas in the prison where they could view him unclothed, violating the tenets of Islam. 661 F.Supp. At 427. The Court held that the plaintiff did not have sincere Muslim beliefs because he abandoned his religion during his first years in prison and

additionally because his complaint was largely based upon his human dignity as opposed to being religiously-based. 661 F.Supp. At 437. On the other hand, in Cole v. Fulcomer, the Court held that a Native American prisoner had sincerely-held religious beliefs despite not maintaining such beliefs throughout his life. 588 F.Supp. at 774-775 (Many individuals who sincerely believe in Christianity or Judaism have not held their religious belief throughout their lives.). Likewise, in Reed v. Faulkner, 842 F.2d 960 (7th Cir. 1988), the Seventh Circuit held that a prisoner's failure to adhere steadfastly to every tenet of Rastafarian faith could not be considered conclusive evidence of insincerity. 842 F.2d at 963. It would be bizarre for prisons to undertake in effect to promote strict orthodoxy, by forfeiting the religious rights of any inmate observed backsliding, thus placing guards and fellow inmates in the role of religious police. 842 F.2d at 963. Finally, although holding that the MOVE organization was not a religion within the meaning of the First Amendment, the Third Circuit noted that the requirement of sincerity poses no obstacle to Africa in this case. Africa, 662 F.2d at 1030.

Whether or not an individual sincerely holds religious beliefs is not dependent upon racial or biological criteria. For example, in Jackson v. Mann, 196 F.3d 316 (2d Cir. 1999) State officials, including the prison rabbi, denied a prisoner access to kosher meals because he could not provide evidence that he was either born Jewish or had converted to Judaism. 196 F.3d at 320. The Second Circuit remanded the case back to the lower court, noting that the question whether Jackson's beliefs are entitled to Free Exercise protection turns on whether they are "sincerely held", not on the "ecclesiastical question" whether he is in fact a Jew under Judaic law. 196 F.3d at 321. Likewise in Morrison v. Garraghty, 239 F.3d 648 (4th Cir. 2001) the Fourth Circuit held that prison officials' refusal to consider a prisoner's request for Native American religious items only upon proof of Native American descent violated equal protection. 239 F.3d at 659 (We agree with the district court's conclusion that prison officials cannot measure the sincerity of Morrison's religious belief in Native American Spirituality solely by his racial make-up or the lack of his tribal membership.); see also Mitchell v. Angelone, 82 F.Supp.2d 485, 492 (E.D.Va.

1999)(prison officials' refusal to acknowledge that sincere belief in Native American theology is not absolutely limited to individuals with a certain percentage of Native American blood defies common sense and precedent); Combs v. Corrections Corp. of America, 977 F.Supp. 799, 802 (W.D.LA 1997)(restricting practice of Native American religion to only prisoners of Native American ancestry is akin to a requirement that practicing Catholics prove an Italian ancestry).

In conclusion, prisoners claiming free exercise violations as the result of State regulations and practices must satisfy two threshold issues: (1) beliefs rooted in religion; and (2) sincerity in those religious beliefs. If either of these two requirements is not satisfied, the case is terminated and it is unnecessary for the court to determine whether any existing State penological interest outweighs or justifies the restriction on religious freedom.

3. Balancing Religious Exercise Against Penological Interests

The Supreme Court first addressed prisoner's religious rights in Cooper v. Pate, 378 U.S. 546 (1964)(per curiam). In Cooper, a Muslim prisoner alleged that solely because of his religious beliefs he was denied permission to purchase certain religious publications and denied other privileges enjoyed by other prisoners. 378 U.S. at 546. The Supreme Court held that assuming the allegations of the complaint were true, it stated a cause of action and it was error to dismiss it. 378 U.S. at 546.

In 1972 the Supreme Court revisited prisoner's religious rights when it reviewed Cruz v. Beto, 405 U.S. 319 (1972)(per curiam). In Cruz, a Buddhist prisoner alleged that he was not allowed to use the prison chapel or consult with religious advisors as enjoyed by Protestant, Jewish and Roman Catholic inmates. 405 U.S. at 319. Cruz also claimed he was placed in solitary confinement for sharing his Buddhist religious materials with other inmates. 405 U.S. at 319. The Supreme Court held that if Cruz was denied a reasonable opportunity of pursuing his faith comparable to the opportunity afforded fellow prisoners who adhered to conventional religious precepts, then Texas has violated the First and

Fourteenth Amendments. 405 U.S. at 322.

The questions before the Cooper and Cruz Courts were simply whether the complaints stated a cause of action. Neither case was decided on its merits. Although Cooper and Cruz were significant rulings because they brought an end to the hands-off attitude of federal judges towards prisoners' religious complaints, the Supreme Court failed to establish a precise standard of review for prisoners' free exercise claims.

It would not be until 15 years after Cruz that the Supreme Court finally decided on a precise standard of review for prisoners' free exercise of religion claims. In O-Lone v. Estate of Shabazz, 482 U.S. 342 (1987), the Supreme Court held that regulations restricting prisoners' free exercise rights are constitutional if they are reasonably related to legitimate penological objectives. 482 U.S. at 349. The Court adopted the four-factor reasonableness test formulated in Turner v. Safley to free exercise claims. 482 U.S. at 349.

At issue in Shabazz was a New Jersey prison policy which prohibited minimum security prisoners assigned to outside work details from returning to the prison on Friday afternoons to attend Jumu'ah, the weekly Islamic congregational services. 482 U.S. at 345. Prison officials adopted the policy because of the security and administrative burdens which resulted when one or more prisoners desired to reenter the prison and attend services. 482 U.S. at 346. Applying the Turner test, the Shabazz majority upheld the policy as reasonably related to the penological objectives of institutional security, order and rehabilitation of inmates. 482 U.S. at 351-353. First, the policy was deemed rationally connected to legitimate State interests in security and prisoner rehabilitation by easing congestion at the main gate and instilling responsible work habits. 482 U.S. at 351. Secondly, the Court noted that although denied Jumu'ah services, the prisoners did enjoy alternative means of exercising their religious faith through prayer, pork-alternative meals, and special arrangements during the holy month of Ramadan. 482 U.S. at 352. As for the third Turner factor B the impact of accommodating the right on other prisoners, guards and institutional resources B the Court agreed with State officials

that adverse consequences would result because extra supervision would be required and friction would emerge inside work details as other prisoners perceive favoritism. 482 U.S. at 353. Finally, the Shabazz Court held that there were no obvious, easy alternatives. 482 U.S. at 353. In conclusion, the refusal to allow Muslim prisoners back into the prison for congregational services was reasonably related to legitimate penological objectives and did not offend the First Amendment. 482 U.S. at 353.

The Turner and Shabazz decisions made it crystal clear that prison regulations restricting prisoners' religious exercise were not to be analyzed under any heightened or strict scrutiny standard. A strict scrutiny or compelling interest standard, reasoned the Turner Court, would hamper prison officials' ability to anticipate security problems and adopt innovative solutions. Turner, 482 U.S. at 89. Consequently, as long as restrictions are reasonably related to legitimate penological interests, the lower courts are required under Turner and Shabazz to sustain their constitutionality. See Ward v. Walsh, 1 F.3d 873, 879 (9th Cir. 1992)(applying Turner, regulation prohibiting prisoners from possessing and using candles for religious purposes reasonably related to safety and security concerns); Mark v. Nix, 983 F.2d 138, 139 (8th Cir. 1993)(applying Turner, restriction against wearing hard plastic crucifix upheld because it could be used to unlock handcuffs); Muhammad v. Lynaugh, 966 F.2d 901, 902 (5th Cir. 1992)(applying Turner, regulation restricting use of Islamic kufi caps to cells upheld to prevent concealment of contraband); Jordan v. Gardner, 953 F.2d 1137, 1140-1141 (9th Cir. 1992)(applying Turner, rejecting female prisoners' claim that pat-down search by male guard violated free exercise); Iron Eyes v. Henry, 907 F.2d 810, 814-816 (8th Cir. 1990)(applying Turner, regulation restricting hair length of Native American prisoner upheld to further identification and prevent concealment of contraband); Benjamin v. Coughlin, 905 F.2d 571, 577-578 (2d Cir. 1990)(applying Turner regulation requiring congregational services only under supervision of outside spiritual leader upheld to ensure meeting is convened for religious purposes).

In 1993 Congress passed the Religious Freedom Restoration Act (RFRA) to reverse

the Supreme Court's decision in **Employment Division v. Smith**, 494 U.S. 872 (1990) (neutral laws of general application which burden free exercise of religion need not be justified by compelling governmental interest). Binding on all federal and State government agencies, including prisons, RFRA prohibited government from substantively burdening a person's exercise of religion even if the burden results from a rule of general applicability unless the government can demonstrate that the burden: (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest. See 42 U.S.C. § 2000bb, *et seq.*

The effect of RFRA was to create a more even playing field between the State and prisoners over religious exercise. Under **Turner** and **Shabazz**, prison officials need only show that a restriction on religious exercise was rationally related to prison security or other penological interests. See **Kimberlin v. United States Department of Justice**, 150 F.Supp.2d 36, 45 (D.D.C. 2001) (the court under **Turner** must determine whether the legislature might reasonably believe that the policy will advance the governmental interest, not whether the policy in fact advances that interest).

Under RFRA, the security and order of an institution, and the discipline and rehabilitation of prisoners, receive continued recognition as compelling governmental interests. However, prison officials must prove that these penological interests are actually furthered by the restriction on religious exercise (as posed to being merely rational, logical, or reasonable under **Turner**), and additionally, are no greater than necessary. Thus, even if a restriction furthers prison security, it would still be unconstitutional if its sweep was too broad. **Requiring a State to demonstrate a compelling interest and show that it has adopted the least restrictive means of achieving that interest is the most demanding test known to constitutional law.** **City of Bourne v. Flores**, 521 U.S. at 534.

Make no mistake that, although the courts began using RFRA's stricter standard to weigh free exercise claims against penological interests, it was not an automatic victory for prisoners. The stark reality of prisons is that security and order must prevail and State officials

are due substantial deference in maintaining those interests whether under **Turner's** reasonableness standard or the heightened compelling interest test of RFRA. However, unlike **Turner**, RFRA's compelling interest standard required State officials prove that restrictions on prisoners' religious exercise actually furthered a legitimate penological interest and were no greater or broader than necessary to maintain that interest. For example, in **Campos v. Coughlin**, 854 F.Supp. 194 (S.D.N.Y. 1994) two prisoners brought suit claiming that a regulation prohibiting them from wearing Santeria religious beads was a substantial burden on their free exercise rights. 854 F.Supp. at 197. Prison officials adopted the ban to combat gang rivalry and violence. 854 F.Supp. at 198. Although agreeing that prohibiting the wearing of beads facilitated institutional security by reducing gang identification, the district judge held that the regulation was not the least restrictive means to protect prison security. 854 F.Supp. at 207-208. Specifically, the Court noted that requiring prisoners to wear religious beads under their clothing would accommodate both the security interests of prison officials and the religious needs of the prisoners. 854 F.Supp. at 208.

The protection RFRA afforded prisoners claiming violations of their religious freedom vanished, however, when the Supreme Court held that RFRA was unconstitutional (as applied to the States) since it was an improper exercise of Congressional power to regulate State conduct under the Fourteenth Amendment. See **City of Bourne v. Flores**, 521 U.S. 507 (1997). As the result of **Bourne**, the courts abandoned RFRA's compelling interest test and returned the free exercise standard back to the **Turner** reasonableness standard. See **Freeman v. Arpaio**, 125 F.3d 732, 736 (9th Cir. 1997) (the decision in **Bourne** restored the reasonableness test as the applicable standard in free exercise challenges); **Africa v. Horn**, 701 A.2d 273, 275 (PA Commwlth. 1997) (as the result of **Bourne**, the compelling interests standards set forth in RFRA are no longer applicable to the inmates' claim of a constitutional right to practice a religion).

The return of **Turner** and **Shabazz** as the controlling standard in free exercise disputes makes it extremely difficult for prisoners to mount successful challenges to regulations restricting

religious practices. The **Turner** factors were deliberately slanted by the Supreme Court in favor of deference to State officials. However, it is not impossible to prove a First Amendment violation under **Turner** as we briefly look at four areas of recurring free exercise disputes: (a) congregational services; (b) religious diets; (c) grooming regulations; and (d) name changes.

(a) Congregational services

In **Cooper v. Tard**, 855 F.2d 125 (3d Cir. 1988), Islamic prisoners brought suit claiming their free exercise rights were violated when prison officials punished them for participating in group prayer in the prison yard. 855 F.2d at 127. Applying **Turner**, the Third Circuit stated it had no difficulty sustaining the regulation, noting that unauthorized group activity involves a prisoner leadership structure which poses a potential threat to prison authority. 855 F.2d at 129.

Challenges to congregational restrictions, as illustrated by **Cooper**, are virtually insurmountable under **Turner** as prison officials' security concerns are at their highest level when prisoners assemble for any meeting, religious or not. In **Shabazz**, the Supreme Court upheld a New Jersey Prison policy barring minimum security prisoners on outside work details from reentering the prison for the weekly Jumu'ah services due to security and administrative concerns. 482 U.S. at 351-352. In **St. Claire v. Cuyler**, 634 F.2d 109 (3d Cir. 1980) the Third Circuit sustained, also on security grounds, a prison regulation barring segregated prisoners from congregational services. 634 F.2d at 116. In **Green v. Carlson**, 877 F.2d 14 (8th Cir. 1989) the Eighth Circuit held that a Jewish prisoner's First Amendment rights were not violated when he was prohibited from praying with a quorum of ten Jewish men while confined in administrative segregation. 877 F.2d at 16-17. Not all challenges to congregational restrictions prove fruitless, however. In **Mayweathers v. Newland**, 258 F.3d 930 (9th Cir. 2001), the Ninth Circuit upheld a lower court's injunction prohibiting prison administrators from disciplining Muslim prisoners who missed work assignments to attend Friday Jumu'ah services. 258 F.3d at 933. Weighing the four factors in **Turner**, the Court concluded that while the State has a legitimate interest in making sure prisoners attend their

work assignment, the punishment of prisoners for attending Jumu'ah services was not rationally related to this interest. 258 F.3d at 938. The Court noted that the absence of Muslim prisoners for about one hour on Fridays could not adversely impact the work incentive program given the fact that other inmates take off as much as 16 hours a month for visits, other religious services, and recreational events. 258 F.3d at 938.

In another issue pertaining to congregational services, the courts have upheld under **Turner** numerous prison regulations and policies banning congregational services absent the presence of an outside religious leader. See **Anderson v. Angelone**, 123 F.3d 1197, 1199 (9th Cir. 1997)(prohibiting prisoner-led religious services); **Hadi v. Horn**, 830 F.2d 779, 784 (7th Cir. 1987)(cancellation of Islamic services reasonable security measure when outside Muslim chaplain was unavailable.).

(b) Religious diets

Many religions have dietary codes prohibiting followers from consuming non-kosher foods. State officials, on the other hand, have security and budgetary concerns in running a simplified food service. Resolving these competing interests under **Turner**, prisoners have successfully established free exercise violations in several cases. See **Love v. Reed**, 216 F.3d 682, 690-691 (8th Cir. 2000)(applying **Turner**, prison officials' refusal to provide food to prisoner in his cell on Sabbath not reasonably related to penological interests); **Ashelman v. Wawraszek**, 111 F.3d 674, 678 (9th Cir. 1997)(applying **Turner**, prison required to provide diet sufficient to sustain Jewish prisoner in good health without violating his religious dietary commands); **Makin v. Colorado Dept. of Corrections**, 183 F.3d 1205, 1213-1214 (10th Cir. 1999)(prison officials' refusal to accommodate Islamic prisoner's meal requirements during holy month of Ramadan violated First Amendment). Other courts, however, have reached opposite conclusions and sustained the denial of religious diets under **Turner** based upon identical State interests. See **Martinelli v. Dugger**, 817 F.2d 1599, 1506 n.25 (11th Cir. 1987)(rejecting full kosher meals as beyond State's budgetary constraints); **Kahey v. Jones**, 836 F.2d 948, 950 (5th Cir. 1988)(prison has legitimate governmental interest in running

simplified food service rather than full-scale restaurant).

The Third Circuit has addressed prisoners' religiously-based dietary claims in two cases. In Johnson v. Horn, 250 F.3d 276 (3d Cir. 1998) the Third Circuit applied Turner and upheld the denial of hot kosher meals to Jewish prisoners on grounds that the State has a legitimate interest in running a simplified food system and security would be compromised from both the introduction of additional food into the facility from new sources and the potential security problems that might emerge as other prisoners perceived the Jewish prisoners as receiving special treatment. 150 F.3d at 282. Although the prison was not required to provide a hot kosher diet, the Third Circuit did hold that the First Amendment requires the prison officials to provide the inmates with a diet sufficient to sustain them in good health without violating the kosher laws. 150 F.3d at 283.

Johnson should be ignored, however, because the Third Circuit subsequently concluded that Johnson was based upon a defective or faulty interpretation of Turner. See Depart v. Horn, 227 F.3d 47, 55 (3d Cir. 2000)(en banc)(noting that since Johnson is inconsistent with Supreme Court precedent, we overrule the analysis in Johnson pertaining to the second prong of the Turner analysis.®).

In Depart, a prisoner brought suit, claiming his free exercise rights were violated when SCI-Greene officials refused to provide him with a vegetarian diet consistent with Buddhist beliefs. 227 F.3d at 48. Applying the four-factor Turner analysis, the Third Circuit remanded the case back to the lower court, holding that the record was inadequate to properly balance the State's penological interests against Depart's religious needs. 227 F.3d at 58. The Third Circuit, however, was clearly agitated by the fact that State officials denied Depart's request for a vegetarian diet based on alleged administrative and security concerns yet openly conceded that Jewish prisoners were receiving religiously-based kosher meals. 227 F.3d at 58 (The defendants' treatment of Jewish inmates, in the absence of some further explanation, casts substantial doubt on their assertion that accommodating Depart's request would result in significant problems for the prison community.®).

Since Depart and Johnson are not definitive in terms of balancing penological interests against a prisoners' religiously-based dietary requests, we must await further decisions in this area from the Third Circuit.

(c) Grooming regulations

Another source of conflict between prisoners' religious exercise and State penological interests involves personal grooming regulations. Religious decrees requiring the covering of the head with special headgear during prayer and outside travel conflict with prison officials' security concerns pertaining to contraband smuggling and detection. Religious decrees prohibiting the cutting of facial hair or the hair on one's head conflict with State interests in prisoner identification. Balancing these competing interests under Turner, the courts have overwhelmingly concluded that such regulations outweigh or justify the intrusion upon prisoners' free exercise rights.

Consistent with Turner (although preceding it by two years) are Wilson v. Schillinger, 761 F.2d 921 (3d Cir. 1985) and Cole v. Flick, 758 F.2d 124 (3d Cir. 1985) where the Third Circuit rejected free exercise challenges to a Pennsylvania State prison grooming regulation, prohibiting male hair length below the collar. 758 F.3d 131. Finding that the regulation was based on valid security concerns, including an effective prisoner identification system, contraband detection and control, and the control of predatory homosexuals, the Court sustained the regulation. 758 F.3d at 126-131. See also Green v. Polunsky, 229 F.3d 486, 491 (5th Cir. 2000)(applying Turner, prison policy prohibiting prisoners from wearing beards, except for medical reasons, was not free exercise violation); Hines v. South Carolina Department of Corrections, 148 F.3d 353, 358 (4th Cir. 1998)(applying Turner, prison regulation requiring male prisoners to keep hair short and faces shaven upheld as reasonably related to goals of eliminating contraband, reducing gang activity and identifying inmates); Harris v. Chapman, 97 F.3d 499, 504 (11th Cir. 1996)(applying RFRA, prison regulation requiring short-to-medium length hair and clean-shaven faces upheld as least restrictive means to identify prisoners and prevention of contraband); Powell v. Estelle, 959 F.2d 22, 24-25 (5th Cir.

1992)(applying Turner, prison regulation prohibiting long hair and beards upheld as rationally related to goal of preventing concealment of contraband and identification of prisoners).

We take this opportunity to reaffirm our refusal, even where claims are made under the First Amendment, to substitute our judgment on difficult and sensitive matters of institutional administration for the determination of those charged with the formidable task of running a prison.

O=Lone v. Estate of Shabazz, 482 U.S. 342, 353 (1987)(citations omitted).

Although most prisons allow Jewish prisoners to wear yarmulkes and Islamic prisoners to wear kufis, a few courts have upheld prison regulations restricting the time and places that religious headgear may be worn. See Young v. Lane, 922 F.2d 370, 377 (7th Cir. 1991)(applying Turner, policy limiting wearing of yarmulkes only inside cells and during religious services upheld.).

(d) Name Changes

Prisoners who have experienced a spiritual reawakening in their lives occasionally petition the local courts to obtain a religious name change. State officials, however, often refuse to recognize the individual's legally-recognized name change and require him to identify himself under his commitment name. In Hakim v. Hicks, 223 F.2d 1244 (11th Cir. 2000) a prisoner converted to Islam during his incarceration and obtained a name change from the State of Florida reflecting his Islamic faith. 223 F.3d at 1246. Prison officials, however, refused to recognize the religious name, claiming that name changes would interfere with record-keeping practices and undermine security by creating confusion in prisoner identification. 223 F.3d at 1249. The Eleventh Circuit found that the State's refusal to adopt a dual-name policy (in which the prisoner's commitment name is followed by his legally-recognized religious name) was an exaggerated response to prison concerns and was unreasonable under the Turner standard. 223 F.3d at 1249; see also Malik v. Brown, 71 F.3d 724, 729-730 (9th Cir. 1995)(law governing

religious name changes has been litigated extensively and courts have consistently recognized an inmate's First Amendment interest in using his new legal name B at least in conjunction with his committed name.); Salaam v. Lockhart, 905 F.2d 1168, 1174-1175 (8th Cir. 1990)(applying Turner, prison policy of using only committed names on records, clothing and in mailroom, was unreasonable restraint on inmate who had changed his name upon conversion to Islam); Ali v. Dixon, 912 F.2d 86, 90 (4th Cir. 1990)(requiring inmate who had converted to Islam to acknowledge his commitment name to receive trust fund monies violated First Amendment when prison officials refused to add new religious name).

4. The Resurrection of RFRA?

Just as prisoners and many civil rights advocates resigned themselves to the harsh realities of Turner and Shabazz, Congress stepped back up to the plate in September of 2000 and passed the Religious Land Use and Institutionalized Persons Act of 2000 (we shall refer to it as "Act of 2000"). See 42 U.S.C.A. '2000cc. The Act of 2000 is Congress' attempt to resurrect RFRA by reinstating the compelling interest standard in free exercise claims. It states:

No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution. . . .even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person: (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.

42 U.S.C.A. Sec. 2000cc-1.

Whether or not the Act of 2000 will suffer a constitutional fate similar to RFRA remains to be seen. That issue is beyond the scope of this review. The Act of 2000 states that "no government shall impose a substantial burden on a person's religious exercise unless it

demonstrates that the burden is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that compelling governmental interest. 42 U.S.C.A. Sec. 2000cc-1. Assuming that a prisoner can meet the threshold requirements that: (a) his system of belief constitutes a religion within the meaning of the First Amendment, see Africa, 662 F.2d at 1032; and (b) he sincerely holds those religious beliefs, see Depart, 227 F.3d at 51, he is entitled to protection under the **Act of 2000**.

Under the **Act of 2000**, a prisoner must first prove that government imposed a substantial burden on the religious exercise of a person. A substantial burden generally occurs when the government restricts conduct or expression that is a central tenet of a person's religious beliefs or denies benefits because of conduct mandated by religious belief. See Thomas v. Review Board, 450 U.S. 707, 717-718 (1981); Mack v. O'Leary, 80 F.3d 1175, 1179 (7th Cir. 1996) (a substantial burden in the free exercise of religion is one that forces adherents of a religion to refrain from religiously motivated conduct, inhibits or constrains conduct or expression that manifests a central tenet of a person's religious beliefs, or compels conduct or expression that is contrary to those beliefs).

The **Act of 2000** defines religious exercise as any exercise of religion, whether or not compelled by, or central to, a system of religious belief. 42 U.S.C.A. § 2000cc-5(7)(A). Combining the two phrases, the **Act of 2000** appears to prohibit the substantial burdening of any religious practice, regardless whether it is central to, or mandated by, a particular religion. See Kikumura v. Hurley, 242 F.3d 950, 961 (10th Cir. 2001) (although pastoral visits are not mandated by Buddhist or Christian religions, they are religious exercise and, accordingly, are protected activities under the **Act of 2000**).

A prison regulation which substantially burdens a prisoner's religious practice will be upheld by the courts if it is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that governmental interest. 42 U.S.C.A. § 2000cc-1(a)(1)-(2). The safety, security and order of the institution, and the discipline and rehabilitation of prisoners would presumably remain compelling governmental interests under the **Act of 2000**.

See Turner, 482 U.S. at 92 (maintaining safety and internal security are the core functions of prison administration); Pell v. Procunier, 417 U.S. at 822-823 (lower courts must assess challenges to prison regulations in light of legitimate penal objectives including deterrence of crime, rehabilitation of offenders, and internal security of facility). The courts have also recognized budgetary concerns as a compelling governmental interest. See Shabazz, 482 U.S. at 353 (noting that accommodating prisoners' requests to re-enter the facility from outside work details for purpose of attending Jum'ah services would require extra supervision).

If a prison regulation burdening religious exercise is in furtherance of a compelling penological interest such as security and safety of the institution, it will be sustained by the courts only if it is the least restrictive means to protect that interest. Under this requirement, prison officials cannot simply ban a religious practice if there exists reasonable alternatives that, if implemented, will protect the penological interest while allowing the religious practice. For example, one justification for State prison grooming regulations is that uncut long hair is unsanitary and dangerous when prisoners work in food preparation or around machinery. Under the least restrictive means test, however, a simple hair net would protect the State's safety interests while permitting the exercise of the prisoner's religious beliefs.

The compelling governmental interest test of the **Act of 2000** is certainly a more prisoner-friendly free exercise standard than Turner and Shabazz. It requires State officials to prove that a restriction on religious exercise actually furthers prison security or other legitimate interests, and additionally, is no broader than necessary. The Act of 2000, however, should not be interpreted as the answer to all religious grievances. It does not mean, for example, that prisoners confined in isolation units for disciplinary reasons will suddenly be released to attend the weekly congregational services or that prisoners will be entitled to don robes and conduct rituals in their cells. The courts always have, and always will give substantial deference to State officials in matters involving the safety and security of the institution. The lower courts will uphold the vast majority of prison regulations curtailing religious exercise even when applying

the compelling interest standard of the **Act of 2000**.

In conclusion, while religious practices are now routine in prisons and jails, the standards applied by the courts to evaluate free exercise disputes remains unsettled. Clearly, prisoners should assert that the appropriate free exercise standard is the compelling governmental interest/least restrictive means test enunciated in the **Act of 2000**. Under this standard, a regulation curtailing religious free exercise can be sustained only if it is in furtherance of a compelling governmental interest (such as prison security, safety and the discipline and rehabilitation of prisoners) and is the least restrictive means to protect that interest.

Turner should not be ignored since the constitutionality of the **Act of 2000** remains open to question. Before filing suit, prisoners should carefully analyze any prison regulation or practice restricting free exercise under each of the **Turner** factors and available case precedent to determine the likelihood of success under the reasonableness standard. This requires familiarity with current prison operations. Only by fully appreciating the State's likely positions regarding each of the **Turner** factors can you conduct effective pretrial discovery to uncover evidence demonstrating that the regulation is not reasonably related to the State's purported penological justifications.

C. Association and Media Rights

The First Amendment also protects the individual's right to freedom of association. The Supreme Court has recognized two types of association protected by the First Amendment: (1) intimate association, that is, the right to maintain personal family relationships; and (2) expressive association, that is, the right to join groups and associate with others to advance ideas or engage in expressive conduct. See **Roberts v. United States Jaycees**, 468 U.S. 609, 617-618 (1984). Given the fact that prisoners maintain family relationships and join advocacy groups while incarcerated, both types of association are implicated in the corrections system. Once again, however, the exercise of a constitutional right is not absolute, but must be weighed against legitimate State interests.

1. Intimate association

The right of intimate association involves an individual's right to enter into and maintain intimate or private relationships free of State intrusion. **Phi Lambda Phi Frat v. University of Pittsburgh**, 229 F.3d 435, 441 (3d Cir. 2000). Family relationships are the classic example of protected intimate associations because they involve deep attachments and commitments to those few individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life. **Roberts**, 468 U.S. at 619-620.

Although the Supreme Court has never definitively answered the question, common sense suggests that prisoners do enjoy a constitutional right of intimate association to the extent that it is not inconsistent with the legitimate penological interests of the corrections system. In **Turner v. Safley**, 482 U.S. 78 (1987) prisoners brought suit challenging a Missouri regulation which prohibited them from marrying unless they had the permission of the prison superintendent, which could be given only when there were compelling reasons to do so. 482 U.S. at 96. The **Turner** Court struck down the marriage regulation, holding that it was not reasonably related to the State's rehabilitation and security concerns, and thus, was unconstitutional. 482 U.S. at 97-99. One can infer from **Turner** that prisoners do enjoy a constitutional right of intimate association; otherwise, there was no justification for the Supreme Court to balance Missouri's penological objectives against the prisoner's interest in marriage.

The right of intimate association in prison emerges primarily in the context of family visitation and prisoner marriages. **Turner** held that the States cannot impose unreasonable barriers on prisoner marriages. As for family visitation, some lower courts have held that prisoners do not enjoy a constitutional right to visitation. See **Buehl v. Lehman**, 802 F.Supp. 1266, 1270 (E.D.PA 1992)(It is doubtful that convicted prisoners or those who wish to visit them, including family and spouses, have a constitutional right to visitation.); **Flanagan v. Shively**, 783 F.Supp. 922, 934 (M.D.PA 1992)(noting that visitation is a privilege subject to the discretion of prison officials, the court held,

Inmates have no constitutional right to visitation.®, affirmed, 980 F.2d 722 (3d Cir. 1993).

With all due respect to these courts, we think such statements are simply wrong. It would be nonsensical for the Supreme Court to hold that prisoners retain a constitutional right of marriage B the most sacred intimate association B yet reject constitutional recognition of family visitation in order to maintain that marriage. In addition, such statements are inconsistent with well-established Supreme Court precedent holding that Aa prison inmate retains those First Amendment rights that are not inconsistent with his status as a prisoner or with the legitimate objectives of the corrections system.® Pell v. Procunier, 417 U.S. 817, 822 (1974). In short, we believe that the constitutional right of intimate association in the context of family visitation survives incarceration but, as with all constitutional rights, it must be balanced against legitimate State interests. For example, in Bazzetta v. McGinnis, 286 F.3d 311 (6th Cir. 2002), the Sixth Circuit held that the First Amendment grants prisoners a Alimited right to freedom of association® in the context of **non-contact** visits. However, state officials may restrict such rights B and the federal courts will uphold those restrictions utilizing the Turner balancing test B where it is Anecessary and appropriate® to protect valid security interests. 286 F.3d at 317; see also Caraballo-Sandoval v. Honsted, 35 F.3d 521, 525 (11th Cir. 1994)(Inmates do not have an absolute right to visitation, such privileges being subject to the prison authorities= discretion provided that the visitation policies= meet legitimate penological objectives.®).

Assuming that prisoners do enjoy some form of a constitutional right of intimate association in the context of family visitation, there can be no doubt that the State has the right to enforce regulations which are reasonably necessary to ensure the safety, security and order of the institution during the visiting process. For example, in Block v. Rutherford, 468 U.S. 576 (1984), pretrial detainees brought suit challenging a Los Angeles County jail regulation banning all contact visits. 468 U.S. at 578. Noting that contact visits may allow the introduction of contraband into the facility and expose innocent persons to potentially dangerous

persons, 468 U.S. at 586-587, the Supreme Court upheld the regulation stating that Athe Constitution does not require detainees be allowed contact visits when responsible, experienced administrators have determined, in their sound discretion, that such visits will jeopardize the security of the facility. 468 U.S. at 589.

A prison regulation restricting family visitation will be upheld as valid Aif it is reasonably related to legitimate penological interests.® Turner, 482 U.S. at 89. The Supreme Court in Turner identified four factors relevant to the reasonableness inquiry. First, there must be a Avalid, rational connection® between the regulation and a legitimate penological interest put forward by the State to justify it. Second, the courts must determine whether alternative means remain open for the prisoner to exercise the asserted constitutional right. Third, the courts should consider what impact accommodating the asserted right would have on other prisoners, staff and prison resources. Finally, the courts inquire whether readily available alternatives exist which would accommodate the asserted right at de minimis cost to the penological objective. 482 U.S. at 89-91.

In addition to banning contact visitation, the courts have upheld a variety of other restrictions which are considered reasonably related to prison security and order. For example, in Kilumura v. Hurley, 242 F.3d 950 (10th Cir. 2001) the Tenth Circuit held that it is Awell established that prison administrators can enact regulations that restrict the number of visitors an inmate can have for purposes of maintaining institutional security.® 242 F.3d at 957. In Kilumura, the Court applied Turner and upheld a prison regulation barring pastoral visitation unless the prisoner initiates the request for the visit and the pastor is a member of the clergy from the prisoner-s faith. 242 F.3d at 957. The Court held that the regulation was reasonably related to the States= interests in keeping the number of pastoral visits at a manageable level given security and limited resources concerns, and preventing abuse of the system. 242 F.3d at 957. In Robinson v. Palmer, 841 F.2d 1151 (D.C. Cir. 1988) the Circuit Court upheld the suspension of visitation rights under Turner for attempting to bring contraband into the facility. 841 F.2d at 1156-

1157. In **Brooks v. Kleinman**, 743 F.Supp. 350 (E.D.PA 1989) the district court upheld prison regulations restricting prisoners confined in the restricted housing unit to non-contact weekday visits. 743 F.Supp. at 351; see also **Ross v. Owens**, 720 F.Supp.490, 91 (E.D.PA 1989)(upholding prison officials' rejection of inmates' visit with 16 year-old son for failure to produce proper identification); **Shaddy v. Gunter**, 690 F.Supp. 860, 862 (D.Neb. 1988)(sustaining disciplinary sanction against prisoner for violating prison rule prohibiting kissing, caressing and fondling during visit).

On the other hand, where prison regulations restricting family visitation are not reasonably related to a legitimate penological objective, the courts have found First Amendment violations. In **Doe v. Sparks**, 733 F.Supp. 227 (W.D.PA 1990) the district court found unconstitutional a Blair County Prison regulation which prohibited visitation between homosexual prisoners and their boyfriends or girlfriends. 733 F.Supp. at 234. Applying **Turner**, the Court held that the connection between the asserted security goal (of preventing harassment or abuse of homosexual prisoners) and the visitation policy is so remote as to be arbitrary. 733 F.Supp. at 234. The Court noted that the perception of prisoners that a particular inmate is homosexual due to a chance observation during a mere two-hour weekly visit is a practically negligible one in comparison to the other 166 hours per week in which prisoners can observe the inmates' appearance and behavior. 733 F.Supp. at 233. See also **Bazzetta**, 286 F.3d at 321-322 (prison regulations barring non-contact prisoner visitation with minor children and permanent visitation bans on prisoners with two substance-abuse misconducts were not reasonably related to penological interests under **Turner**, and thus violated First Amendment).

2. Expressive association

The Supreme Court has recognized a First Amendment right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious and cultural ends. 468 U.S. at 622. Whether or not a particular group or organization is entitled to constitutional protection as an expressive association depends on whether it is engaged in some form of

expression, whether it be public or private. 468 U.S. at 622. In **Boy Scouts of America v. Dale**, ___ U.S. ___, 120 S.Ct. 2446, 2451 (2000). In **Roberts**, the Supreme Court held that the Jaycees were a protected expressive association because at the national and local levels of the organization have taken public positions on a number of diverse issues, and members of the Jaycees regularly engage in a variety of civic, charitable, lobbying, fund-raising and other activities. 468 U.S. at 627. And in **Dale**, the Supreme Court held that the Boy Scouts were also a protected expressive association because its general mission was to instill certain moral values in young people by having adult leaders spend time with them in a variety of outdoor activities. ___ U.S. at ___, 120 S.Ct. At 2452.

In Pennsylvania's State correctional system, prisoners are permitted to join a diverse group of organizations including the Jaycees, Lifers' organizations and Vietnam Veterans chapters, among many others. All of these groups have taken positions on public issues affecting their members and engage in a variety of civic and charitable activities. Accordingly, they likely qualify as constitutionally protected expressive associations. See **Roberts** 468 U.S. at 622.

That a particular organization qualifies under the First Amendment as a constitutionally protected expressive association does not mean that it is immune from State regulation. See **Roberts**, 468 U.S. at 623 (right to associate for expressive purposes is not absolute and infringements on that right may be justified by compelling State interests). In the prison context, curtailment of prisoners' rights to expressive association is justified by important State penological interests, central of which are institutional safety and order. In **Jones v. North Carolina Prisoners' Labor Union**, 433 U.S. 119 (1977), the Supreme Court rejected prisoners' First Amendment associational challenge to prison regulations prohibiting meetings of a prisoners' labor union and barring prisoners from soliciting others to join the union. 433 U.S. at 132. The Court based its decision upon prison officials' testimony that the concept of a prisoners' labor union was fraught with potential dangers, including increased tension between prisoners and staff, and between union prisoners and non-union prisoners. 433 U.S. at 126-127.

Similarly, in **Hudson v. Thornburg**, 770 F.Supp. 1030 (W.D.PA 1991) the district court upheld prison officials' decision to disband a prisoners= Lifers= Organization on grounds that its leaders were exacerbating tensions within the facility. 770 F.Supp. at 1036. And in **Hendrix v. Evans**, 715 F.Supp. 897 (N.D.IND. 1989) the district court held that a minimum custody prisoner housed in an outside dormitory had no First Amendment associational right to contact or attend inmate organizations inside the prison. 715 F.Supp. at 905. In conclusion, prisoner organizations like Jaycees and Lifers= organizations retain some First Amendment associational rights but under **Turner** and **Jones** those rights may be restricted by prison regulations reasonably related to legitimate penological objectives such as prison security and safety. Finally, it is well-settled that prisoners do not have any First Amendment expressive associational rights to circulate petitions protesting prison conditions. See **Wolfel v. Morris** 972 F.2d 712, 716 (6th Cir. 1992)(AThe right to circulate a petition in prison is not a protected liberty interest.); **Edwards v White**, 501 F.Supp. 8, 12 (M.D.PA 1979)(Aa regulation prohibiting circulation of petitions among inmates is a reasonable response to a reasonable fear.), affirmed 633 F.2d 209 (3d Cir. 1980).

3. Access to the press

As for access to the press, it is important for prisoners to maintain ties with journalists for the purpose of educating the public about prison conditions and criminal justice issues. The degree of constitutional protection extended to prisoner access to the press, however, varies according to the means of communication.

There is no question that prisoners retain significant First Amendment rights to communicate with the media by mail. While there may be a dispute between the lower courts as to whether mail to and from journalists is privileged (entitled to be opened only in the presence of the prisoner), there is no question that prison officials cannot censor or withhold such mail absent a legitimate governmental interest. See **Procunier v. Martinez**, 416 U.S. at 413 (APrison officials may not censor inmate correspondence simply to eliminate unflattering or unwelcome opinions or factually inaccurate statements.); **Mujahid v. Sumner**, 807 F.Supp. 1505, 1510-1511

(D.Hawaii 1992)(applying **Turner**, prison regulations permitting prisoner correspondence with member of news media only if prisoner had bona fide friendship prior to commitment unconstitutional).

In terms of face-to-face interviews with journalists, however, the Supreme Court has interpreted the First Amendment much more narrowly. In **Pell v. Procunier**, 417 U.S. 817 (1974) the Court upheld a California regulation prohibiting face-to-face interviews between the media and particular prisoners. 417 U.S. at 827-828. Prison officials implemented the restriction in the wake of a 1971 escape attempt in which three staff members and two prisoners, including George Jackson, were killed. 417 U.S. at 832. Prison officials contended that press interviews with prisoners who espoused a philosophy of noncooperation with prison rules encouraged others to follow suit, thereby undermining prison security. 417 U.S. at 832. The **Pell** Court sustained the regulation based upon the articulated security concerns, and in light that it operated in a neutral fashion and alternative means of communicating with the media (e.g., mail) were open to prisoners. 417 U.S. at 827-828. See also **Houchins v. KQED, Inc.**, 438 U.S. 1, 5 n.2 (1978)(upholding denial of media requests for special inspection of prison and interviews with inmates, noting that inmates retain certain fundamental rights of privacy and are not animals in a zoo to be filmed and photographed at will by the public or by media reporters); **Saxbe v. Washington Post Co.**, 417 U.S. 843 (1974)(prison regulation prohibiting face-to-face interviews by newsmen of individual prisoners did not violate First Amendment.).

In light of **Pell** and its progeny, prisoners have no constitutional remedies when denied press interviews as long as alternative means of communication remain open (such as mail and telephone) and the restriction operates in a neutral fashion. See **Johnson v. Stephan**, 6 F.3d 691, 692 (10th Cir. 1993); **Entertainment Network, Inc. v. Lappin**, 134 F.Supp.2d 1002, 1017-1018 (S.D.Ind. 2001)(applying **Turner**, prison regulation rejecting recording of federal execution of Timothy McVeigh upheld).

If restrictions on face-to-face interviews do not operate in a neutral fashion, prisoners' First Amendment rights are violated. For

example, in **Main Road v. Aytch**, 522 F.2d 1080 (3d Cir. 1975) the Third Circuit held that the Superintendent of the Philadelphia prison system unconstitutionally denied press interviews with prisoners for the purpose of averting public criticism of the public defender and probation offices. 522 F.2d 1087. The Court distinguished **Pell** on the basis that the ban on media contacts was not applied in a neutral fashion without regard to the content of the expression. 522 F.2d at 1088. ¶Even if the prisoners held pending trial have no constitutional right to meet with reporters, the First Amendment precludes (prison officials) from regulating, through the grant or denial of permission for prisoners to talk with reporters, the content of speech which reaches the news media, unless the restriction bears a substantial relationship to a significant governmental interest.¶ 522 F.2d at 1086-1087.

D. Retaliatory Conduct

Although State officials vehemently deny it, prisoners who speak out against prison conditions through media contacts, civil rights lawsuits, or internal grievances are often subject to retaliatory conduct. This can range from annoying cell searches and denial of prison services to matters of a more serious nature, including misconduct reports, prison transfers, and parole rejection recommendations. In **Abu-Jamal v. Price**, 154 F.3d 128 (3d Cir. 1998) the Third Circuit found that SCI-Greene officials' opening, reading and copying of confidential attorney-client mail of a former journalist confined on death row was motivated, at least in part, by mounting public pressure to do something about his writings. 154 F.3d at 134. In **Castle v. Clymer**, 15 F.Supp.2d 640 (E.D.PA 1998), the district court held SCI-Dallas officials liable for the retaliatory prison transfer of a prisoner who made statements about prison conditions to the media. 15 F.Supp.2d at 665. Other federal courts have found similar constitutional violations, suggesting that retaliatory conduct is a far greater problem than State officials concede. See **Trobaugh v. Hall**, 176 F.3d 1087 (8th Cir. 1999)(prison officials liable for confining prisoner in isolation cell for his filing grievances); **Goff v. Burton**, 91 F.3d 118, 1191 (8th Cir. 1996)(prison officials liable for retaliatory prison transfer of prisoner who brought civil rights action claiming overcrowded conditions); **Gaston v. Coughlin**, 81 F.Supp.2d 381 (N.D.N.Y. 1999)(prison officials liable for

retaliatory prison transfer of inmate complaining of kitchen work conditions); **Gomez v. Vernon**, 255 F.3d 1118, 1127 (9th Cir. 2001)(Finding that Idaho Department of Corrections had a policy or custom of retaliating against inmate law clerks for providing legal assistance to prisoners, including prison transfers and misconduct reports).

The controlling Third Circuit decision in this area is **Rausser v. Brown**, 241 F.3d 330 (3d Cir. 2001). In **Rausser**, a prisoner objected on religious grounds to attending a drug and alcohol treatment program which required participants to accept God as a treatment for their addictions.¶ 241 F.3d at 332. As a result of his religious objections, Rausser alleged that the Pennsylvania Department of Corrections transferred him from SCI-Camp Hill to SCI-Waynesburg, deprived him of a higher paying prison job, and denied him a favorable parole recommendation. 241 F.3d at 332. The lower court agreed with Rausser that the religious program violated his constitutional rights under the Establishment Clause of the First Amendment. 241 F.3d at 332. However, the Court dismissed the retaliatory claim, holding that Rausser had no federal constitutional rights to parole, prison wages or a specific place of confinement. 241 F.3d at 332.

The Third Circuit reversed, holding that the relevant question is not whether Rausser had a protected liberty interest in the privileges he was denied, but whether he was denied those privileges in retaliation for exercising a constitutional right.¶ 241 F.3d at 333; see also **Allah v. Sieverling**, 229 F.3d 220, 224-225 (3d Cir. 2000)(government actions which standing alone do not violate the Constitution, may nonetheless be constitutional torts if motivated in substantial part by a desire to punish an individual for exercise of a constitutional right). Having established that a prisoner litigating a retaliation claim need not prove that he had an independent liberty interest in the privileges he was denied,¶ **Rausser**, 241 F.3d at 333, the Third Circuit set forth the essential elements of a retaliatory claim:

1. As a threshold matter, a prisoner must first prove that the conduct which led to the alleged retaliation was constitutionally protected;

2. Secondly, a prisoner must show that he suffered some adverse action^o at the hands of prison officials;
3. Thirdly, the prisoner must establish a causal connection between the first two elements by proving that his constitutionally protected conduct was a substantial or motivating factor^o in the adverse action taken against him;
4. Finally, if the prisoner proves that his constitutionally protected conduct was a substantial or motivating factor in the adverse action taken against him, the burden then shifts to prison officials to prove that they would have taken the same adverse action even in the absence of the protected activity.

Rauser, 241 F.3d at 333.

Applying these standards, the Third Circuit held that Rauser had adequately stated a retaliatory claim and remanded the matter back to the lower court. First, it was undisputed that Rauser's refusal to participate in the religious program was protected by the First Amendment. 241 F.3d at 333. Secondly, Rauser presented evidence that he suffered adverse action when he was denied parole, transferred to a distant prison and given a lower-paying job. 241 F.3d at 333. Finally, Rauser presented evidence that his objections to the religious program was a motivating factor in the adverse action taken against him. 241 F.3d at 333. Consequently, unless prison officials prove on remand that they would have taken the same adverse action against Rauser absent the protected conduct for reasons reasonably related to a legitimate penological interest,^o Rauser could prevail on his retaliatory claim. 241 F.3d at 333.

1. Protected conduct

The first prong of a retaliatory claim is to establish that the conduct which led to the alleged retaliation was constitutionally protected.^o **Rauser**, 241 F.3d at 333. Absent proof that a

prisoner was engaged in constitutionally protected activity, there is no constitutional violation.

In **Rauser**, the Third Circuit held that the refusal to participate in a religious program was protected activity under the Establishment Clause of the First Amendment. 241 F.3d at 333. In **Allah**, the Third Circuit held that filing civil rights lawsuits against prison officials was protected activity under the constitutional right of access to the courts. 229 F.3d at 224. In **Thaddeus-X v. Blatter**, 175 F.3d 378 (6th Cir. 1999) the Sixth Circuit held that a jailhouse lawyer's legal assistance to another prisoner (who could not otherwise gain access to the courts) was protected activity under the constitutional right of access to the courts. 175 F.3d at 395.

Whether or not a prisoner's speech or conduct is constitutionally protected is a question of law. In considering this matter, one should bear in mind that not all prisoner speech or conduct is constitutionally protected. For example, a prisoner cannot incite others to disobey prison rules and subsequently claim State retaliation for his transfer to another prison because such speech is not constitutionally protected. Likewise, prisoners cannot circulate signature petitions against jail conditions and subsequently claim State retaliation for disciplinary sanctions because such speech is not constitutionally protected. Prison officials are allowed to enforce regulations and policies restricting prisoners' First Amendment rights as long as they are reasonably related to legitimate penological interests. See **Turner v. Safley**, 482 U.S. at 89. Consequently, if State action against a prisoner is reasonably related to legitimate penological goals, a prisoner's speech or conduct is not constitutionally protected and there are no cognizable grounds for a State retaliation claim. On the other hand, if prison officials take adverse action against a prisoner for filing a legitimate grievance regarding prison conditions, he has a cognizable claim because such speech is constitutionally protected since the States' response is not reasonably related to any legitimate penological interests.

2. Adverse action

A prisoner alleging retaliation must prove that he or she suffered some adverse action^o at

the hands of prison officials. **Rausser**, 241 F.3d at 333. Of course, not every adverse action by State officials is cognizable. See **Ingraham v. Wright**, 430 U.S. 651, 674 (1977) (There is, of course, a *de minimis* level of imposition with which the Constitution is not concerned). Whether or not particular State action is sufficiently adverse for purposes of a retaliation claim depends on whether it is one that would deter a person of ordinary firmness from exercising his First Amendment rights. See **Suppan v. Dadonna**, 203 F.3d 228, 235 (3d Cir. 2000); **Bart v. Telford**, 677 F.2d 622, 625 (7th Cir. 1982).

In **Rausser**, the Third Circuit held that the denial of parole, transfer to a distant prison and denial of a higher-paying prison job was sufficiently adverse to deter a prisoner from exercising his constitutional rights. 241 F.3d at 333. In **Allah v. Seiverling**, 229 F.3d 220 (3d Cir. 2000), the Third Circuit held that confinement in administrative segregation with resulting loss of privileges was sufficiently adverse action to deter a prisoner from exercising his constitutional rights. 229 F.3d at 225. In **Thaddeus-X v. Blatter**, 175 F.3d 378 (6th Cir. 1999) the Sixth Circuit held that harassment, physical threats, and transfer to a prison area reserved for mentally disturbed inmates was sufficiently adverse action to deter a prisoner from exercising his right of access to the courts. 175 F.3d at 398. On the other hand, in **ACLU of Maryland v. Wicomico County**, 999 F.2d 780 (4th Cir. 1993) the Fourth Circuit held that prison officials' denial of contact visitation with prisoner-clients was more akin to a *de minimis* inconvenience rather than genuine adverse action to constitute retaliatory conduct. 999 F.2d at 785. See also **Davidson v. Chestnut**, 193 F.3d 144, 150 (2d Cir. 1999) (there is a serious question as to whether the alleged acts of retaliation, especially Smith's asserted one-day denial of an opportunity to exercise, were more than *de minimis*).

3. Causal connection

The third element of a retaliatory claim requires the prisoner to link the first element (constitutionally protected conduct) and the second (adverse State action) by proving his constitutionally protected conduct was a substantial or motivating factor in the State's decision to take adverse action. **Rausser**, 241

F.3d at 333. Unlike the first and second elements, this is a question of fact, not of law. And unlike the first and second elements, this is extremely difficult to prove because there usually is no smoking-gun evidence of retaliation; rather, the fact finder (whether judge or jury) must make difficult credibility judgments regarding the reasons behind prison officials' actions.

Since there typically is no direct evidence or admission of a retaliatory purpose, prisoners must establish a causal connection between their constitutionally protected speech and adverse State action through circumstantial evidence. In **Farrell v. Planters Lifesavers Co.**, 206 F.3d 271 (3d Cir. 2000) the Third Circuit identified several factors relevant to a retaliatory inquiry. First, evidence of temporal proximity between the exercise of the protected speech and the adverse action suggests retaliatory motivation. 206 F.3d at 280. Secondly, evidence of intervening antagonism between exercise of the protected speech and the adverse action suggests retaliatory motivation. 206 F.3d at 280. Thirdly, evidence of inconsistent reasons for the adverse action would likewise point toward a finding of retaliatory motivation. 206 F.3d at 281. Finally, the **Farrell** Court made clear that while these three factors are relevant in determining whether a causal link exists, we have been willing to explore the record in search of evidence, and our case law has set forth no limits on what we have been willing to consider. 206 F.3d at 281.

While pretrial discovery in any prisoner litigation is important, it is absolutely indispensable in a civil rights case alleging State retaliation. After the complaint is served, prisoners should immediately file interrogatories (Fed.R.C.P. 33) to expose under oath the official reasons for the adverse action. The prisoner can then quickly draft additional interrogatories and discovery requests seeking **Farrell** evidence in order to both undermine the State's official version and support a claim of retaliatory animus. Only by making effective use of pretrial discovery can a prisoner-litigant be prepared to try a State retaliation claim before a jury.

4. Whether legitimate reasons exist for the adverse action

In every prisoner civil rights case

claiming retaliation, he or she must establish (a) that his or her speech or conduct was constitutionally protected; (b) that the State took sufficiently adverse action; and (c) that his or her constitutionally protected speech or conduct was a substantial or motivating factor in the State's adverse action. Rausser, 241 F.3d at 333. Prisoners proving these three elements have established a presumption of State retaliation. At this point, the burden then shifts to prison officials to rebut the presumption of retaliation by producing evidence that, absent the prisoners' constitutionally protected speech, they had legitimate non-retaliatory penological reasons for taking the adverse action. Rausser, 241 F.3d at 333.

III. FOURTH AMENDMENT ISSUES

The Fourth Amendment to the United States Constitution guarantees:

The right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or Affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Constitution, Amend. IV.

The essential purpose of this Amendment is to impose a standard of reasonableness upon law enforcement agents and other government officials in order to prevent arbitrary invasions of the privacy and security of citizens. See United States v. Martinez-Fuerte, 428 U.S. 543, 554 (1976) (Fourth Amendment imposes limits on search-and-seizure powers in order to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals); Camara v. Municipal Court, 387 U.S. 523, 528 (1967) (purpose of Fourth Amendment is to safeguard the privacy and security of individuals against arbitrary invasions by government officials).

Whether or not a particular search

violates the Fourth Amendment requires a two-step analysis. First, a person must have standing to contest the search by demonstrating that he or she has a legitimate expectation of privacy in the place, person or object searched. See Rakas v. Illinois, 439 U.S. 128, 143 (1978) (capacity to claim protection of the Fourth Amendment depends upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place). To satisfy this threshold requirement, a person must show that his subjective expectation of privacy is one that society is prepared to accept as objectively reasonable. See Minnesota v. Olson, 495 U.S. 91, 100 (1990) (Because overnight guest's expectation of privacy in friend's home was rooted in understandings that are recognized and permitted by society, it was legitimate and he can claim the protection of the Fourth Amendment); California v. Greenwood, 486 U.S. 35, 39-40 (1988) (An expectation of privacy does not give rise to Fourth Amendment protection, however, unless society is prepared to accept that expectation as objectively reasonable). Absent proof that a person has a legitimate expectation of privacy in the area searched, there is no search subject to constitutional scrutiny. See Minnesota v. Carter, 525 U.S. 83, 91 (1998) (where visitors had no legitimate expectation of privacy in the apartment, we need not decide whether the police officer's observation constituted a search).

If the court finds that a person has a reasonable expectation of privacy, only then does it proceed to the second part of the analysis, namely, determining whether the search is constitutionally reasonable by balancing the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion. See United States v. Place, 471 U.S. 696, 703 (1983); see also, Tennessee v. Garner, 471 U.S. 1, 8 (1985) (noting that balancing of competing interests is the key principle of the Fourth Amendment); Delaware v. Prouse, 440 U.S. 648, 654 (1979) (whether a particular search meets the reasonableness standard is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests).

In this section, we review judicial

application of this well-established two-part constitutional test to the prison context by focusing upon (a) cell searches; (b) body searches (pat-down and body cavity); (c) blood and urine testing; and (d) searches of prison visitors.

In general, the extent of prisoners' protection under the Fourth Amendment is exceedingly limited. Most courts have narrowly construed prisoners' privacy rights either by rejecting recognition of a reasonable expectation of privacy or by concluding that governmental interests in prison safety and security justify the privacy intrusion.

A. Cell Searches

In Hudson v. Palmer, 468 U.S. 517 (1984) the Supreme Court granted *certiorari* to determine whether a prisoner has a reasonable expectation of privacy in his prison cell entitling him to the protection of the Fourth Amendment against unreasonable searches and seizures. 468 U.S. at 591. In Hudson, a Virginia prisoner (Palmer) filed suit, claiming that prison guards had conducted "shakedown" searches of his cell and destroyed personal property solely for the purpose of harassment. 468 U.S. at 519-520.

Chief Justice Burger, writing for the Hudson majority, concluded that prisoners have no legitimate expectation of privacy in their cells and therefore are not entitled to Fourth Amendment protection. 468 U.S. at 526. The Supreme Court reasoned that our **society is not prepared to recognize as legitimate any substantive expectation that a prisoner might have in his prison cell** because such recognition **simply cannot be reconciled with the concept of incarceration and the needs and objectives of penal institutions.** 468 U.S. at 526.

That prisoners do not possess a reasonable expectation of privacy in their cells which would entitle them to Fourth Amendment protection, continued the Chief Justice, does not mean that he is without a remedy for calculated harassment unrelated to prison needs. Nor does it mean that prison attendants can ride roughshod over inmates' property rights with impunity. 468 U.S. at 530. Noting that intentional harassment of even the most hardened criminals cannot be

tolerated by a civilized society, 468 U.S. at 528, the Chief Justice cited the Eighth Amendment (cruel and unusual punishment clause), State tort and common law remedies as potential sources of redress for destruction of prisoner property. 468 U.S. at 530.

A right of privacy in traditional Fourth Amendment terms is fundamentally incompatible with the close and continual surveillance of inmates and their cells required to ensure institutional security and internal order. We are satisfied that society would insist that the prisoners' expectation of privacy always yield to what must be considered the paramount interest in institutional safety.

Hudson v. Palmer, 468 U.S. 517, 527-528 (1984).

In light of Hudson, prisoners have absolutely no Fourth Amendment protection from unreasonable searches of their prison cells. See Proudfoot v. Williams, 803 F.Supp. 1048, 1051 (E.D.PA 1991) (A prisoner has no reasonable expectation of privacy in his cell that would entitle him to Fourth Amendment protection from unreasonable searches and seizures.); Williams v. Kyler 680 F.Supp. 172 n.1 (M.D.PA 1986)(same), affirmed, 845 F.2d 1019 (3d Cir. 1987); Gilmore v. Jeffes, 675 F.Supp. 219, 221 (M.D.PA 1987)(same). Prison officials require neither a search warrant nor probable cause to enter and search a prisoners' cell. See Bell v. Wolfish, 441 U.S. 520, 557 (1979) (Even the most zealous advocate of prisoners' rights would not suggest that a warrant is required to conduct such a search of prisoner living quarters); United States v. Lilly, 576 F.2d 1240, 1244 (5th Cir. 1978)(same); Cook v. New York, 578 F.Supp. 179, 182 (S.D.N.Y. 1984)(same). Nor do prisoners possess a constitutional right to be present to observe cell searches. See Block v. Rutherford, 468 U.S. 576, 591 (1984) (county jail's practice of conducting random "shakedown" searches of cells while detainees are away at meals, recreation and other activities upheld); Bell v. Wolfish, 441 U.S. 520, 557 (1979) (upholding prison room search rule requiring unannounced searches of prisoner living areas when inmates are cleared of unit because it simply facilitates the safe and effective performance of the search).

In terms of maliciously motivated searches instituted not for security needs but for harassment, the Eighth Amendment's proscription against cruel and unusual punishments may provide a remedy. Hudson, 468 U.S. at 530. In Scher v. Engelke, 943 F.2d 921 (8th Cir. 1991) a prison guard searched a prisoner's cell ten times in nineteen days and left the cell in disarray after three searches. 943 F.2d at 922. All searches took place after another prison guard was disciplined for threatening inmate Scher. 943 F.2d at 922. The Eighth Circuit agreed that the searches violated the Eighth Amendment because they demonstrated a pattern of calculated harassment unrelated to prison needs from which the U.S. Supreme Court has stated that prisoners are protected. 943 F.2d at 924.

Prisoners should, however, exercise caution in relying solely upon Scher. First, the factual record in Scher was extraordinary (ten cell searches in nineteen days by the same maliciously-motivated guard) and is unlikely to be repeated. Secondly, Scher is an Eighth Circuit decision, rendering it without binding precedential value within our Third Circuit Court of Appeals. Finally, Scher failed to apply or even make reference to Wilson v. Seiter, 501 U.S. 294 (1991) in which the Supreme Court held that prisoners alleging cruel and unusual punishment must prove both an objective component (denial of life's necessities) and a subjective component (culpable state of mind). 501 U.S. at 298. While Scher established that the guard acted maliciously (satisfying the subjective component), some courts may question whether cell searches of this nature inflict sufficient psychological pain to satisfy the objective component.

B. Body Searches

Although the Fourth Amendment's proscription against unreasonable searches does not apply to prison cells, it does apply to other prison contexts such as body searches. Unfortunately, after balancing institutional interests in security and order against the privacy concerns of prisoners, many courts have sustained prison policies and practices governing body searches.

The key precedent in this area is undoubtedly Bell v. Wolfish, 441 U.S. 520

(1979) where federal detainees brought suit challenging the requirement that they expose their body cavities for visual inspection as a part of a strip search conducted after every contact visit with a person from outside the institution. 441 U.S. at 558. Corrections officials testified that these searches were necessary to prevent and deter the smuggling of contraband into the facility. 441 U.S. at 558. Justice Rehnquist, writing for the majority, openly admitted that this practice instinctively gives us the most pause. 441 U.S. at 558.

As to whether prisoners retain a reasonable expectation of privacy in their bodies against body cavity searches, the Bell majority simply stated that it was assuming for present purposes that inmates do retain some Fourth Amendment rights upon commitment to a corrections facility. 441 U.S. at 558. Proceeding with his analysis, Justice Rehnquist noted that the Fourth Amendment prohibits only unreasonable searches and under the circumstances, we do not believe that these searches are unreasonable. 441 U.S. at 558. (Citation omitted). Whether or not a particular search is reasonable **requires a balancing of the need for the particular search against the invasion of personal rights that the search entails.** 441 U.S. at 559. Among the factors the courts must consider are:

- a. the scope of the particular intrusion;
- b. the manner in which it is conducted;
- c. the justification for initiating it; and
- d. the place in which it is conducted.

441 U.S. at 559.

Applying these factors to the case before it, the Bell majority concluded that the body cavity searches did not violate the reasonableness standard of the Fourth Amendment in light of the significant and legitimate security interests of the institution. 441 U.S. at 560.

In light of **Bell**, most courts have given their stamp of approval on prisoner body searches. They may be conducted absent consent, probable cause and a search warrant. However, this does not mean prison officials can do as they please in this area. Even an otherwise justifiable search of limited intrusiveness may be unconstitutional if conducted in a particularly offensive manner or for reasons totally devoid of penological interests. **Bell**, 441 U.S. at 560.

1. Do prisoners retain a legitimate expectation of privacy in their bodies?

As noted above, the **Bell** majority sidestepped this threshold question by simply assuming that prisoners retain some Fourth Amendment rights upon incarceration. 441 U.S. at 558. Some lower courts have likewise assumed the existence of a reasonable expectation of privacy in order to proceed with the balancing-of-competing-interests component. See **Grummett v. Rushen**, 779 F.2d 491, 494 (9th Cir. 1985)(assuming that the interest in not being viewed naked by members of the opposite sex is protected by the right of privacy). However, it seems reasonable to conclude that if the Supreme Court ever confronted the matter directly, it would find that **B** in the context of body cavity searches **B** prisoners have some or at least a diminished expectation of privacy in their bodies that society would accept as objectively reasonable. See **Covino v. Patrissi**, 967 F.2d 73, 78 (2d Cir. 1992) (prisoners possess a limited expectation of bodily privacy). To hold otherwise (that prisoners have absolutely no Fourth Amendment privacy rights) would allow male guards to routinely conduct genital searches of female prisoners (and vice versa), a scenario which even a crime-hardened Supreme Court is not likely to accept as reasonable. Holding that prisoners have a diminished legitimate expectation of privacy in their bodies would also parallel Supreme Court decisions in similar contexts. See **Planned Parenthood v. Casey**, 505 U.S. 833, 849 (1992)(noting in abortion case that the Constitution places limits on a States right to interfere with a persons bodily integrity); **Skinner v. Railway Labor Executives Association**, 489 U.S. 602, 617 (1989)(A collection and testing of urine intrudes upon expectations of privacy that society has

long recognized as reasonable); **Winston v. Lee**, 470 U.S. 753, 759 (1992)(compelled intrusion into suspects body for criminal evidence implicates expectations of privacy).

2. Balancing State penological interests in institutional security against prisoner privacy

Establishing the existence of a legitimate expectation of privacy is only the beginning, not the end, of Fourth Amendment analysis. **Bell** directs the lower courts to balance the States interests in institutional security and safety against the prisoners privacy concerns. Among the factors that should be considered are: (a) the scope of the particular intrusion; (b) the manner in which it is conducted; (c) the justification for initiating it; and (d) the place in which it is conducted. 441 U.S. at 559. We apply these factors first to pat-down searches and secondly to the more intrusive body cavity searches.

- a. Pat-down searches

Clothed body searches **B** in which a prison guard runs his hands thoroughly over a prisoners clothed body **B** have largely been upheld by the courts. Given the limited intrusiveness on bodily privacy that a **A**pat-down or **A**frisk search entails, most courts have sustained such searches under the Fourth Amendment in light of the States interest in deterring the possession and movement of contraband. For example, in **Grummett v. Rushen**, 779 F.2d 491 (9th Cir. 1985) San Quentin prisoners brought suit on Fourth Amendment grounds challenging pat-down searches by female guards. 779 F.2d at 495. Citing **Bell**, the Ninth Circuit held that **A**pat-down searches conducted by the female guards are not so offensive as to be unreasonable under the Fourth Amendment. 779 F.2d at 496. The **Grummett** Court noted that the searches were performed briefly and professionally while the prisoners were fully clothed and were justified by security needs. 779 F.2d at 496. In **Timm v. Gunter**, 917 F.2d 1093 (8th Cir. 1990) the Eighth Circuit rejected a challenge by male prisoners to pat-down searches by female guards, finding they were performed in a professional manner and involved only incidental touching of the genital area. 917 F.2d at 1100. The **Timm** Court held that, assuming prisoners possess a

constitutional right to privacy, when balanced against the security needs to deter contraband movement and the equal employment rights of female guards, the right to privacy must give way to the use of pat-down searches. 917 F.2d at 1100. In **Smith v. Fairman**, 678 F.2d 52 (7th Cir. 1982) the Seventh Circuit also sustained cross-gender pat-down searches of male prisoners by female guards, noting that female guards were instructed to exclude the genital area, thus affording Plaintiff whatever privacy right he may be entitled to in this context. 678 F.2d at 55.

In addition to Fourth Amendment invasion-of-privacy claims, prisoners also have asserted that cross-gender pat-down searches violate their First Amendment rights to freely exercise their religious beliefs and infringe the cruel and unusual punishment clause of the Eighth Amendment. In **Smith v. Franzen**, 704 F.2d 954 (7th Cir. 1983) an Illinois prisoner brought suit contending that frisk searches by female guards violated his First Amendment religious exercise rights because Islamic faith forbade such physical contact with a woman other than his wife or mother. 704 F.2d at 956. While agreeing that such searches were incompatible with the tenets of his religion, the Seventh Circuit held that the State's compelling interests in prison security and equal employment opportunities for female guards outweighed the infringement of religious exercise. 704 F.2d at 960. Whether or not the recently-enacted **Religious Land Use and Institutionalized Persons Act of 2000**, 42 U.S.C.A. '2000cc, would reverse this trend is doubtful at best. Under the **Act of 2000**, prison regulations which substantially burden a prisoner's exercise of religion would be upheld if those regulations were in furtherance of a compelling governmental interest and are the least restrictive means of furthering that governmental interest. See 42 U.S.C.A. '2000cc-1(a)(1) and (2). Setting aside the State's interest in providing equal employment opportunities for female guards, there can be no question that the State has a compelling governmental interest in detecting and deterring the movement of prisoner contraband. As for the least restrictive means test, whether or not a federal court would order a particular prison to accommodate a prisoner's religious beliefs by readjusting work posts of guards to ensure same-gender frisk searches is debatable. On the one hand, prison

administrators currently readjust the work posts of guards to ensure same-gender supervision during inmate showers and contact visitation strip searches. It would therefore seem reasonable that prison administrators could also readjust work posts of guards to ensure same-gender frisk searches. On the other hand, frisk searches unlike once-a-day showers and contact visits occur throughout the prison at all times day and night that prisoners circulate within the facility. It may not be easy to ensure same-gender frisk searches without damaging both institutional security and the orderly operation of the prison. See **Timm v. Gunter**, 917 F.2d at 1100 n.10 (prohibiting female guards from conducting searches of male prisoners would create resentment among male guards, tension between staff, and a deterioration of morale which, when combined, would impede prison security).

The only significant successful challenge to pat-down searches has been decided on Eighth Amendment grounds. In **Jordan v. Gardner**, 986 F.2d 1521 (9th Cir. 1993) the Ninth Circuit held that random pat-down searches of female prisoners by male guards, including intrusive touching of breasts and crotch area, was an unnecessary and wanton infliction of pain in violation of the Eighth Amendment. 986 F.2d at 1526-1527. The **Jordan** majority distinguished its prior decision in **Grummett** (upholding pat-down searches of male prisoners by female guards) on the basis that women experience unwanted intimate touching by men differently from men subject to comparable touching by women. 986 F.2d at 1526. **Grummett** indicates that the men had particular vulnerabilities that would cause the cross-gender clothed body searches to exacerbate symptoms of pre-existing mental conditions. 986 F.2d at 1526. In contrast, female prisoners with histories of sexual and physical abuse by men suffer psychological pain as the result of unwanted touching of their bodies by male guards. 986 F.2d at 1523-1525 (noting that one female prisoner, with a long history of sexual abuse by men, suffered such distress during the pat-down search that others had to pry her fingers loose from the bars). The **Jordan** majority also went on to conclude that this infliction of pain on female prisoners was unnecessary because the security of the facility was not dependent upon the cross-gender searches. 986 F.2d at 1526-1527.

The Supreme Court has noted that a pat-down search of the outer clothing for weapons constitutes a severe, though brief, intrusion upon cherished personal security, and it must surely be an annoying, frightening, and perhaps humiliating experience. Terry v. Ohio, 392 U.S. 1, 24-25 (1968) (holding that frisk searches of free citizens are unconstitutional unless police officers have reasonable suspicion that criminal activity may be afoot). However, when weighed against institutional interests in controlling the possession and movement of contraband, and in consideration that prisoners enjoy only a diminished expectation of privacy, if at all, the courts have overwhelmingly upheld pat-down searches. Absent abuse, pat-down searches may be conducted freely by prison guards without warrants, probable cause or even individualized suspicion. The one exception to pat-down searches of female prisoners by male guards is based upon a single Ninth Circuit Court of Appeals decision which has neither been reviewed nor endorsed by the Supreme Court.

b. Visual body-cavity searches

Pat-down or frisk-type searches, though annoying and degrading, do not require the prisoner to remove his or her clothing. Body-cavity searches, on the other hand, require inspection of the prisoner's naked body, including the genital and anal areas. These searches are far more intrusive of prisoner privacy than pat-down searches, and when wielded by abusive guards, can cause severe anguish and mental suffering. There are two types of body-cavity searches: (1) the more common variety is visual body cavity search which requires visual inspection only of the body cavities; (2) the digital body cavity search, on the other hand, is quite rare but horribly intrusive as it involves probing of body cavities. We review the visual search first.

Once again, the key precedent is Bell v. Wolfish, 441 U.S. 520 (1979) in which the Supreme Court upheld visual body cavity searches of prisoners after every contact visit with a person outside the institutions. 441 U.S. at 560. The Fourth Amendment prohibits only unreasonable searches and under the circumstances, we do not believe that these searches are unreasonable. 441 U.S. at 558.

According to the Bell majority, the test of reasonableness is not capable of precise definition but requires a balancing of the needs for the particular search against the invasion of personal rights that the search entails. 441 U.S. at 559. Among the factors that should be considered in determining whether a particular search is reasonable under the Fourth Amendment are: (1) the scope of the particular intrusion; (2) the manner in which it is conducted; (3) the justification for initiating it; and (4) the place in which it is conducted. 441 U.S. at 559.

As a result of Bell, there is no simple bright line test separating reasonable from unreasonable searches. In theory, a body cavity search would be unreasonable if based upon legitimate security concerns but conducted in an abusive manner. Likewise, a body cavity search would be unreasonable if conducted in a professional and courteous manner in a private area but based upon malicious reasons. Although all four Bell factors are relevant to the reasonableness inquiry, clearly whether or not the body cavity search was conducted pursuant to valid security interests is paramount. Indeed, the lower federal courts have allowed so many visual body cavity searches to fall within the Bell zone of reasonableness that there is little or no Fourth Amendment protection remaining.

In Hay v. Waldron, 834 F.2d 481 (5th Cir. 1987) the Fifth Circuit upheld a Texas prison regulation requiring visual body cavity searches of all prisoners entering or leaving their cells in administrative segregation. 834 F.2d at 482. The Court rejected the plaintiff's arguments that prison officials must have probable cause to conduct body cavity searches and that the least restrictive means test should be applied in judging the constitutionality of such searches. 834 F.2d at 485. Citing Bell, the Fifth Circuit found that the searches were reasonably related to legitimate security needs including stemming the rising tide of violence in the Texas prison system through the detection of contraband. 834 F.2d at 487.

In Arruda v. Fair, 710 F.2d 886 (1st Cir. 1983) the First Circuit upheld a Massachusetts prison policy of conducting visual body cavity searches of prisoners entering or leaving the security unit for library attendance, infirmary appointments or family visits. 710 F.2d at 886.

Citing **Bell**, the Court upheld the policy based on the need to control the introduction of contraband, including drugs and weapons. 710 F.2d at 888. The First Circuit noted that prison guards themselves were involved in smuggling contraband to prisoners. 710 F.2d at 888.

In **Peckham v. Wisconsin Department of Corrections**, 141 F.3d 694 (7th Cir. 1998) the Seventh Circuit upheld a Wisconsin prison policy requiring visual body cavity searches upon arrival at the facility, upon completion of a contact visit, upon return to the facility after an outside medical appointment or court proceeding, and upon placement in the segregation unit. 141 F.3d at 695. Because the searches were conducted for legitimate security reasons and not for harassment, the Seventh Circuit concluded that the searches were reasonable. 141 F.3d at 697.

In **Rickman v. Avanti**, 854 F.2d 327 (9th Cir. 1988) the Ninth Circuit upheld an Arizona prison regulation requiring administrative segregation prisoners to submit to visual body cavity searches before leaving their cells. 854 F.2d at 327. Citing **Bell**, the Court found the searches reasonable, based on the fact that they were initiated to maintain security, were visual only, and were conducted within the prisoner's cell. 854 F.2d at 328.

In **Thompson v. Souza**, 111 F.3d 694 (9th Cir. 1997) the Ninth Circuit also upheld a visual body cavity search conducted on a prisoner during a midnight prison raid to uncover illicit drugs in the facility. 111 F.3d at 696-697. Citing **Bell**, the Court held that the search was reasonable, noting that it was visual only, justified by the need to detect illicit drugs, and was conducted in a professional manner. 111 F.3d at 700-701.

In **Franklin v. Lockhart**, 883 F.2d 654 (8th Cir. 1989) the Eighth Circuit upheld an Arkansas prison policy requiring prisoners confined in a disciplinary segregation unit be searched twice daily regardless of whether they have left their cells or had unsupervised contact with anyone. 883 F.2d at 654-655. Although acknowledging that the intrusiveness was significant, the Court nonetheless upheld the searches, noting the history of contraband in the unit, including weapons. 883 F.2d at 656.

The test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application. In each case it requires a balancing of the need for the particular search against the invasion of personal rights that the search entails. Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted.

Bell v. Wolfish, 441 U.S. 520, 599 (1979).

In **Williams v. Price**, 25 F.Supp.2d 605 (W.D.PA. 1997) the district court upheld a Pennsylvania policy requiring visual body cavity searches of all death-row prisoners before and after non-contact attorney visits. 25 F.Supp.2d at 615. Although conceding that it is difficult to imagine how a shackled inmate, escorted by one or two officers, could obtain contraband from another shackled inmate, also escorted by one or two officers, the district court nonetheless sustained the searches. 25 F.Supp.2d at 615. (Every court of appeals that has considered a similar search policy has upheld it.). The Court noted that although the searches were offensive, they were conducted in the privacy of the prisoner's cell and were rationally connected to the prison's security interest in controlling contraband. 25 F.Supp.2d at 615.

Of course, an otherwise legitimate body cavity search may still violate the Fourth Amendment if conducted in a particularly offensive manner. Thus, in **Goff v. Nix**, 803 F.2d 358 (8th Cir. 1986) the Eighth Circuit upheld as reasonable prisoner body cavity searches conducted before and after contact visits, hospital appearances, and movement outside segregation units. 803 F.2d at 366. The Court, however, did enjoin prison guards from engaging in verbal harassment during the searches. It is demeaning and bears no relationship to the prison's legitimate security needs and we affirm the district court in this regard. 803 F.2d at 365 n.9.

Whether or not visual body cavity searches of prisoners by opposite-gender guards are unreasonable (even if conducted for legitimate security reasons) under the Fourth Amendment is not settled. Certainly, an inadvertent or occasional sighting of a naked

male prisoner by a female guard would not violate the Fourth Amendment. See Michenfelder v. Sumner, 860 F.2d 328, 334 (9th Cir. 1988). In Michenfelder, visual body cavity searches were conducted on segregation unit prisoners before and after escorted trips for sick call, recreation, disciplinary hearings, and visits. 860 F.2d at 330. The Ninth Circuit held that the searches were reasonable, given the need to detect contraband, despite the occasional viewing of a naked male prisoner by female guards. 860 F.2d at 334. Nor would there occur a Fourth Amendment violation during an intentional strip search by an opposite-sex guard under emergency conditions such as a prison riot or disturbance. See Letcher v. Turner, 968 F.2d 508, 510 (5th Cir. 1992)(presence of female guards during strip search of male prisoner following food-throwing incident involving 18 prisoners upheld); Grumtee v. Rushen, 779 F.2d 491, 496 (9th Cir. 1985)(holding that in emergency situations, observations of body cavity searches of male prisoners by female guards are justified by prison security). Routine, non-emergency visual body cavity searches by opposite-sex guards, however, are likely unreasonable under the Fourth Amendment although case law is admittedly scant. See Canedy v. Boardman, 16 F.3d 183, 188 (7th Cir. 1994)(holding that male prisoner stated claim of unreasonable strip search by female guards, noting that where it is reasonable to respect a prisoner's privacy B taking into account the States interests in security and equal employment opportunities B doing so Ais a constitutional mandate@); Lee v. Downs, 641 F.2d 1117, 1120 (4th Cir. 1981)(forceful removal of female prisoners underclothing and subsequent vaginal search in presence of male guards violated right of privacy). Most prison systems, however, prohibit routine, non-emergency visual body cavity searches by opposite-gender guards due to questionable constitutional legality.

As demonstrated above, most lower courts have upheld visual body cavity searches of prisoners as long as they are justified by Alegitimate security interests@ and are Aconducted in a reasonable manner@ and without abuse. Bell, 441 U.S. at 560. The lower courts have sustained visual body cavity searches before and after contact visits; before and after infirmary appointments; before and after library visits;

before and after court appearances; and before and after movement of segregation prisoners from their cells. It would seem, absent evidence of specific abuse, there is not a single visual body cavity search that the courts will not sustain. While no one would reasonably dispute the need for body cavity searches after contact visits and outside court and medical appointments, others seem wildly unnecessary particularly when a simple frisk or pat-down search would be equally as effective in revealing contraband. Quite possibly, prison administrators= justifications for conducting continuous visual body cavity searches on isolation unit prisoners has more to do with behavioral control than contraband detection. In any event, unless and until the Supreme Court heightens the standard for conducting these searches, the lower courts will continue to summarily affirm them.

The only visual body cavity searches the lower courts have significantly curtailed are those performed on temporary detainees arrested and awaiting bail release for misdemeanors and other minor offenses. In this limited context, most courts have interpreted Bell as requiring Areasonable suspicion@ that the detainee is carrying or concealing contraband prior to any body cavity search. See Arpin v. Santa Clara Valley Transportation Agency, 261 F.3d 912, 922 (9th Cir. 2001)(Astrip searches of persons arrested for minor offenses are prohibited by the Fourth Amendment, unless reasonable suspicion exists that the arrestee is carrying or concealing contraband or suffering from a communicable disease@); Roberts v. Rhode Island, 239 F.3d 107, 112 (1st Cir. 2001)(Awhen the inmate has been charged with only a misdemeanor involving minor offenses or traffic violations, crimes not generally assimilated with weapons or contraband, courts have required that officers have a reasonable suspicion that the individual inmate is concealing contraband@); Dobrowolski v. Jefferson County, 823 F.2d 955, 957 (6th Cir. 1987)(Aautomatic strip searches of all detainees violate the Fourth Amendment without a reasonable suspicion, based on the nature of the charge, the characteristics of the detainee, or the circumstances of the arrest, that the detainee is concealing contraband@).

Whether or not police officers (at lockups) or jail officials have Areasonable suspicion@ to justify a body cavity search is based

upon a number of factors, including: (1) the nature of the crime; (2) the detainees appearance and conduct; (3) the detainees prior arrest record; and (4) whether the detainee will intermingle with the general prison population. See **ACT Up/Portland v. Bagley**, 988 F.2d 868, 872 (9th Cir. 1993)(reasonable suspicion may be based on Asuch factors as the nature of the offense, the arrestee=s appearance and conduct, and the prior arrest record@); **Dobrowolskyj**, 823 F.2d at 958-959 (deciding that intermingling a detainee with general prison population is a significant factor); **Weber v. Dell**, 804 F.2d 796 (2d Cir. 1986)(reasonable suspicion must be Abased on the crime charged, the particular characteristics of the arrestee, and/or the circumstances of the arrest@).

In **Giles v. Ackerman**, 746 F.2d 614 (9th Cir. 1984), the Ninth Circuit held that the strip search of a female arrestee for a traffic violation violated the Fourth Amendment where her offense was minor and unrelated to drugs or weapons, she was cooperative and orderly, and there was no reasonable suspicion of contraband possession. 746 F.2d at 618. On the other hand, in **Skurstenis v. Jones** 236 F.3d 678 (11th Cir. 2000) the Eleventh Circuit held that jail officials had reasonable suspicion to strip search a female detainee arrested on a DUI violation based on her possession of a handgun at the time of the arrest. 236 F.3d at 682. See also **Kelly v. Foti**, 77 F.3d 819, 822 (5th Cir. 1996)(motorist=s traffic violations and failure to provide driver=s license did not provide jail officials with reasonable suspicion that arrestee was concealing contraband); **Kraushaar v. Flanigan**, 45 F.3d 1040, 1046 (7th Cir. 1995)(where arresting officer observed arrestee put Asomething down his pants,@ jailer had reasonable cause to conduct strip search); **Thompson v. City of Los Angeles**, 885 F.2d 1439, 1447 (9th Cir. 1989)(grand theft auto was offense Asufficiently associated with violence to justify a visual strip search@); **Jones v. Edwards**, 770 F.2d 739, 741 (8th Cir. 1985)(violation of animal leash law was not offense associated with weapons or contraband to justify strip search).

c. Digital body-cavity searches

Finally, we turn to the highly intrusive digital body cavity search B which involves some degree of touching or probing of body cavities by

prison officials. Once again, whether or not such intrusions upon bodily privacy violate the Fourth Amendment requires examination of Athe scope of the particular intrusion, the manner in which it is conducted, and the justification for initiating it and the place in which it is conducted.@ **Bell v. Wolfish**, 441 U.S. at 559.

That digital body cavity searches are highly intrusive and humiliating is beyond question. The involuntary probing of body cavities by a stranger, often while handcuffed and surrounded by guards, is utterly dehumanizing. On the other hand, prison officials have legitimate security concerns regarding contraband, which has indeed been secreted within prisoners= body cavities.

In **Bruscino v. Carlson**, 845 F.2d 163 (7th Cir. 1988) the Seventh Circuit upheld a policy requiring all prisoners re-entering Marion=s infamous Control Unit be given a probing rectal search to uncover contraband. 854 F.2d at 164 (Aa paramedic inserts a gloved finger into the inmates= rectum and feels around for a knife or other weapon or contraband@). Given Athe history of violence at the prison and the incorrigible, undeterrable character of the inmates,@ the Court held that the rectal searches were reasonable measures to ensure the security and safety needs of the prison. 854 F.2d at 166. Of course, **Bruscino** was decided based upon an extraordinary factual background, including the numerous murders of prisoners and two corrections officers.

At issue in **Tribble v. Gardner**, 860 F.2d 321 (9th Cir. 1988) was Washington=s Walla Walla prison=s policy requiring rectal cavity searches of all prisoners entering the Intensive Management Unit. 860 F.2d at 323. While prison officials contended that the policy was necessary to uncover contraband and maintain prison security, videotapes revealed little effort to search prisoners= clothing, other body cavities, hair, or even hands. 860 F.2d at 325-326. Noting the inconsistency, the Ninth Circuit remanded the case, suggesting that the rectal searches stemmed not from valid security concerns but rather from punitive and behavioral control motivations. 860 F.2d at 327.

While digital body cavity searches must be conducted for legitimate security concerns,

whether prison officials must have a reasonable suspicion that the prisoner searched is secreting contraband is unsettled. Most courts have concluded that reasonable suspicion is not required. See Hemphill v. Kincheloe, 987 F.2d 589, 592 (9th Cir. 1993) (at time of search, it was not clearly established that digital rectal probe searches without individualized suspicion of high security risk inmates violated constitutional rights). Some district courts, however, have reached an opposite conclusion. See Castillo v. Gardner, 854 F.Supp. 725, 726 (E.D.Wash. 1994) (a policy of conducting digital rectal probes without cause predicate is not reasonably related to a legitimate penological goal and is therefore unconstitutional); Hill v. Koon, 732 F.Supp. 1076, 1080 (D.Nev. 1990) (holding that whether digital body cavity search was reasonable would depend upon whether there was reasonable cause to believe that the particular inmate on the particular occasion was secreting drugs in his anal cavity).

Even if digital body cavity searches conducted for legitimate security reasons but absent individualized suspicion are constitutional, they may nevertheless become unconstitutional if conducted in an unreasonable manner. At issue in Vaughan v. Ricketts, 859 F.2d 736 (9th Cir. 1988) was a series of digital rectal cavity searches ordered to uncover gunpowder in a maximum security unit at an Arizona prison. 859 F.2d at 738. The Ninth Circuit concluded that it was unnecessary to resolve whether prison officials had reasonable cause to conduct the searches because the manner in which Vaughan alleges the searches were conducted violated clearly established standards. 859 F.2d at 740. Prisoners were forced to lie on an unsanitary table in an open hallway visible to other inmates and prison staff who made jokes and insulting comments. 859 F.2d at 741. Medical assistants untrained in involuntary body cavity searches conducted the probes, incredibly without washing their hands between searches. 859 F.2d at 741. Medical records were not inspected to ensure that individual prisoners did not have medical conditions that made the searches dangerous. 859 F.2d at 741. The Ninth Circuit held that a body cavity searches of inmates must be conducted in a reasonable manner, and that issues of privacy, hygiene and the training of those conducting the searches are relevant to determining whether the manner of search was

reasonable. 859 F.2d at 741. Under the circumstances of the case, the Ninth Circuit ruled that a reasonable officer could believe that such searches were conducted in a reasonable manner. 859 F.2d at 741; see also Vaughan v. Ricketts, 950 F.2d 1464 (9th Cir. 1991).

While the rectal probes of Arizona prisoners in Vaughan were appalling, there is likely no equal in terms of State cruelty and wickedness than the body cavity probes conducted on female prisoners in Bonitz v. Fair, 804 F.2d 164 (1st Cir. 1986). In Bonitz, Massachusetts prison officials, alarmed over allegations of drugs, prostitution and gambling at a medium security prison for women, summoned two hundred State police officers dressed in riot gear to conduct a search of the facility. 804 F.2d at 169. While male police officers searched the cellblocks, female officers conducted body cavity searches of the prisoners, including putting their fingers in the plaintiffs' noses, mouths, anuses, and vaginas. 804 F.2d at 169. Each female officer was provided only one set of gloves and thus could not have changed their gloves during the search procedure. 804 F.2d at 169. The body cavity probes were visible to male police officers who peered through open doors or openings in closed doors. 804 F.2d at 169. The prisoner-plaintiffs did not challenge the State's security justifications for the search, but rather challenged the manner in which the searches were conducted. 804 F.2d at 173 n.10. Noting that Bell prohibits conducting body cavity searches in an abusive fashion, the First Circuit held that the intrusions clearly violated the Fourth Amendment. 804 F.2d at 173. The Court stated that a body cavity search of female inmates conducted by police officers, involving touching, conducted in a non-hygienic manner and in the presence of male officers, was a clearly established violation of the inmates' Fourth Amendment right to be free from an unreasonable search. 804 F.2d at 173.

C. Blood and Urine Testing

Few would deny that illicit drug use is one of the major problems in American society. Not only does it spawn criminal enterprises that control the trafficking, but its human toll in terms of addictive and wasted lives is substantial. To combat the problem, federal and State officials

initiated widespread drug testing programs during the 1980s and 1990s for vast segments of the population, including government employees, military personnel, students and prisoners. Whether these programs are effective in deterring illicit drug use is unknown and debatable. What is known and undebatable is that these programs operate absent any individualized suspicion of wrongdoing and clash sharply with the privacy objectives underlying our Fourth Amendment.

As with other Fourth Amendment issues, we examine first whether prisoners have any legitimate expectations of privacy and, if so, whether these searches are reasonable by balancing the nature of the privacy intrusion against the governmental interests put forward to justify them.

1. Do prisoners retain a legitimate expectation of privacy in the context of drug testing?

In a series of decisions involving settings outside the prison context, the Supreme Court has made clear that government-ordered collection and testing of blood and urine samples does intrude upon expectations of privacy that society has long recognized as reasonable. See **Ferguson v. City of Charleston**, 121 S.Ct. 1281, 1287 (2001)(urine tests conducted by state hospital on maternity patients were indisputably searches); **Chandler v. Miller**, 520 U.S. 305, 313 (1997)(government-ordered collection and testing of urine samples of Georgia political candidates intrudes upon reasonable expectations of privacy); **Vernonia School District 47J v. Acton**, 515 U.S. 646, 652 (1995)(government-ordered collection and testing of urine samples of Oregon student athletes intrudes upon reasonable expectations of privacy); **National Treasury Employees Union v. Von Raab**, 489 U.S. 656, 665 (1989)(government-ordered collection and testing of urine samples of federal customs officers involved in drug interdiction intrudes upon reasonable expectations of privacy); **Skinner v. Railway Labor Executives Association**, 489 U.S. 602, 616 (1989)(government-ordered collection and testing of railroad personnel involved in train accidents intrudes upon reasonable expectations of privacy); **Schmerber**

v. California, 384 U.S. 757 767-770 (1966)(non-consensual blood test of motorist implicates interests in human dignity and privacy protected by Fourth Amendment). The reasoning underpinning these decisions is that blood and urine testing can reveal significant medical information to which a person has a reasonable expectation of privacy. See **Skinner**, 489 U.S. at 617 (It is not disputed, however, that chemical analysis of urine, like that of blood, can reveal a host of private medical facts about an employee, including whether he or she is epileptic, pregnant, or diabetic. Nor can it be disputed that the process of collecting the sample to be tested, which may in some cases involve visual or aural monitoring of the urination, itself implicates privacy interests.) Accordingly, the Supreme Court has consistently agreed that such intrusions constitute a search subject to the demands of the Fourth Amendment. See **Chandler**, 520 U.S. at 313; **Vernonia**, 515 U.S. at 652; **Von Raab**, 489 U.S. at 665; **Skinner**, 489 U.S. at 617.

Although the Supreme Court has not yet addressed the constitutionality of State-compelled collection and testing of prisoner blood and urine, several lower courts have agreed that prisoners also enjoy a legitimate expectation of privacy. See **Forbes v. Trigg**, 976 F.2d 308, 312 (7th Cir. 1992)(Urine tests are searches for Fourth Amendment purposes, and prison inmates retain protected privacy rights in their bodies, although these rights do not extend to their surroundings.); **Spence v. Farrier**, 807 F.2d 753, 755 (8th Cir. 1986)(urinalysis constitutes a search or seizure for purposes of the Fourth Amendment).

2. Are suspicionless drug testing of prisoners unreasonable searches under the Fourth Amendment?

Since State-ordered collection and testing of blood and urine intrudes into an area where the prisoner has a legitimate expectation of privacy, the Fourth Amendment's proscription against unreasonable searches applies. However, the Fourth Amendment does not proscribe all searches; rather it proscribes only those that are unreasonable. See **Skinner**, 489 U.S. at 619; **Bell v. Wolfish**, 441 U.S. at 558.

Whether or not a State's drug testing

program is reasonable under the Fourth Amendment is not necessarily contingent upon individualized suspicion of wrongdoing. In Von Raab, the Supreme Court noted that while, in general, a search must be supported by a warrant issued upon probable cause, **neither a warrant nor probable cause nor, indeed, any measure of individualized suspicion, is an indispensable component of reasonableness in every circumstance.** 489 U.S. at 665. The Supreme Court has upheld suspicionless urine testing of high school athletes in Vernonia; upheld suspicionless urine testing of railroad workers involved in train accidents in Skinner; and upheld suspicionless urine testing of federal customs officers in Von Raab. The Supreme Court explained that a search absent probable cause or reasonable suspicion of individual wrongdoing can be constitutional if the government can demonstrate special needs. See Vernonia, 515 U.S. at 653 (when government can show special needs, beyond the ordinary needs of law enforcement, warrant and probable cause not required); Skinner, 489 U.S. at 624 (**In limited circumstances, where the privacy interests implicated by the search are minimal, and where an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion, a search may be reasonable despite the absence of such suspicion.**). Whether or not such special needs exist to dispense with individualized suspicion requires a context-specific inquiry, examining closely the competing privacy and public interests advanced by the parties. Chandler, 520 U.S. at 314.

In Vernonia, the Supreme Court identified three factors relevant to this balancing act:

1. the nature of the privacy interest upon which the search at issue intrudes. 515 U.S. at 654.
2. the character of the intrusion that is complained of. 515 U.S. at 658.
3. the nature and immediacy of the governmental concern at issue and the efficiency of this means for meeting it. 515 U.S. at 660.

Applying these factors in Vernonia, the Supreme Court upheld the urine testing of high school athletes, noting that: (a) student athletes enjoyed a lower privacy interest than both the general public and the remaining student body; (b) the intrusion upon the athletes' privacy was negligible since male students remained fully clothed during the testing process and were observed only from behind, if at all, and female students were permitted to use an enclosed stall; additionally, testing was limited to detecting illicit drugs and the results remained private and were not used for disciplinary purposes; and (c) the Vernonia school district's need for drug testing was compelling and testing student athletes who served as role models for the others helped address the problem. 515 U.S. at 656-663.

In light of Vernonia, the likelihood that the Supreme Court would strike down State drug testing for prisoners seems highly remote (of course, it would depend on the exact operation of the program). First, like the student athletes in Vernonia, prisoners enjoy only a diminished Fourth Amendment expectation of privacy, if at all. Bear in mind that the Supreme Court has stressed over and over again that, lawful imprisonment brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system. See Pell v. Procunier, 417 U.S. 817, 822 (1974); Wolff v. McDonnell, 418 U.S. 539, 555 (1974); Price v. Johnston, 334 U.S. 266, 285 (1948). This philosophy seems particularly germane to Fourth Amendment applications where the Supreme Court has concluded that prisoners have no legitimate expectations of privacy in their cells, Hudson v. Palmer, 468 U.S. at 525-526, and that prisoner body cavity searches are permissible to preserve institutional security, Bell v. Wolfish, 441 U.S. at 558-560. Clearly, the safety and security needs of the penal system justify a diminished expectation of privacy for prisoners. See Dunn v. White, 880 F.2d 1188, 1195 (10th Cir. 1989) (in upholding AIDS testing against prisoners' Fourth Amendment challenge, noting that plaintiff's privacy expectation in his body is further reduced by his incarceration).

In limited circumstances, where the privacy interests implicated by the search are minimal, and where an important governmental interest furthered by the intrusion would be placed in

jeopardy by a requirement of individualized suspicion, a search may be reasonable despite the absence of such suspicion.

Skinner v. Railway Labor Executives Association, 489 U.S. 602, 624 (1989).

In regards to the second **Vernonia** factory **B** the character of the intrusion **B** as long as urine samples are collected in a sanitary environment, secluded from public viewing, the invasion of privacy is negligible. See **Vernonia**, 515 U.S. at 658 (noting that the collection process took place under conditions **A**nearly identical^oto public restrooms). However, if prison guards demanded to directly observe the act of urination, such a factor is excessively intrusive and would likely tilt the analysis in the prisoners' favor. See **Skinner**, 489 U.S. at 626 (collecting urine samples intrudes upon **A**an excretory function traditionally shielded by great privacy^o); **Wilcher v. City of Wilmington**, 139 F.3d 366, 376 n.6 (3d Cir. 1998)(noting **A**we would be much more concerned with a procedure's intrusion on privacy^oif it **A**demanded the direct observation of the firefighter's genitalia^o). This view, however, is not universal, as some courts are unwilling to grant prisoners any dignity and privacy even during the act of urination. See **Thompson v. Souza**, 111 F.3d 694, 703 (9th Cir. 1997)(upholding prisoner urine test despite guard **A**continuously watches Thompson urinate into a small plastic bottle^oto ensure integrity of sample and because there were no females or other inmates present to view urination).

Another aspect of the character of the intrusion concerns the scope of the test and the disclosure of the results. Does the program test only for illicit drugs or does it pry into prisoners' medical conditions? Are the test results widely disseminated or limited to only those staff on a need-to-know basis? All of these matters should be considered when evaluating the intrusiveness of the search.

The final **Vernonia** factors **B** the nature and immediacy of the governmental concern and the efficacy of the means for meeting it **B** have been described by the Supreme Court as **A**the core issue^o in Fourth Amendment drug testing cases. See **Chandler**, 520 U.S. at 318. The State's **A**special need^o for drug testing **A**must be

substantial **B** important enough to override the individual's acknowledged privacy interest, sufficiently vital to suppress the Fourth Amendment's normal requirement of individual suspicion. 520 U.S. at 318. In **Chandler**, the Supreme Court struck down a Georgia statute requiring all candidates for State office submit to and pass a drug test, finding that Georgia failed to show a special need demonstrating that public safety was in jeopardy. 520 U.S. at 321-322.

Unlike **Chandler**, where drug testing of political candidates was initiated not in response to any fear or suspicion of drug use by State officials but merely as a symbolic **A**set a good example^ogesture, 520 U.S. at 322, illicit drug use in prison is both very real and a substantial threat to public safety. See **Block v. Rutherford**, 468 U.S. 576, 588-589 (1984)(**A**the unauthorized use of narcotics is a problem that plagues virtually every penal and detention center in the country^o). In Pennsylvania alone, illicit drug use in prison has resulted in inmate deaths; it has corrupted guards who engage in trafficking; and it jeopardizes prison safety due to disturbances ranging from one-on-one physical confrontations over failed payments to gang-like **A**turf^obrawls. It is simply unquestionable that the State has a **A**special need^o in institutional security to justify departure from the ordinary Fourth Amendment requirement of individualized suspicion.

In light of these factors **B** a prisoner's diminished expectation of privacy, minimal intrusiveness of the testing process, and the compelling State interest in curbing illicit drug use in prison **B** it is highly probable that the Supreme Court would sustain suspicionless drug testing in our prison system. While our reasoning here is merely hypothetical, it does mirror several lower court decisions upholding prisoner drug testing programs. See **Lucero v. Gunter**, 17 F.3d 1347, 1350 (10th Cir. 1994)(**A**random urine collection and testing of prisoners is a reasonable means of combating the unauthorized use of narcotics and does not violate the Fourth Amendment^o); **Forbes v. Trigg**, 976 F.2d 308, 315 (7th Cir. 1992)(upholding prison policy of urine testing of all prisoners every ninety days); **Spence v. Farrier**, 807 F.2d 753, 755 (8th Cir. 1986)(prisoners' Fourth Amendment rights not violated by random urinalysis testing for drugs).

The collection and testing of prisoners=

blood B whether for law enforcement DNA databases or for institutional public health needs B is also judged by balancing the intrusion on the prisoner's privacy against legitimate governmental interests. Once again, **where the privacy interests implicated by the search are minimal, and where an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion, a search may be reasonable despite the absence of such suspicion.** Skinner, 489 U.S. at 624.

Given the fact that the extraction of blood samples is commonplace and that for most people the procedure involves virtually no risk, trauma or pain, Schmerber, 384 U.S. at 771, the intrusiveness of a blood test on individual privacy is minimal. See Skinner, 489 U.S. at 625 (the intrusion occasioned by a blood test is not significant); Winston v. Lee, 470 U.S. 753, 762 (1985) (blood tests do not constitute an unduly intrusive imposition on an individual's privacy and bodily integrity). Whether or not the government's interest in collecting blood samples is sufficient to override the individual's privacy interest depends on the purpose of the program.

In Jones v. Murray, 962 F.2d 302 (4th Cir. 1992) the Fourth Circuit sustained a Virginia statute requiring all convicted felons to provide samples for DNA analysis for the purpose of creating a data bank which would assist police officers in solving future crimes. 962 F.2d at 303. The Jones Court held that State interests in solving future crimes outweighed the minor intrusion caused by taking blood samples for DNA analysis. 962 F.2d at 308. In Dunn v. White, 880 F.2d 1188 (10th Cir. 1989) the Tenth Circuit upheld a mandatory blood testing program enacted to identify prisoners infected with the AIDS virus. 880 F.2d at 1196. The Dunn Court concluded that prison officials' interests in treating those infected with the deadly disease and preventing further transmission outweighed any privacy interests of prisoners. 880 F.2d at 1196. Other federal courts have since joined Jones and Dunn in upholding blood collection and testing programs. See Roe v. Marcotte, 193 F.3d 72 (2d Cir. 1999) (DNA bank); Boling v. Romer, 101 F.3d 1336 (10th Cir. 1996) (DNA bank); Rise v. Oregon, 59 F.3d 1556 (9th Cir. 1995) (DNA bank).

D. Searches of Prison Visitors

While prisoners do not forfeit all constitutional protections while imprisoned for crime, the fact of confinement as well as the legitimate goals and policies of the penal institution limits their retained constitutional rights. See Pell v. Procunier, 417 U.S. 817, 822 (1974). Thus, prisoners have no Fourth Amendment expectation of privacy in their cells given the security needs of the prison, see Hudson v. Palmer, 468 U.S. 517, 526 (1984); Doe v. Delie, 257 F.3d 309, 316 (3d Cir. 2001), and retain only a diminished expectation of privacy in their bodies. Bell v. Wolfish, 441 U.S. 520, 558 (1979).

Family members who visit their loved ones in prison, on the other hand, do not shed constitutional protections at the penitentiary door. Courts have held that prison visitors enjoy a reasonable expectation of privacy in their bodies to warrant Fourth Amendment protection from unreasonable searches. See Boren v. Deland, 958 F.2d 987, 988 (10th Cir. 1992) (wife of prisoner had a legitimate expectation of privacy when she entered the prison to visit her husband); Chochrane v. Quattrocchi, 949 F.2d 11, 13 (1st Cir. 1991) (prison visitors possess diminished expectation of privacy). At the same time, the States have a compelling governmental interest in preventing contraband introduction into the facility to maintain prison security. See Bell v. Wolfish, 441 U.S. at 546 (maintaining institutional security and preserving internal order are essential goals of corrections); Block v. Rutherford, 468 U.S. at 586 (visitors can easily conceal guns, knives, drugs or other contraband in countless ways and pass them to an inmate unnoticed by even the most vigilant observers). To reconcile these competing interests, courts have held that pat-down or metal detector sweeps of prison visitors are constitutional, even in the absence of individualized suspicion of contraband possession. See Spear v. Swoders, 71 F.3d 626, 630 (6th Cir. 1995) (visitors can be subjected to some searches, such as a pat-down or a metal detector sweep, merely as a condition of visitation, absent any suspicion). In such cases, the security needs of the prison outweigh or justify the limited intrusion on personal privacy that a pat-down search entails.

As the intrusiveness of the search on

bodily privacy increases, however, so does the level of constitutional scrutiny. In cases of visual body cavity searches of prison visitors, the courts have agreed that prison officials need not secure a search warrant or have probable cause. See **Spear**, 71 F.3d at 630. (Those courts that have examined the issue have concluded that even for strip and body cavity searches prison authorities need not secure a warrant or have probable cause.) State officials, however, must have **Areasonable suspicion** that the visitor is concealing contraband before conducting such a search. See **Varrone v. Bilotti**, 123 F.3d 75, 79 (2d Cir. 1997)(the law was clearly established that correctional officers needed reasonable suspicion to strip search prison visitors without violating their constitutional rights); **Spear**, 71 F.3d at 630 (the residual privacy interests of visitors in being free from such an invasive search requires that prison authorities have at least a reasonable suspicion that the visitor is bearing contraband before conducting such a search); **Hunter v. Auger**, 672 F.2d 668, 674 (8th Cir. 1982)(After weighing the interest of correctional officials in preserving institutional security against the extensive intrusion on personal privacy resulting from a strip search, we conclude that the Constitution mandates that a reasonable suspicion standard govern strip searches of visitors to penal institutions.)

In order to justify a strip search of a particular prison visitor under the **Areasonable suspicion** standard, prison officials must point to specific facts and rational inferences from those facts which would lead to a reasonable conclusion that the visitor is engaged in contraband smuggling. **Hunter**, 672 F.2d at 674. Mere hunches or unspecified suspicions are not sufficient. 672 F.2d at 674. Nor are uncorroborated anonymous tips lacking any indicia of reliability. 672 F.2d at 675. **Areasonable suspicion** does not mean evidence beyond a reasonable doubt, or by clear and convincing evidence, or even by a preponderance of the evidence. Reasonable suspicion is not even equal to a finding of probable cause. Rather, reasonable suspicion requires only specific objective facts upon which a prudent official, in light of his experience, would conclude that illicit activity might be in progress. **Spear v. Sowders**, 71 F.3d at 631; see also **United States v. Sokolow**, 490 U.S. 1, 7 (1989)(reasonable suspicion is obviously less

demanding than that for probable cause but must be more than unparticularized suspicion or hunch). In determining whether reasonable suspicion exists to justify a body cavity search of a prison visitor, the factors that may be considered include: (1) the nature of the tip or information; (2) the reliability of the informant; (3) the degree of corroboration; and (4) other factors contributing to suspicion or lack thereof. See **Varrone v. Bilotti**, 123 F.3d at 79; **Security and Law Enforcement Employees v. Carey**, 737 F.2d 187, 205 (2d Cir. 1984).

In **Daugherty v. Campbell**, 33 F.3d 554 (6th Cir. 1994) prison officials stripped searched a prisoner's wife based upon two anonymous letters indicating that she was smuggling drugs into the prison. 33 F.3d at 555. Prison officials also searched her vehicle. 33 F.3d at 555. None of the searches uncovered contraband. 33 F.3d at 555. Applying the **Areasonable suspicion** standard, the Sixth Circuit held that prison officials' reliance on a wholly uncorroborated tip is, under the facts of this case, insufficient to constitute reasonable suspicion. 33 F.3d at 557. **Clearly**, strip searches of prison visitors based upon bare allegations of illegal activities, whether by anonymous informants or a corrections officer who later denies making such allegations, contravene the well-established protections of the Fourth Amendment. 33 F.3d at 557.

In **Varrone v. Bilotti**, 123 F.3d 75 (2d Cir. 1997) prison officials stripped searched a prisoner's wife and son based upon information received from a narcotics officer indicating that they would be bringing heroin into the facility. 123 F.3d at 77. None of the strip searches uncovered any drugs. 123 F.3d at 77. The Second Circuit held that the reasonable suspicion standard was satisfied in **Varrone** because the information underlying the search was precise, specific and detailed. 123 F.3d at 79. **The** information identified the smugglers by name, stated where and when they would commit the offense and specified the particular drug they would attempt to smuggle. 123 F.3d at 80. Moreover, prison officials were informed that the information supplied came from a **Areliable** source. 123 F.3d at 80.

In **Spear v. Sowders**, 71 F.3d 626 (6th Cir. 1995) prison officials conducted a body cavity search on a prisoner's female visitor based on an

informant's statement that the prisoner was receiving drugs every time a young unrelated female visitor visited. 71 F.3d at 629. The informant in question had given reliable information in the past which included the termination of a prison guard for engaging in a romance with a prisoner. 71 F.3d at 629. Given the history of reliability and the information provided, the Sixth Circuit upheld the search, concluding that prison officials had reasonable suspicion. 71 F.3d at 631.

In Hunter v. Auger, 672 F.2d 668 (8th Cir. 1982) three prison visitors brought suit alleging unreasonable strip searches when they visited their family members in various Iowa State prisons. 672 F.2d at 670-671. Each strip search was based on an anonymous tip that the visitor would attempt to smuggle drugs into the facility. 672 F.2d at 670-671. The searches revealed no drugs or other contraband. 672 F.2d at 670-671. Applying the reasonable suspicion standard, the Eighth Circuit held that the searches violated the Fourth Amendment, noting that they were based upon uncorroborated anonymous tips without any information to evaluate the tipster's reliability. 672 F.2d at 677. See also Smothers v. Gibson, 778 F.2d 470, 473 (8th Cir. 1985)(strip search of prisoner's seventy-two year-old mother based on anonymous tip totally devoid of any information as to the nature of the tip, or the reliability of the informant potentially unreasonable and remanding case for trial); Romo v. Champion, 46 F.3d 1013, 1020 (10th Cir. 1995)(prison officials had reasonable suspicion for strip search where drug interdiction canine alerted authorities to presence of narcotics).

Prison officials often raise the issue of consent in the matter of visitor strip searches. Typically, the issue arises when prison officials confront and inform the visitor that he or she must either submit to a strip search in order to visit the prisoner or leave the facility. If the visitor consents to the strip search, often by signing a document, prison officials will inevitably argue that the visitor waived his or her Fourth Amendment protection against unreasonable searches.

It is well-settled that a search which would otherwise be unlawful under the Fourth Amendment may become legal through the consent of the person searched. However,

consent to search must be voluntarily given and not contaminated by duress or coercion. Scheckloth v. Bustamonte, 412 U.S. 218, 228 (1973). In the context of visitor strip searches, several courts have held that consent is the product of coercion when prison officials condition the privilege of visitation upon submission to a strip search. See Cochrane v. Quattrocchi, 949 F.2d 11, 14-15 (1st Cir. 1991)(there was no valid consent to search where visitor was given choice between being denied visitation indefinitely or waiving her constitutional rights to be free from unreasonable search). Finally, only those persons whose privacy is invaded by a search have standing to object. Thus, a prisoner does not have standing to challenge the strip search of his girlfriend. See Wool v. Hogan, 505 F.Supp. 928, 931 (D.Vermont 1981).

In conclusion, prison officials can conduct pat-down searches on prison visitors absent any individualized suspicion of wrongdoing. The intrusion on personal privacy that a pat-down search entails, although intimidating, is considered outweighed by the security needs of the State. Consequently, unless the pat-down search is conducted in an abusive fashion or motivated by malicious reasons, the courts will sustain the practice as reasonably related to the State's compelling security interests.

Body-cavity searches of prison visitors, on the other hand, violate the Fourth Amendment unless prison officials have reasonable suspicion that the visitor in question is concealing contraband. Reasonable suspicion is not satisfied by anonymous tips absent corroborating facts. Reasonable suspicion is not satisfied by vague information from inmate informants without any history of reliability. Such tips are notoriously erroneous, often motivated by petty personal reasons to inflict harm on a particular prisoner. Given the substantial intrusion on individual privacy that a body cavity search entails, the courts will closely examine prison officials' justifications for such searches to determine whether it constitutes reasonable suspicion.

IV. PROCEDURAL DUE PROCESS

The Due Process Clause of the Fourteenth Amendment to the United States

Constitution guarantees that no State shall deprive any person of life, liberty, or property without due process of law. U.S. Const. Amend. XIV. The purpose of the Due Process Clause is to protect the individual from arbitrary and erroneous State action by requiring some kind of hearing prior to the deprivation of life, liberty, or property. See **Matthews v. Eldridge**, 424 U.S. 319, 333 (1976) (fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner); **Wolff v. McDonnell**, 418 U.S. 539, 558 (1974) (The touchstone of due process is protection of the individual against arbitrary action of government.); **Armstrong v. Manzo**, 380 U.S. 545, 550 (1965) (at a minimum due process requires that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case). Here we confine our discussion to State deprivations of prisoner liberty and property only. State deprivation of prisoner life is isolated to the contentious and emotionally-charged issue of capital punishment, a matter far beyond the scope of this manual.

While due process is to protect the individual from arbitrary deprivations of liberty and property, it is not always clear when State action against prisoners implicates due process concerns. The Supreme Court has emphasized that not every governmental deprivation of a prisoner's liberty or property triggers the application of due process. See **Hewitt v. Helms**, 459 U.S. 460, 466 (1983) (While no State may deprive a person of life, liberty or property, without due process of law, it is well settled that only a limited range of interests fall within this provision). Exactly when such procedures must be provided has been the subject of considerable Supreme Court activity during the past thirty years. Beginning with **Morrissey v. Brewer**, 408 U.S. 471 (1972) (parole revocation implicates a liberty interest protected by due process), the Supreme Court has implemented a two-part inquiry to determine whether a prisoner is entitled to due process protection.

The first or threshold inquiry requires the lower courts to determine whether a liberty or property interest within the meaning of the Due Process Clause is at stake. See **Morrissey**, 408 U.S. at 481 (explaining that government deprivations must fall within the contemplation of

the liberty or property language of the Fourteenth Amendment to require due process). If government action implicates a liberty or property interest within the meaning of the Due Process Clause, the courts then proceed to the second inquiry, under which it determines the amount of process due under the circumstances to protect the individual against unwarranted deprivations. See **Morrissey**, 408 U.S. at 481. (Once it is determined that due process applies, the question remains what process is due.)

A liberty or property interest deserving of the procedural protections of the Due Process Clause may arise from two sources: (1) the Federal Constitution itself; or (2) State statutes, regulations and practices. See **Board of Regents v. Roth**, 408 U.S. 564, 577 (1972) (Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law or understandings that secure certain benefits and that support claims of entitlement to those benefits.); **Hewitt v. Helms**, 459 U.S. 460, 466 (1983) (Liberty interests protected by the Fourteenth Amendment may arise from two sources: the Due Process Clause itself and the laws of the States.)

A. Protected Interests Created by the Due Process Clause Itself

Some State deprivations are so severe or so different from the normal conditions of confinement that they are considered outside the terms of the imposed sentence. In such cases, the Supreme Court has held that the Constitution itself confers a liberty interest entitled to due process protection. For example, in **Morrissey v. Brewer**, 408 U.S. 471 (1972), the Supreme Court held that the revocation of parole implicates a liberty interest under the Due Process Clause itself. 408 U.S. at 482. **Morrissey** reasoned that even though a parolee is subject to State restrictions, he can be gainfully employed and is free to be with family and friends and to form the other enduring attachments of normal life. 408 U.S. at 482. Since the liberty of a parolee includes many of the core values of unqualified liberty and its termination inflicts a grievous loss on the parolee and often on others, the Supreme Court agreed that its termination calls for some

orderly process, however informal. 408 U.S. at 482. In Vitek v. Jones, 445 U.S. 480 (1980) the Supreme Court held that the involuntary transfer of a prisoner to a state mental hospital implicates a liberty interest protected by the Due Process Clause itself. 445 U.S. at 493. The Vitek Court reasoned that commitments to mental hospitals are not within the range of conditions of confinement to which a prison sentence subjects an individual because it is qualitatively different from punishment and has stigmatizing consequences. 445 U.S. at 493-494. In Washington v. Harper, 494 U.S. 210 (1990) the Supreme Court agreed that a prisoner's interest in not being treated involuntarily with antipsychotic medication also implicates a liberty interest emanating directly from the Due Process Clause. 494 U.S. at 221. The Washington Court reasoned that a forcible injection of medication into a nonconsenting person's body represents a substantial interference with that person's liberty. 494 U.S. at 229. Finally, in Young v. Harper, 520 U.S. 143 (1997) the Supreme Court held that removal of a prisoner from an Oklahoma pre-parole program implicated a liberty interest within the meaning of the Due Process Clause itself. 520 U.S. at 145. There the pre-parolee was released from prison before the expiration of his sentence. He kept his own residence; he sought, obtained and maintained a job; and he lived a life generally free of the incidents of imprisonment. 520 U.S. at 148. The Court held that due process must accompany removal from the program because it was essentially no different from parole as we described it in Morrissey. 520 U.S. at 152.

On the other hand, the Supreme Court has made clear that prisoners retain no protected liberty interests originating from the Constitution itself in deprivations or conditions of confinement considered within the terms of a valid prison sentence. In Meachum v. Fano, 427 U.S. 215 (1976) the Supreme Court held that the Due Process Clause itself did not protect a prisoner's transfer from a medium- to a maximum-security prison because it was within the normal limits or range of custody which the conviction had authorized the State to impose. 427 U.S. at 225. In Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex, 442 U.S. 1 (1979) the Supreme Court held that the Due Process Clause itself does not protect a prisoner's interest in parole release

since a convicted offender has no constitutional right to be conditionally released before his sentence has expired. 442 U.S. at 7. In Hewitt v. Helms, 459 U.S. 460 (1983) the Supreme Court held that the Due Process Clause itself does not protect a prisoner against transfer from the general prison population to administrative segregation since movement to more restrictive quarters for non-punitive reasons is well within the terms of confinement ordinarily contemplated by a prison sentence. 459 U.S. at 468. And in Kentucky Department of Corrections v. Thompson, 490 U.S. 454 (1989) the Supreme Court held that the Due Process Clause itself does not protect a prisoner's interest in visitation since the denial of prison access to a particular visitor is well within the terms of confinement ordinarily contemplated by a prison sentence. 490 U.S. at 461. Keep in mind that in terms of liberty interests originating from the Constitution, the Supreme Court has consistently refused to recognize more than the most basic liberty interests in prisoners. Hewitt v. Helms, 459 U.S. at 467. As long as the conditions or degree of confinement to which the prisoner is subjected is within the sentence imposed upon him and is not otherwise violative of the Constitution, the Due Process Clause does not in itself subject an inmate's treatment by prison authorities to judicial oversight. Montanye v. Haymes, 427 U.S. 236, 242 (1976).

If conditions of confinement are so severe or qualitatively different from punishment normally suffered by prisoners, the Constitution itself will give rise to a protected liberty interest. If, however, conditions of confinement are within the range of punishment authorized by a criminal sentence, the prisoner must look to state law to justify application of procedural due process safeguards.

B. Protected Interests Created by State Law

For nearly two decades the Supreme Court held that a State creates a liberty interest, protected by due process, when its statutes and regulations contained mandatory language, requiring that certain procedures shall or must be employed, in combination with specific substantive predicates which limit official discretion. See Hewitt v. Helms, 459 U.S. at 471-472. Known as the state-created entitlement doctrine, prisoners asserting due process

violations were required to prove they were entitled to some benefit (such as good-time credits; freedom from disciplinary segregation; parole release, etc.) by pointing to state law containing mandatory language requiring the use of certain procedures in conjunction with substantive predicates limiting the discretion of State officials. For example, in Wolff v. McDonnell, 418 U.S. 539 (1974) the Supreme Court held that prisoners had no constitutionally-derived liberty interest in good-time credits; however, in light of Nebraska law creating the right to good-time credits and mandating that they could be forfeited only for serious misconduct, a state-created liberty interest was at stake. 418 U.S. at 557. In Greenholtz v. Inmates of Nebraska Penal and Correctional Complex, 442 U.S. 1 (1979) the Supreme Court held that the Constitution itself does not give rise to a liberty interest in parole release; however, in light of Nebraska law mandating that the parole board shall order an inmates release unless one or more specific reasons were found, state officials' discretion to deny parole was sufficiently curbed to give rise to a state-created liberty interest. 442 U.S. at 11. And in Hewitt v. Helms, 459 U.S. 460 (1983) the Supreme Court held that the Constitution itself does not protect a prisoner against transfer from the general population to administrative segregation; however, in light of Pennsylvania regulations mandating that certain procedures shall and must be employed and that administrative segregation would not occur absent specific substantive predicates, prison officials' discretion to segregate prisoners was sufficiently restricted to give rise to a state-created liberty interest. 459 U.S. at 472. See also: Meachum v. Fano, 427 U.S. 215, 226-227 (1976)(where Massachusetts law did not limit the discretion of State officials to transfer prisoners to other facilities, no state-created liberty interest at stake); Connecticut Board of Pardons v. Dumschat, 452 U.S. 458, 466-467 (1981)(where Connecticut law contained no criteria and no mandated shall, the discretion of State officials to deny commutation was not limited and no state-created liberty interest at stake); Olim v. Wakinekona, 461 U.S. 238, 249 (1983)(where Hawaii law placed no substantive limitations on discretion of State officials to transfer prisoner to California facility, no state-created liberty interest at stake); Kentucky Department of Corrections v. Thompson, 490 U.S. 454, 464 (1989)(where Kentucky regulations stopped short of requiring

that a particular result is to be reached upon a finding that substantive predicates are met, State officials' discretion to deny visitation was not sufficiently restricted to give rise to state-created liberty interest).

On June 19, 1995 the Supreme Court issued an extraordinary decision which turned the state-created entitlement doctrine upside down. In Sandin v. Conner, 515 U.S. 472 (1995) the Supreme Court granted certiorari to re-examine the circumstances under which State prison regulations afford inmates a liberty interest protected by the Due Process Clause. 515 U.S. at 474. In a 5-4 decision, the Court recognized that States may under certain circumstances create liberty interests which are protected by the Due Process Clause. 515 U.S. at 483-484. However, the Sandin majority further noted that,

these interests will be generally limited to freedom from restraint which, while not exceeding the sentence in such an unexpected manner as to give rise to protection by the Due Process Clause of its own force, nonetheless imposes **atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life.** (Citations omitted).

515 U.S. at 484.

At issue in Sandin was whether a Hawaiian prisoner, sentenced to thirty days disciplinary segregation for misconduct, retained a state-created liberty interest protected by the Due Process Clause. 515 U.S. at 477. The Sandin majority concluded that neither the Hawaii prison regulation in question, nor the Due Process Clause itself, afforded Conner a protected liberty interest that would entitle him to the procedural protection set forth in Wolff. The regime to which he was subjected as a result of the misconduct hearing was within the range of confinement to be normally expected for one serving an indeterminate term of 30 years to life. 515 U.S. at 487.

In reaching this conclusion, Chief Justice Rehnquist, writing for the 5-4 majority, reasoned that the state-created liberty interest doctrine had encouraged prisoners to comb the regulations in

search of mandatory language on which to base entitlements to various state-conferred privileges.⁶ 515 U.S. at 481. This had led to two undesirable results according to the majority. First, the state-created liberty interest doctrine had discouraged States from drafting progressive prison management procedures out of fear they would create liberty interests entitled to due process protection. 515 U.S. at 482. Secondly, the search for mandatory language and substantive predicates in state regulations had led to significant federal court involvement in the day-to-day operations of prisons. 515 U.S. at 482. For these reasons, the **Sandin** majority announced that the time has come to return to the due process principles we believe were correctly established and applied in **Wolff** and **Meachum**.⁶ 515 U.S. at 483. The **Sandin** majority recognized that the States can create liberty interests which are protected by the Due Process Clause. 515 U.S. at 483-484. However, such state-created liberty interests are limited only to those prison conditions which impose an **atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life**.⁶ 515 U.S. at 484.

Unquestionably, the intent of the **Sandin** majority was to rein in the state-created liberty interest doctrine by restricting its application to only those state deprivations amounting to an atypical and significant hardship⁶ as compared to the ordinary incidents of prison life.⁶ It is a far-reaching decision that releases state officials from due process accountability in all but the most severe cases.

We examine the impact of **Sandin**'s new approach for identifying liberty interests in the remaining sections. Applying the bifurcated due process analysis established thirty years ago in **Morrissey**, we ask first whether a liberty⁶ or property⁶ interest within the meaning of the Fourteenth Amendment is at stake. Only if state action implicates a liberty⁶ or property⁶ interest do we make the second inquiry as to how much process is due the prisoner. See **Kentucky Department of Corrections v. Thompson**, 490 U.S. 454 (1989) (Supreme Court never reached question of how much process was due because it declined to recognize a liberty interest in prison visitation).

The time has come to return to the due process

principles we believe were correctly established and applied in **Wolff** and **Meachum**. Following **Wolff**, we recognize that States may under certain circumstances create liberty interests which are protected by the Due Process Clause. But these interests will be generally limited to freedom from restraint which, while not exceeding the sentence in such an unexpected manner as to give rise to protection by the Due Process Clause of its own force, nonetheless imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life.

Sandin v. Conner, 515 U.S. 472, 484 (1995) (citations omitted).

C. Disciplinary Sanctions

Wolff v. McDonnell, 418 U.S. 539 (1974) is the Supreme Court's seminal decision addressing prisoner's due process rights. At issue in the case was the disciplinary process of the Nebraska correctional system in which the revocation of good-time credits and solitary confinement were imposed for flagrant or serious misconduct.⁶ 418 U.S. at 546-547. The Supreme Court recognized that the Constitution does not require Nebraska to provide prisoners with good-time credits. 418 U.S. at 557. However, since the State had statutorily created a right to good-time credits, the deprivation of which could not occur without proof of serious misconduct, the prisoner's interest has real substance and is sufficiently embraced within Fourteenth Amendment liberty to entitle him to those minimum procedures appropriate under the circumstances and required by the Due Process Clause to insure that the state-created right is not arbitrarily abrogated.⁶ 418 U.S. at 557. The **Wolff** Court also agreed that solitary confinement constituted a major change in the conditions of confinement⁶ which could be imposed only upon proof of serious misconduct. 418 U.S. at 571 n.19. Thus, as in the case of good time, there should be minimum procedural safeguards as a hedge against arbitrary determination of the factual predicate for imposition of the sanction.⁶ 418 U.S. at 571 n.19.

In the twenty-one years following **Wolff**, the lower courts consistently held that where State statutes and regulations prohibited the imposition of disciplinary sanctions, except upon proof of major misconduct, a state-created liberty

interest was a stake which triggered application of due process. See Todaro v. Bowman, 872 F.2d 43, 48 (3d Cir. 1989)(in light of nondiscretionary language in Pennsylvania statute that no further punishment is permitted unless the prisoner violates the rules and regulations of the prison or violates State law, county prisoners had state-created liberty interest); Gibbs v. King, 779 F.2d 1040, 1044 (5th Cir. 1986)(where state law mandated that no prisoner may be punished except after a finding of guilt by the Disciplinary Officer, state-created liberty interest at stake); Sher v. Coughlin, 739 F.2d 77, 81 (2d Cir. 1984)(state statutes and regulations authorizing restrictive confinement as punishment upon a finding of a disciplinary infraction will invariably provide sufficient limitation on the discretion of prison officials to create a liberty interest).

Each one of these decisions (and dozens like them) are now obsolete. In the post-Sandin era, merely establishing that state law restricts the discretion of prison officials to impose punishment is insufficient to trigger due process. Prisoners must now prove that the disciplinary sanction in question involves an atypical and significant hardship in relation to the ordinary incidents of prison life. Sandin, 515 U.S. at 484.

1. Do prisoners have a protected liberty interest, derived from the Constitution itself, in freedom from disciplinary sanctions for misconduct?

The answer to this question is no. The Supreme Court has made clear that as long as conditions of confinement are within the sentence imposed and not otherwise violative of the Constitution, the Due Process Clause itself does not subject an inmate's treatment to judicial oversight. See Montanye v. Haymes 427 U.S. at 242. Applying this within the sentence imposed test in the prison disciplinary context, the Supreme Court has ruled that the Due Process Clause itself does not give rise to any protected interests in good-time credits, see Wolff, 418 U.S. at 557 (It is true that the Constitution itself does not guarantee good-time credit for satisfactory behavior while in prison, or freedom from disciplinary segregation for thirty days. See Sandin, 515 U.S. at 487 (explaining that Conner's disciplinary segregation was within

the range of confinement to be normally expected for one serving an indeterminate term of 30 years to life.)).

Obviously, if the loss of good-time credits and disciplinary segregation are not severe enough to trigger a liberty interest under the Due Process Clause directly, neither are minor penalties such as cell restriction and loss of privileges. Indeed, the Sandin majority appeared to place all disciplinary sanctions within the sentence imposed universe by noting, Discipline by prison officials in response to a wide range of misconduct falls within the expected parameters of the sentence imposed by a court of law. 515 U.S. at 485. Whether or not harsher penalties for prisoner misconduct would qualify for protection under the Due Process Clause itself is doubtful. With the exception of prison transfers to mental hospitals, see Vitek v. Jones, 445 U.S. 480 (1980) and the administration of antipsychotic medication, see Washington v. Harper, 494 U.S. 210 (1990), the Supreme Court has rarely accepted this argument. Nonetheless, given the history of corrections, we should never underestimate the ability of the States to implement new draconian measures that may trigger liberty interests under the Due Process Clause directly.

2. Do prisoners have a protected liberty interest, derived from State law, in freedom from disciplinary sanctions for misconduct?

The answer to this question is yes, if and only if prisoners establish: (a) that the disciplinary sanction in question imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life, Sandin, 515 U.S. at 484; and (b) that State statutory or regulatory law contain the magical combination of mandatory- and discretion-limiting language that restricts the conduct of prison officials. See Hewitt, 459 U.S. at 471-472.

As a preliminary matter, there does exist an on-going debate over whether Sandin (a) completely abolished Hewitt's language-intensive search and replaced it with the atypical and significant hardship test or (b) merely supplemented the Hewitt methodology with the atypical and significant hardship test. We will

have to await future Supreme Court clarification on the exact role that State law plays in prisoner due process jurisprudence. For now, our Third Circuit has determined that **Sandin** did not replace the **Hewitt** language methodology but merely restricted its application to those deprivations involving an atypical and significant hardship. See **Allah v. Seiverling**, 229 F.3d 220, 223 (3d Cir. 2000) (holding that an examination of a state statute or regulation should not be conducted unless the challenged restraint on freedom imposes atypical and significant hardship); **Griffin v. Vaughn**, 112 F.3d 703, 708 (3d Cir. 1997) (The central teaching of **Sandin** is that a state statute or regulation conferring a right is not alone enough to trigger due process. State law must also result in an atypical and significant hardship).

Since we have extensively reviewed Supreme Court precedent analyzing State law for mandatory- and discretion-limiting language, there is no need to do so again. We concentrate here on the atypical and significant hardship component which focuses not on the language of a regulation but on the severity of the deprivation.

According to **Sandin**, the States may under certain circumstances create liberty interests deserving of due process protection. 515 U.S. at 483-484. However, these interests are limited to freedom from restraint which imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life. 515 U.S. at 484. Unfortunately, this standard is easier said than done. What exactly do atypical and significant hardship and ordinary incidents of prison life mean in the prison context? Beyond stating that Connor's thirty days in disciplinary segregation was not an atypical, significant deprivation because his confinement mirrored conditions in administrative segregation and protective custody, 515 U.S. at 486, the Supreme Court provided scant guidance for the lower courts. See **Sandin**, 515 U.S. at 490 n.2 (Ginsburg, J., dissenting) (The Court ventures no examples, leaving consumers of the Court's work at sea, unable to fathom what would constitute an atypical, significant deprivation, and yet not trigger protection under the Due Process Clause directly.); **Frey v. Fulcomer**, 132 F.3d 916, 925 n.7 (3d Cir. 1997) (noting that it is still uncertain how broadly this circuit and others will construe **Sandin's** reasoning.).

Despite these uncertainties, the lower courts have begun the task of applying **Sandin** to the disciplinary process. In regards to minor disciplinary sanctions such as cell restriction and loss of privileges the courts have agreed that such penalties do not rise to the level of an atypical and significant hardship. See **Sandin**, 515 U.S. at 499 (Breyer, J., dissenting) (The Court has never held that comparatively unimportant prison deprivations fall within the scope of the Due Process Clause even if local law limits the authority of prison administrators to impose such minor deprivations.); **Wolff**, 418 U.S. at 571 n.19 (we do not suggest, however, that the procedures required by today's decision for the deprivation of good time would also be required for the imposition of lesser penalties such as the loss of privileges.); **Malachi v. Thaler**, 211 F.3d 953, 958 (5th Cir. 2000) (prisoner's thirty-day loss of commissary privileges and cell restriction do not implicate due process concerns); **Turner v. Johnson**, 46 F.Supp.2d 655, 664 (S.D. Tex. 1999) (Turner did not suffer an atypical or significant hardship in the context of prison life merely by being reclassified, restricted to his cell for fifteen days, and losing his commissary privileges for fifteen days.); **Austin v. Lehman**, 893 F.Supp. 448, 453 (E.D.PA 1995) (loss of bi-weekly cigarette allotment while in disciplinary custody implicates no protected liberty interest); **Madison v. Parker**, 104 F.3d 765, 768 (5th Cir. 1997) (30-days commissary and cell restriction as punishment do not implicate due process concerns). See also: **Ware v. Morrison**, 276 F.3d 385, 387 (8th Cir. 2002) (citing **Sandin**, suspension of visitation privileges without a hearing did not implicate atypical and significant hardship sufficient to trigger due process).

At the other end of the disciplinary spectrum are severe penalties such as the forfeiture of good-time credits which directly impact a prisoner's liberty by affecting the duration of his or her sentence. Most courts have concluded that the deprivation of good-time credits as a punitive sanction for misconduct does rise to the level of an atypical and significant hardship. See **Sandin**, 515 U.S. at 487 (distinguishing Connor's claim by noting that it does not present a case where the State's action will inevitably affect the duration of his sentence.); **Wolf v. McDonnell**, 418 U.S. at 557 (describing a prisoner's liberty interest in good-

time credits as one of Areal substance.®); **Montgomery v. Anderson**, 262 F.3d 641, 645 (7th Cir. 2001)(deprivation of prisoner=s credit-earning class implicates a liberty interest protected by due process); **Sweeney v. Parke**, 113 F.3d 716, 718 (7th Cir. 1997)(prisoner=s loss of 180 days good-time credits entitles him to due process under **Sandin** because State=s action will inevitably affect the duration of his sentence); **Madison v. Parker**, 104 F.3d 765, 769 (5th Cir. 1997)(Athe court in **Sandin** clearly left intact its holding in **Wolff**, namely, that the loss of good time credits under a state statute that bestowed mandatory sentence reductions for good behavior must be accompanied by certain procedural safeguards in order to satisfy due process.®); **McGuinness v. Dubois**, 75 F.3d 794, 797 n.3 (1st Cir 1996)(prisoner who forfeited 100 days good time credits entitled to due process); **Gotcher v. Wood**, 66 F.3d 1097, 1099 (9th Cir. 1995)(prisoner=s loss of 30 days good time credits sufficient to confer a liberty interest). Although the forfeiture of good-time credits for misconduct qualifies as an Aatypical and significant hardship® under **Sandin**, prisoners should exercise caution before rushing into federal court with a 42 U.S.C. ' 1983 action. See **Preiser v. Rodriguez**, 411 U.S. 475 (1973)(sole remedy in federal court for prisoner seeking restoration of good-time credits is writ of habeas corpus); **Edwards v. Balisok**, 520 U.S. 641 (1997)(inmate cannot pursue ' 1983 action for money damages based upon due process violation until prison disciplinary verdict that resulted in loss of good-time credits is reversed or invalidated).

The greatest difficulty and most controversial aspect in applying **Sandin**=s new approach for identifying liberty interests concerns solitary confinement. Although the **Wolff** Court agreed that solitary confinement represents Aa major change in the conditions of confinement® which warrants due process protections, see **Wolff**, 418 U.S. at 571-572 n.19, the **Sandin** majority brushed off that conclusion as mere Adicta®. See **Sandin**, 515 U.S. at 485. Since the **Wolff** footnote holding is no longer valid precedent, we ask, at what point, if ever, does confinement in solitary confinement become an Aatypical and significant hardship on the inmate in relation to the ordinary incidents of prison life®? 515 U.S. at 484.

Making this determination requires the lower courts to conduct a factual inquiry into two factors: (1) the duration of the solitary confinement; and (2) the degree of restriction involved in the solitary confinement as compared to the Aordinary incidents of prison life.® See **Sandin**, 515 U.S. at 486 (noting that Conner=s thirty days in disciplinary segregation was not an atypical, significant hardship because it Adid not exceed similar, but totally discretionary, confinement in either duration or degree of restriction.®).

At the outset, numerous courts have held that thirty days or less of solitary confinement does not rise to the level of an Aatypical and significant hardship.® See **Mujahid v. Meyer**, 59 F.3d 931, 932 (9th Cir. 1995) (fourteen days not atypical and significant hardship); **Chisolm v. Manimon**, 97 F.Supp.2d 615, 626 (D.N.J. 2000)(one day not atypical and significant hardship). Most courts consider short-term disciplinary or administrative solitary confinement neither Aatypical® or a Asignificant hardship® (absent unusual circumstances) but rather Athe sort of confinement that inmates should reasonably anticipate receiving at some point in their incarceration.® **Hewitt**, 459 U.S. at 468.

Whether or not longer periods of solitary confinement constitutes an Aatypical, significant hardship® is a difficult question largely dependent on the court=s comparison between conditions in solitary confinement and what it deems the Aordinary incidents of prison life.® See **Sealey v. Giltner**, 197 F.3d 578, 588 (2d Cir. 1999)(AHaving examined the conditions and the duration of Sealey=s confinement, we next consider the base against which to make the **Sandin** comparison of atypicality.®); **Hatch v. District of Columbia**, 184 F.3d 846, 851 (D.C. Cir. 1999)(AThe central difficulty in determining whether segregative confinement imposes atypical and significant hardship on the inmate= is how to characterize the comparative baseline B i.e., how to define the ordinary incidents of prison life=®). For example, if conditions in the Restricted Housing Unit (where prisoners are normally confined in their cells 23 hours per day, denied all privileges, and movement is strictly controlled with strip searches, handcuffs and leg irons) are the Aordinary incidents of prison life®, then it is highly unlikely that a prisoner=s confinement in the RHU would ever be

considered atypical or a significant hardship because those conditions are no different than what other prisoners experience. On the other hand, if conditions in general population (where prisoners are free to move about the institution and participate in daily work, educational, recreational and rehabilitative programs) are the ordinary incidents of prison life, then a prisoner's transfer from general population to the RHU may indeed constitute an atypical and significant hardship. The Sandin Court did not definitively rule on which prison conditions constitute the ordinary incidents of prison life. Indeed, the Sandin Court compared Conner's thirty days of disciplinary segregation to conditions in administrative segregation, protective custody, and the general population. 515 U.S. at 486. (Based upon a comparison between inmates inside and outside disciplinary segregation, the State's actions in placing him there for 30 days did not work a major disruption in his environment.)

This confusion over which conditions of confinement should be used as the comparative base has divided the Circuit Courts and produced some disturbing results. For example, in Colon v. Howard, 215 F.3d 227 (2d Cir. 2000) the Second Circuit held that 305 days of solitary confinement is in our judgment a sufficient departure from the ordinary incidents of prison life to require procedural due process protections under Sandin. 215 F.3d at 231. Yet, in Griffin v. Vaughn, 112 F.3d 703 (3d Cir. 1997) the Third Circuit held that fifteen months of solitary confinement was not an atypical and significant hardship sufficient to warrant due process protection. 112 F.3d at 706. And in Payton v. Horn, 49 F.Supp.2d 791 (E.D.PA 1999) a district court held that in excess of three and one-half years of administrative and disciplinary segregation was not an atypical and significant hardship sufficient to trigger due process protection.

Although the prisoners in Colon, Griffin and Payton were each confined in solitary confinement under nearly identical conditions, only Colon was entitled to due process despite having served the least amount of restrictive confinement. This is because the Second Circuit used the general population as the comparative base to determine whether solitary confinement constitutes an atypical and significant hardship.

See Colon, 215 F.3d at 231 (As to atypicality, we are unaware of any data showing that New York frequently removes prisoners from general population for as long as the 305 days that Colon served). In contrast, the Third Circuit has narrowly construed Sandin by using conditions in the RHU as the basis of comparison. See Griffin, 112 F.3d at 708 (noting that Ait is not extraordinary for inmates to be confined in administrative custody and Ait is not atypical for inmates to be exposed to those conditions for a substantial period of time).

Given this division between the Circuit Courts over the meaning of atypical and significant hardship and the ordinary incidents of prison life, there is an obvious need for additional Supreme Court clarification. However, until that occurs in some future case, Griffin's interpretation of Sandin makes it extremely difficult for Pennsylvania prisoners confined in solitary confinement to clear the atypical and significant hardship hurdle.

One final observation before moving on: Sandin's atypical and significant hardship test does not apply to pretrial detainees. See Sandin, 515 U.S. at 484 (distinguishing pretrial detainees from convicted prisoners since disciplinary infractions for convicted prisoners falls within the expected perimeters of their sentences). Although the Supreme Court has not yet reviewed a due process liberty interest claim of a pretrial detainee accused of prison misconduct, a growing number of lower courts have decided that Sandin does not apply. See Benjamin v. Fraser, 264 F.3d 175, 189 (2d Cir. 2001)(distinguishing pretrial detainees from convicted prisoners holding Sandin inapplicable to detainees); Fuentes v. Wagner, 206 F.3d 335, 342 n.9 (3d Cir. 2000)(Sandin does not apply to due process claim of pretrial detainee). This does not mean, however, that pretrial detainees are immune from the disciplinary process because county officials still retain a legitimate interest in prison safety and security. It simply means that pretrial detainees accused of institutional misconduct must be provided a Wolff-type due process hearing regardless whether the sanction imposed constitutes an atypical and significant hardship. See Benjamin, 264 F.3d at 189-190.

3. What process is due prisoners deprived of protected liberty interests in the context of disciplinary sanctions?

Prisoners subjected to disciplinary sanctions must satisfy **Sandin-s** Atypical and significant hardship@ standard to be entitled to due process. As noted previously, this is an extremely difficult task given our Third Circuit-s current interpretation of **Sandin**. If a prisoner can satisfy this test, he or she is entitled to those procedures outlined by the Supreme Court in **Wolff v. McDonnell**, 418 U.S. 539 (1974). In **Wolff**, the Supreme Court made clear that Adisciplinary proceedings are not part of a criminal prosecution and the full panoply of the rights due a defendant in such proceedings does not apply.@ 418 U.S. at 556. Nonetheless, the Court held that the following procedural safeguards must be provided at prison disciplinary hearings to satisfy due process: (a) Advance written notice of the charges; (b) Impartial disciplinary decision making; (c) right to call witnesses and present documentary evidence when not unduly hazardous to institutional security; (d) Assistance from a fellow prisoner or staff member where an illiterate inmate is involved or where the issues are complex; and (e) written statement by the fact finders as to the evidence relied upon and the reasons for the disciplinary action taken. 418 U.S. at 563-571.

(a) Advanced written notice

Prisoners facing disciplinary proceedings are entitled to written notice of the charges at least 24 hours prior to the hearing. 418 U.S. at 564. The purpose of providing the accused with a misconduct notice Ais to give the charged party a chance to marshal the facts in his defense and to clarify what the charges are, in fact.@ 418 U.S. at 564. To comply with due process requirements, misconduct notices must be written rather than oral. See **Wolff**, 418 U.S. at 564 (condemning practice of summoning prisoners to hearings, informing them of charges, and conducting hearings); **Dzana v. Foti**, 829 F.2d 558, 562 (5th Cir. 1987)(oral notice violates due process). Written misconduct notices must also be provided to the charged party no less than 24 hours prior to the hearing to permit preparation of a defense. See **Benitez v. Wolff**, 985 F.2d 662,

665 (2d Cir. 1993)(providing a prisoner only 5 hours to review notice detailing 12 charges violated due process). Finally, misconduct notices must be sufficiently detailed to apprise prisoners of the facts underlying the charges. See **Edwards v. White**, 501 F.Supp. 8, 10 (M.D.PA 1979)(notice adequate where it Ainformd him of the charges and their underlying factual basis@), affirmed, 663 F.2d 209 (3d Cir. 1980). Of course, minor technical errors during misconduct notice preparation do not violate due process. See **Holt v. Caspari**, 961 F.2d 1370, 1373 (8th Cir. 1992)(failure to specify whether charge was serious or minor not violation where factual basis for charges provided); **Barry v. Whalen**, 796 F.Supp. 885, 895 (E.D.VA 1992)(failure to provide notice of hearing date not violation).

(b) Timing of disciplinary hearing

Turning to the disciplinary hearing itself, it is clear that the hearing should occur within a reasonable time after expiration of the 24-hour **Wolff** requirement. What is a Areasonable time@ however, varies according to the circumstances facing prison officials. See **Layton v. Beyer**, 953 F.2d 839, 850 (3d Cir. 1992). For example, it is well settled that disciplinary hearings may be postponed due to exigent circumstances. See **Gray v. Creamer**, 465 F.2d 179, 185 n.6 (3d Cir. 1972)(Afor example, during a prison riot, notice and hearing must be delayed a reasonable period of time@). In such cases, once the emergency condition has passed, disciplinary hearings must be promptly provided. Where disciplinary hearings are not provided or are delayed unreasonably, due process is violated. **Huges v. Rowe**, 449 U.S. 5, 11 (1980)(Asegregation of a prisoner without a prior hearing may violate due process if the postponement of procedural protections is not justified by apprehended emergency conditions@). Finally, the Third Circuit has made clear that violations of state regulations mandating hearings within a prescribed period of time are not dispositive. See **Layton v. Breyer**, 953 F.2d at 850 (what is Areasonable time@ must be based upon federal constitutional law, not state law).

(c) Lay assistance

The Supreme Court held that prisoners facing disciplinary proceedings do not enjoy a

constitutional right to counsel. **Wolff**, 418 U.S. at 570. However, where an illiterate prisoner is involved or there exists complex legal or factual issues, prisoners are entitled to assistance by a lay advocate. **Wolff**, 418 U.S. at 570; **Horne v. Coughlin**, 795 F.Supp. 72, 76 (N.D.N.Y. 1991)(failure to provide retarded prisoner with assistance in disciplinary hearing violates due process); **United States ex rel. Ross v. Warden**, 428 F.Supp. 443, 446 (E.D.Ill. 1977)(due process violated where accused prisoner was not competent to defend himself due to psychological problems). Some federal courts have also held that prisoners unable to gather evidence for a defense due to pre-hearing segregation must be provided lay assistance. See **Eng v. Coughlin**, 858 F.2d 889, 898 (2d Cir. 1988); **Von Kahl v. Brennan**, 855 F.Supp.1413, 1426 (M.D.PA 1994)(assistance required where inmate's pre-hearing conference confinement interferes with his ability to prepare his defense). Bear in mind, however, this interpretation of due process is not shared by all courts. See **Miller v. Duckworth**, 963 F.2d 1002, 1004 (7th Cir. 1992)(inability to collect evidence for defense not constitutionally sufficient reason for lay assistance). Finally, where lay assistance is constitutionally required, prison officials must permit the accused prisoner and his lay advocate a reasonable opportunity to prepare a defense. See **Grandison v. Cuyler**, 774 F.2d 598, 604 (3d Cir. 1985)(requiring prison officials to justify mere five-minute meeting prior to hearing between accused and assistant).

(d) Witnesses and documentary evidence

The **Wolff** Court also held that the inmate facing disciplinary proceedings should be allowed to call witnesses and present documentary evidence when permitting him to do so will not be unduly hazardous to institutional safety or correctional goals. 418 U.S. at 516. Thus, the right to call witnesses and present evidence is not absolute; according to **Wolff**, prison officials must have the necessary discretion to keep the hearing within reasonable limits and may refuse to call any witnesses for irrelevance and lack of necessity in addition to legitimate security concerns. 418 U.S. at 566.

The **Wolff** Court also concluded that the Constitution does not require confrontation and cross-examination of adverse witnesses at prison

disciplinary hearings. 418 U.S. at 567. The Court reasoned that, if confrontation and cross-examination of those furnishing evidence against the inmate were to be allowed as a matter of course, as in criminal trials, there would be considerable potential for havoc inside the prison walls. 418 U.S. at 567. When prison officials refuse to call a witness, due process requires they explain the reasons why the witness was not permitted to testify. However, they can do so either contemporaneously as part of the disciplinary record or subsequently in court if the hearing is challenged on due process grounds. See **Ponte v. Real**, 471 U.S. 491, 497 (1985).

Applying these precepts, the lower courts have generally deferred to prison officials' discretion to exclude witnesses so long as those decisions are based upon legitimate security concerns or keeping the hearing within reasonable limits. See **McMaster v. Pung**, 984 F.2d 948, 952 (8th Cir. 1993)(prison officials' refusal to permit prisoner's wife to testify upheld where wife presented security threat); **Bostic v. Carlson**, 884 F.2d 1267, 1271 (9th Cir. 1989)(refusal to call inmate witnesses upheld where prisoner already allowed three witnesses and proposed testimony was repetitive); **Zimmerlee v. Keeney**, 831 F.2d 183, 186 (9th Cir. 1987)(refusal to call informant upheld due to security concerns over informant's safety); **Malek v. Camp**, 822 F.2d 812, 815 (8th Cir. 1987)(refusal to call inmate witnesses upheld where proposed testimony was cumulative); **Freeman v. Rideout**, 808 F.2d 949, 954 (2d Cir. 1986)(refusal to call alleged assault victim as witness upheld due to security threat of retaliation).

On the other hand, if the refusal to call a witness is not logically related to prison security or other legitimate correctional goals, prison officials have violated due process. See **Moran v. Farrier**, 924 F.2d 134, 137 (8th Cir. 1991)(refusal to call staff chaplain involved in misconduct incident violated due process); **Patterson v. Coughlin**, 905 F.2d 564, 570 (2d Cir. 1990)(prisoner denied due process when not allowed to call inmate witnesses to fight); **Brooks v. Andolina**, 826 F.2d 1266, 1269 (3d Cir. 1987)(where witnesses would not have impaired security, refusal violated due process); **Woods v. Marks**, 742 F.2d 770, 773 (3d Cir. 1984)(deference to prison officials' judgment

does not extend to arbitrary denial of witnesses). In addition, a number of federal appellate courts have struck down state prison regulations which permit the automatic exclusion of broad categories of witnesses. See Whitlock v. Johnson, 153 F.3d 380, 386 (7th Cir. 1998)(prison policy of denying virtually all requests for witnesses at disciplinary hearing violates due process); Forbes v. Trigg, 976 F.2d 308, 317 (7th Cir. 1992)(regulation allowing staff and prisoners to refuse to testify without explanation violates due process); Dalton v. Hutto, 713 F.2d 75, 78 (4th Cir. 1983)(APrison regulations which restrict absolutely the calling of certain categories of witnesses have been found unconstitutional.®). All of these courts have interpreted Wolff as requiring an individualized or person-by-person determination of each witness in terms of their relevance, necessity and security threat.

Finally, prisoners seeking the testimony of witnesses at their disciplinary hearings are required to follow established prison procedures governing the requesting of such witnesses. See Scott v. Kelly, 962 F.2d 145, 147 (2d Cir. 1992)(refusal to call witnesses upheld where prisoner failed to disclose contents of proposed testimony); Brooks v. Andolina, 826 F.2d 1266, 1269 (3d Cir. 1987)(prison officials may insist on compliance with reasonable procedural rules requiring prehearing identification of witnesses); Garfield v. Davis, 566 F.Supp. 1069, 1073 (E.D.PA 1983)(prisoner waived right to present witnesses where he failed to properly complete witness form); Piggie v. McBride, 277 F.3d 922, 925 (7th Cir. 2002) (failure of disciplinary board to review videotape containing potential exculpatory evidence is not due process violation if prisoner fails to request videotape review either before or at the hearing).

(e) Impartial Tribunal

An essential element of due process is an impartial decision-maker. In Wolff, the Supreme Court found that the composition of the Nebraska Adjustment Committee was insufficiently impartial to satisfy the due process clause.® 418 U.S. at 571.

In Myers v. Alldredge, 492 F.2d 296 (3d Cir. 1974) the Third Circuit held that the requirement of an impartial tribunal prohibits only

those officials who have a direct personal or otherwise substantial involvement, such as major participation in a judgmental or decision-making role, in the circumstances underlying the charge from sitting on the disciplinary body.® 492 F.2d at 306. AThis would normally include only those such as the charging and the investigating staff officers who were directly involved in the incident.® 492 F.2d at 306. Applying this standard, the Meysers court concluded that the presence of an Associate Warden on the disciplinary committee violated the inmates=rights to an impartial hearing due to his substantial involvement in controlling a work stoppage. 492 F.2d at 305-306.

Other federal courts have likewise concluded that investigating officers and other officials having substantial involvement in the circumstances underlying the misconduct charge are barred from sitting on the disciplinary tribunal. See Diercks v. Durham, 959 F.2d 711, 713 (8th Cir. 1992)(inmate denied impartial tribunal where prison supervisor sat on disciplinary body despite ordering subordinate to charge inmate); Merritt v. De Los Santos, 721 F.2d 598, 600-601 (7th Cir. 1983)(inmate denied impartial tribunal where corrections officer witnessed incident, drafted report, and then sat on disciplinary committee). On the other hand, the federal courts have also issued rulings defining instances where due process does not require disqualification of prison officials. See Russell v. Selsky, 35 F.3d 55, 60-61 (2d Cir. 1994)(prison official who merely reviewed misconduct allegations not disqualified from serving as disciplinary hearing officer absent showing of actual bias); Adams v. Gunnell, 729 F.2d 362, 370 (5th Cir. 1984)(Awe cannot say that due process is denied by a prison disciplinary panel that includes an official with whom the accused inmate has had a factually unrelated grievance in the past®); Redding v. Fairman, 717 F.2d 1105, 1113 (7th Cir. 1983)(prison officials who were defendants in unrelated lawsuits brought by prisoners were not necessarily disqualified from hearing tribunals); Jensen v. Satran, 688 F.2d 76, 78 (8th Cir. 1982)(mere delivery of misconduct report to prisoner does not disqualify officer).

(f) Written Statement of the Decision

Prisoners facing disciplinary proceedings

are also entitled to a written statement by the fact finders as to the evidence relied upon and the reasons for the disciplinary action taken. Wolff, 418 U.S. at 563. The purpose of a written record is to insure that administrators, faced with possible scrutiny by state officials and the public, and perhaps even the courts, where fundamental constitutional rights may have been abridged, will act fairly. 418 U.S. at 565.

Several courts have decided that in order to satisfy this constitutional mandate, prison disciplinary officials must do more than give boilerplate statements that they accept the officer's misconduct report. Rather, they must engage in specific fact-finding, detailing the evidence supporting their verdict. For example, in Dyson v. Kocik, 689 F.2d 466 (3d Cir. 1982), a prisoner was found guilty of contraband possession and issued a written statement indicating inmate is guilty of misconduct as written. 689 F.2d at 468. The Third Circuit remanded the case back to the district court concluding that the rationale which supports the findings in this case is so vague that the verdict constitutes a violation of the minimum requirements of due process. 689 F.2d at 468. See also Redding v. Fairman, 717 F.2d 1105, 1116 (7th Cir. 1983); Hayes v. Walker, 555 F.2d 625, 633 (7th Cir. 1977). Rather than pointing out the essential facts upon which inferences were based, the committee merely incorporated the violation report and the special investigator's report. This general finding does not ensure that prison officials will act fairly. Other courts, however, have accepted lower levels of specificity. See Brown v. Frey, 807 F.2d 1407, 1413 (8th Cir. 1986).

(g) Sufficiency of the evidence

The purpose of mandating due process procedures in prison is to minimize the possibility of erroneous deprivations of liberty and to convey a sense of fundamental fairness. In some cases, however, an accused prisoner can receive all the Wolff procedural safeguards (notice, impartial tribunal, witnesses, and written statement) and still be denied due process if there exists no evidence to support a disciplinary verdict. See Superintendent v. Hill, 472 U.S. 445 (1985).

In Hill, a prison guard happened upon an inmate named Stephens who was bleeding from

the mouth and suffering from a swollen eye. The guard saw three prisoners running from the scene. Based upon those observations, the guard concluded that Stephens had been beaten by the other three. At their disciplinary hearings, the accused prisoners declared their innocence, and Stephens gave written statements that they had not caused his injuries. Nonetheless, the disciplinary board found the accused inmates guilty as charged. 472 U.S. at 447-448. Considering whether the disciplinary board's finding had sufficient evidentiary support to satisfy due process, the Supreme Court held that although the evidence in this case might be characterized as meager, and there was no direct evidence identifying any one of three inmates as the assailant, the record is not so devoid of evidence that the findings of the disciplinary board were without support or otherwise arbitrary. 472 U.S. at 457. **We hold that the requirements of due process are satisfied if some evidence supports the decision by the prison disciplinary board to revoke good time credits.** 472 U.S. at 455. **Ascertaining whether this standard is satisfied does not require examination of the entire record, independent assessment of the credibility of witnesses, or weighing of the evidence. Instead, the relevant question is whether there is any evidence in the record that could support the conclusion reached by the disciplinary board.** 472 U.S. at 455-456.

In light of Hill, prison disciplinary action comports with due process when the findings of the disciplinary board are supported by some evidence in the record. Thus, in Griffin v. Spratt, 969 F.2d 16 (3d Cir. 1992) the Third Circuit held that a correctional officer's observation of a fermented beverage during a cell search was some evidence supporting a disciplinary charge of possession or consumption of intoxicating beverages. 969 F.2d at 22. Likewise, in Thompson v. Owens, 889 F.2d 500 (3d Cir. 1989) the Third Circuit held that a positive urinalysis result based upon a sample taken from a prisoner constitutes some evidence supporting an illegal drug use charge. 889 F.2d at 502. On the other hand, due process is violated when disciplinary action is taken absent any evidence to support a guilty verdict. See Burnsworth v. Gundersen, 179 F.3d 771, 775 (9th Cir. 1999) (due process violated when disciplinary board convicted prisoner of escape at

which no evidence of guilt was presented); **Zavaro v. Coughlin**, 970 F.2d 1148, 1152 (2d Cir. 1992)(fact that prisoner was in messhall during riot, without more, constitutes no evidence to support violent conduct conviction).

In conclusion, convicting a prisoner of misconduct without any evidence at all violates due process even if the accused prisoner has received a complete hearing in conformity with **Wolff**. When federal courts review the sufficiency of the evidence in a prison disciplinary proceeding, the question is not whether there was substantial evidence or evidence beyond a reasonable doubt or a preponderance of the evidence. See **Goff v. Dailey**, 991 F.2d 1437, 1441 (8th Cir. 1993)(Federal Constitution does not mandate preponderance of evidence standard for prison disciplinary proceedings). Nor will federal courts retry the misconduct hearing by re-examining the credibility of witnesses. The sole issue of constitutional significance is whether there exists any evidence at all in the record to support the finding of guilt. If there is some evidence to support the disciplinary verdict, the federal courts will conclude, under **Hill**, that sufficient evidence was presented.

D. Administrative Segregation

In most correctional systems there are two basic types of solitary confinement: disciplinary segregation and administrative segregation. Disciplinary segregation is punitive in nature, imposed upon prisoners for violating prison rules. Administrative segregation, on the other hand, is nonpunitive in nature, imposed upon prisoners for security and safety concerns. See **Hewitt v. Helms**, 459 U.S. at 463 n.1 (noting that administrative custody could be imposed when an inmate posed a threat to security, when disciplinary charges were pending against an inmate, or when an inmate required protection). Although the reasons for placing prisoners in administrative segregation (security concerns) differ from those for assigning prisoners in disciplinary segregation (breach of prison rules), the conditions for the two types of solitary confinement are virtually indistinguishable (including loss of privileges; meals inside cells; movement outside cells controlled by strip searches, handcuffs and shackles; elimination of all group activities). Administrative segregation is considered a bleak existence that can last

anywhere from a few days to several years. See **Shoats v. Horn**, 213 F.3d 140 (3d Cir. 2000)(8 years); **Griffin v. Vaughn**, 112 F.3d 703 (3d Cir. 1997)(15 months); **Mims v. Shapp**, 744 F.2d 946 (3d Cir. 1984 (5 years)); **Payton v. Horn**, 49 F.Supp.2d 791 (E.D. PA 1999)(32 years).

1. Do prisoners have a protected liberty interest, derived from the Constitution itself, in freedom from administrative segregation?

The answer is no. In **Hewitt v. Helms**, 459 U.S. 460 (1983) a prisoner was removed from his general population cell at SCI-Huntingdon and placed in administrative custody pending investigation into his alleged participation in a prison riot. 459 U.S. at 463. The Supreme Court rejected Helms' assertion that the Due Process Clause itself creates a liberty interest in remaining in the general prison population, noting, "We think his argument seeks to draw from the Due Process Clause more than it can provide." 459 U.S. at 467. The Court explained that since administrative segregation is something every prisoner can expect to face at some point in his imprisonment, the transfer of a prisoner to more restrictive quarters for nonpunitive reasons is well within the terms of confinement ordinarily contemplated by a prison sentence." 459 U.S. at 468.

2. Do prisoners have a protected liberty interest, derived from State law, in freedom from administrative segregation?

The answer to the question is yes, providing prisoners can establish: (a) that confinement in administrative segregation imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." See **Sandin**, 515 U.S. at 484; and (b) that State statutory or regulatory law contains mandatory language and substantive predicates which restrict the discretion of prison officials to confine prisoners in administrative segregation. See **Hewitt**, 459 U.S. at 471-472 (Pennsylvania prison regulations governing administrative custody restrict discretion of prison officials). The Third Circuit has made clear that the **Hewitt** examination of state statutes and regulations should not be conducted unless the challenged restraint on freedom satisfies **Sandin's** atypical

and significant hardship test. See Allah v. Seiverling, 229 F.3d 220, 223 (3d Cir. 2000).

Although Sandin involved solitary confinement imposed for disciplinary reasons, it is well settled that the Sandin liberty interest analysis applies equally to solitary confinement imposed for administrative reasons. See Griffin v. Vaughn, 112 F.3d 703 (3d Cir. 1997) (applying Sandin to prisoner confined in administrative custody for 15 months). The important consideration is not whether solitary confinement is designated as administrative or disciplinary but whether it imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life. Sandin, 515 U.S. at 486.

In Griffin v. Vaughn, 112 F.3d 703 (3d Cir. 1997) a prisoner was confined in administrative custody for 15 months pending an investigation into his alleged rape of a female guard at SCI-Graterford. 112 F.3d at 705. The Third Circuit concluded that the conditions experienced by Griffin in administrative custody did not satisfy the atypical and significant hardship standard, and thus, did not deprive him of any State-created liberty interest. 112 F.3d at 706. The Third Circuit reasoned that it is not extraordinary for inmates in a myriad of circumstances to find themselves exposed to the conditions to which Griffin was subjected. 112 F.3d at 708. Furthermore, it is also apparent that it is not atypical for inmates to be exposed to those conditions, like Griffin, for a substantial period of time. 112 F.3d at 708.

The Third Circuit's decision in Griffin that fifteen months solitary confinement does not rise to the level of an atypical and significant hardship is an appalling result which virtually grants prison officials a license to segregate prisoners at their whim without any due process accountability. Sandin requires the lower courts to conduct their atypicality determination by comparing the prisoner's conditions of confinement against the ordinary incidents of prison life. In Griffin, the Third Circuit rejected general population as the ordinary incidents of prison life. 112 F.3d at 706 n.2. Instead, the Third Circuit concluded that conditions in administrative custody are the ordinary incidents of prison life. 112 F.3d at 708. Accordingly, unless a prisoner's confinement is substantially longer in duration or substantially more severe

than other inmates in solitary confinement, those conditions are neither atypical or a significant hardship under Sandin. In short, Griffin has created an enormous wall to due process that few, if any, prisoners can climb. See McGrath v. Johnson, 67 F.Supp.2d 499, 514 (E.D. PA 1999) (exposure to the conditions of administrative custody for a period of eight months is not atypical and did not deprive him of a liberty interest.); Bey v. Pennsylvania Department of Corrections, 98 F.Supp.2d 650, 661 n.25 (E.D. PA 2000) (ten-month confinement in administrative custody at SCI-Greene did not represent atypical and significant hardship).

In Shoats v. Horn, 213 F.3d 140 (3d Cir. 2000) the Third Circuit held that confinement in administrative segregation for eight years, with no prospect of release in the near future, did in fact constitute an atypical and significant hardship sufficient to trigger application of due process. 213 F.3d at 114. Although finding a Sandin liberty interest, this decision should not be mistaken as prisoner-friendly; quite the contrary, Shoats was granted no relief. More importantly, Griffin's narrow interpretation of Sandin's ordinary incidents of prison life was left intact.

At issue in Shoats was the indefinite solitary confinement of a prisoner with a history of prison escapes, hostage-taking, and institutional disruptions. 213 F.3d at 141. The record revealed that Russell Shoats had been confined in virtual isolation for eight years, during which he was denied all privileges (including no visits with his family) and his sole contact was with prison officials. 213 F.3d at 144. In light of such unparalleled grotesque conditions and the admission of a State official that he has never witnessed one example of such permanent solitary confinement in his 22 years with the DOC, the Third Circuit agreed that Shoat's eight-year isolation satisfied Sandin's atypical and significant hardship standard. 213 F.3d at 144. Once again, however, the Third Circuit held that when evaluating whether prison conditions constitute an atypical and significant hardship, the lower courts must consider the duration of the solitary confinement and whether the conditions of solitary confinement are significantly more restrictive than those imposed upon other prisoners in solitary confinement. 213 F.3d at 144.

Given the extraordinary set of facts before it in **Shoats**, the Third Circuit had no choice but to conclude that the conditions of Shoats= solitary confinement were exceedingly more severe both in duration and degree of restriction than other prisoners in solitary confinement. Bear in mind, however, **Shoats** is a unique case based upon facts unlikely experienced by other solitary confinement prisoners. Thus, its precedential value for the vast majority of prisoners in solitary confinement is razor-thin. As noted by the Third Circuit in a post-**Shoats** case: **ASandin** instructs that placement in administrative confinement will generally not create a liberty interest. **Allah v. Seiverling**, 229 F.3d 220, 224 (3d Cir. 2000).

In a recent decision, the Third Circuit rejected New Jersey prisoners= claims that their confinement in a ASecurity Threat Group Management Unit@ deprived them of a state-created liberty interest. See **Fraise v. Terhune**, 283 F.3d 506, 522 (3d Cir. 2002). Although inmates who are transferred to the STGMU face additional restrictions, we hold that the transfer to the STGMU does not impose an atypical and significant hardship in relation to the ordinary incidents of prison life. 283 F.3d at 522-523. According to the panel, **Sandin-s** atypicality and hardship standard is to be measured by Awhat a sentenced inmate may reasonably expect to encounter as a result of his or her conviction in accordance with due process of law. 283 F.3d at 522.33

3. What process is due prisoners deprived of projected liberty interests in the administrative segregation context?

If a prisoner can establish that his or her administrative segregation satisfies **Sandin-s** Aatypical and significant hardship@ test, the courts then examine the procedures provided to determine whether they satisfy the Due Process Clause. See **Morrissey v. Brewer**, 408 U.S. at 481(Aonce it is determined that due process applies, the question remains what process is due.) In making this determination, it is well settled that due process is a flexible concept and the procedures required will vary from one context to the next. See **Matthews v. Eldridge**, 424 U.S. 319, 335 (1976)(due process is determined by balancing the private interests at

stake, the government interests involved, and the value of adding procedural requirements).

Although administratively-segregated prisoners are often confined in solitary confinement for a longer duration and under identical conditions than those placed there for violating prison rules, the Supreme Court has held that they are not entitled to a **Wolff**-type hearing complete with witnesses, impartial tribunal, written decision, and other procedural safeguards. In **Hewitt v. Helms**, 459 U.S. 460 (1983) the Supreme Court ruled that prisoners removed from the general population and confined in administrative custody are only entitled to an Ainformal, nonadversary evidentiary review. 459 U.S. at 476. **AA inmate must merely receive some notice of the charges against him and an opportunity to present his views to the prison official charged with deciding whether to transfer him to administrative segregation.** Ordinarily, a written statement by the inmate will accomplish this purpose, although prison administrators may find it more useful to permit oral presentations in cases where they believe a written statement would be effective. So long as this occurs, and the decision-maker reviews the charges and then-available evidence against the prisoner, the Due Process Clause is satisfied. 459 U.S. at 476. See also: **Jones v. Coonce**, 7 F.3d 1359, 1364 (8th Cir. 1993)(prisoners denied **Hewitt** process when not permitted opportunity to present their views to prison officials who made decision to segregate them); **Farmer v. Carlson**, 685 F.Supp. 1335, 1342 (M.D. PA 1988)(where prisoner received memorandum detailing reasons for his segregation and periodic reviews every thirty days, due process satisfied).

In terms of long-term confinement in administrative segregation, the **Hewitt** Court made clear that **Aadministrative segregation may not be used as a pretext for indefinite confinement of an inmate. Prison officials must engage in some sort of periodic review of the confinement of such inmates.** 459 U.S. at 477 n.9.

In **Shoats v. Horn**, 213 F.3d 140 (3d Cir. 2000) the Third Circuit held that Shoats= confinement in isolation for over eight years constituted an Aatypical and significant hardship. 213 F.3d at 144. Turning to the question of how

much process was due Shoats, the Court held that the process provided him upon commitment to administrative custody and during his thirty-days periodic reviews Acomport with the minimum constitutional standards for due process.@ 213 F.3d at 147. The Third Circuit held that prison officials= conclusion that he remained a security threat based upon his past crimes and their subjective impressions constituted sufficient evidence to pass Hewitt-s due process requirements. 213 F.3d at 147. See also Mims v. Shapp, 744 F.2d 946, 953 (3d Cir. 1984)(prison officials are entitled to rely upon their subjective evaluations of a prisoners dangerousness to confine him in administrative custody); Sourbeer v. Robinson, 791 F.2d 1094, 1101-1102 (3d Cir. 1986)(prisoner denied due process where periodic reviews were performed in a perfunctory or rote fashion and thereby denied prisoner meaningful reviews).

E. Prison Transfers

The corrections system today is a vast bureaucracy composed of prisons which vary widely in terms of conditions, benefits and location. Prisoners confined today in a clean, modern facility near their families can find themselves unexpectedly transferred tomorrow to a distant nineteenth century prison wracked by overcrowding and violence. Unfortunately, with but two exceptions, prisoners have no liberty interest, within the contemplation of the Due Process Clause, to a hearing prior to, during, or after a prison transfer.

1. Do prisoners have a protected liberty interest, derived from the Constitution itself, in freedom from prison transfer?

With but two exceptions, the answer is no. In Meachum v. Fano, 427 U.S. 215 (1976) six prisoners brought suit alleging that their transfers from a medium- to a maximum-security prison without adequate hearings violated due process. 427 U.S. at 216. The Supreme Court held that the Due Process Clause itself does not Aprotect a duly convicted prisoner against transfer from one institution to another within the state prison system.@ 427 U.S. at 225. **AConfinement in any of the State-s institutions is within the normal limits or range of custody which the conviction has authorized the State to**

impose.@ 427 U.S. at 225. **AThat life in one prison is much more disagreeable than in another does not in itself signify that a Fourteenth Amendment liberty interest is implicated when a prisoner is transferred to the institution with the more severe rules.**@ 427 U.S. at 225.

At issue in Montanye v. Haymes, 427 U.S. 236 (1976) was the transfer of a New York prisoner from Attica to the Clinton Correctional Facility based upon his circulation of a petition protesting legal assistance. 427 U.S. at 237. The Supreme Court rejected the proposition that the Due Process Clause by its own force requires hearings for prisoners transferred to other facilities because of prison rule violations. 427 U.S. at 242. **AAs long as the conditions or degree of confinement to which the prisoner is subjected is within the sentence imposed upon him and is not otherwise violative of the Constitution, the Due Process Clause does not in itself subject an inmate-s treatment by prison authorities to judicial oversight.**@ 427 U.S. at 242.

The Supreme Court followed the Meachum and Montanye rationale in Olim v. Wakinekona, 461 U.S. 238 (1983) where a prisoner challenged on due process grounds his transfer from a state prison in Hawaii to one in California. 461 U.S. at 241. Despite the 3,000 mile distance, the Supreme Court again concluded that the Constitution itself provides no liberty interest in remaining at a particular prison. 461 U.S. at 247. **AA conviction, whether in Hawaii, Alaska, or one of the contiguous 48 States, empowers the State to confine the inmate in any penal institution in any State unless there is a state law to the contrary or the reasons for confining the inmate in a particular institution is itself constitutionally impermissible.**@ 461 U.S. at 248 n.9.

Similarly, we cannot agree that any change in the conditions of confinement having a substantial adverse impact on the prisoner involved is sufficient to invoke the protections of the Due Process Clause. But given a valid conviction, the criminal defendant has been constitutionally deprived of his liberty to the extent that the State may confine him and subject him to the rules of its prison system so long as the conditions of confinement do not otherwise violate the

Constitution.

Meachum v. Fano, 427 U.S. 215, 224 (1976)

In light of **Meachum**, **Montanye**, and **Olim**, prisoners have no liberty interest, derived from the Due Process Clause itself, against intrastate or interstate prison transfers. The fact that conditions in the receiving facility are substantially more burdensome is irrelevant. The fact that the transfers are disciplinary responses to prisoner misconduct is irrelevant. Given a valid criminal conviction, confinement in any prison within a State or outside a State is considered within the normal range of custody which the conviction has authorized the State to impose. See **Story v. Morgan**, 786 F.Supp. 523, 524 (W.D.PA 1992)(Federal Constitution does not provide a liberty interest guaranteeing housing in a particular penal institution or providing protection against transfer from one institution to another within the state prison system); **Garfield v. Davis**, 566 F.Supp. 1069, 1073-1074 (E.D.PA 1983)(same).

There does exist two specific and narrow exceptions to the **Meachum-Montanye-Olim** line of cases holding that the Due Process Clause itself does not give rise to a liberty interest in prison transfers. In **Vitek v. Jones**, 445 U.S. 480 (1980) the Supreme Court held that a prisoner's transfer to a mental hospital triggered a liberty interest entitled to procedural protections under the Due Process Clause directly. 445 U.S. at 493. The **Vitek** Court distinguished **Meachum** by holding that involuntary commitment to a mental hospital is not within the range of conditions of confinement to which a prison sentence subjects an individual. 445 U.S. at 493. Unlike a normal prison-to-prison transfer, a prison-to-mental hospital commitment is qualitatively different because the prisoner will suffer stigmatizing consequences and may be forced to participate in behavior modification programs. 445 U.S. at 493-494.

The second exception concerns pretrial detainees confined in county jails and prisons. In **Cobb v. Aytch**, 643 F.2d 946 (3d Cir. 1981) a class action suit was brought against Philadelphia County challenging the transfer of over two hundred county prisoners to distant Pennsylvania state prisons. 643 F.2d at 949. Citing **Meachum** and **Montanye**, the **Cobb** Court agreed that

sentenced county prisoners had no liberty interest, rooted in the Due Process Clause itself, which would entitle them to procedural safeguards prior to a prison transfer. 643 F.2d at 953. Pretrial detainees, on the other hand, have federally protected liberty interests that are different in kind from those of sentenced inmates. 643 F.2d at 957. Noting that transfers to distant state prisons interfered with their Sixth Amendment rights to counsel and speedy trial, the **Cobb** Court held that pretrial detainees have liberty interests firmly grounded in federal constitutional law. 643 F.2d at 957. Thus, pretrial detainees were entitled to due process in conjunction with those transfers.

In conclusion, the Supreme Court has repeatedly rejected the notion that convicted prisoners have protected liberty interests regarding prison transfers under the Due Process Clause itself. The Court has consistently held that a criminal conviction and sentence authorizes the State to confine the prisoner at any of its prisons. The only exceptions are the transfer of prisoners to mental hospitals and the transfer of pretrial detainees from county jails to distant prisons.

2. Do prisoners have a protected liberty interest, derived from State law, in freedom from prison transfers?

The answer is no. It is well settled that liberty interests within the meaning of the Fourteenth Amendment can arise from two sources: (a) the Due Process Clause itself (if the State takes action which is considered outside the normal range of custody authorized by a criminal conviction and sentence); and (b) State laws or regulations which restrict the discretion of State officials. See **Hewitt v. Helms**, 459 U.S. at 471-472.

As we have seen, the **Meachum-Montanye-Olim** line-of-cases firmly reject the notion that convicted prisoners have liberty interests in prison transfers under the Due Process Clause directly. See **Meachum**, 427 U.S. at 225. (Due Process Clause in and of itself does not protect a duly convicted prisoner against transfer from one institution to another within the state prison system). Convicted prisoners must therefore look to State law as the

source of a protected liberty interest. See **Montanye**, 427 U.S. at 242 (convicted prisoners have no liberty interest in prison transfers absent some right or justifiable expectation rooted in state law that he will not be transferred except for misbehavior or upon the occurrence of other specified events.).

In **Meachum**, the Supreme Court held that Massachusetts law conferred no right on the prisoner to remain in the prison to which he was initially assigned, defeasible only upon specific acts of misconduct. 427 U.S. at 226. Insofar as we are advised, transfers between Massachusetts prisons are not conditioned upon the occurrence of specified events. 427 U.S. at 226-227 (footnote omitted). Since state prison officials had discretion to transfer prisoners for whatever reason, or for no reason at all, prisoners have no expectation under State law which would give rise to a state-created liberty interest. 427 U.S. at 227.

In **Montanye**, the Supreme Court held that under New York law, a prisoner had no right to remain at any particular facility and no justifiable expectation that he would not be transferred unless found guilty of misconduct. 427 U.S. at 243. Since the transfer of prisoners under New York law is not conditioned upon or limited to the occurrence of misconduct, there is no statutory basis for invoking the protections of the Due Process Clause. 427 U.S. at 243.

Likewise, in **Olim** the Supreme Court found that Hawaii's regulations contained no particularized standards or criteria that limited the discretion of the administrator to transfer prisoners. 461 U.S. at 249. Although Hawaii regulations mandated a hearing prior to transfer (which Wakinekona received), the Supreme Court held that procedural guidelines alone are insufficient to create a liberty interest. A process is not an end in itself. Its constitutional purpose is to protect a substantive interest to which the individual has a legitimate claim of entitlement. 461 U.S. at 250. Since prison officials' discretion to transfer an inmate is completely unfettered, 461 U.S. at 249, the Court agreed there existed no protected liberty interest sufficient to implicate the Due Process Clause. 461 U.S. at 251.

Similar to the state laws of Massachusetts, New York and Hawaii, the

Commonwealth of Pennsylvania has enacted no statutory or regulatory restrictions on the discretion of prison officials to transfer prisoners. Whatever expectation a prisoner may have in remaining at a particular prison, in light of **Meachum**, **Montanye** and **Olim**, it is considered too ephemeral and insubstantial to trigger procedural due process protections. **Meachum**, 427 U.S. at 228. Several lower courts have agreed that Pennsylvania law does not place substantive restrictions on the discretion of prison officials to transfer state prisoners from one institution to another. See **Ford v. Beister**, 657 F.Supp. 607, 609 (M.D.PA 1986) (plaintiffs point to nothing in state regulations conferring a liberty interest in being or not being transferred.); **Mastrota v. Robinson**, 534 F.Supp. 434, 437 (E.D. PA 1982) (neither Pennsylvania law nor the Federal Constitution confer on plaintiff a right not to be transferred temporarily between institutions.).

The likelihood of a successful due process challenge to a prison transfer has been even further reduced by the Supreme Court's decision in **Sandin v. Conner**, 515 U.S. 472 (1995). In **Sandin**, the Supreme Court further restricted the range of liberty interests requiring due process safeguards by adding an atypical and significant hardship component. 515 U.S. at 484. Consequently, even if Pennsylvania would at some future time change its statutory or regulatory law in such a manner to restrict prison transfers only upon the occurrence of specified events, prisoners would still be required to satisfy the atypical and significant hardship test. See **Evans v. Holms**, 114 F.Supp.2d 706, 710-711 (W.D. Tenn. 2000) (transfer of prisoner to private out-of-state prison is not atypical and significant hardship); **Reinholtz v. Campbell**, 64 F.Supp.2d 721, 729 (W.D. Tenn. 1999) (prison transfer did not amount to atypical and significant hardship). Since prison transfers today are routine rather than atypical, and well within the terms of a prison sentence rather than a significant hardship, it would appear that due process challenges to such transfers are basically futile and beyond judicial review.

One very interesting decision bucking this trend, however, is **Austin v. Wilkinson**, 189 F.Supp.2d 719 (N.D. Ohio 2002) where a district judge held that intrastate transfers of prisoners to an Ohio supermax prison satisfied **Sandin's**

Atypical and significant hardship standard. 189 F.Supp.2d at 742. First, the Court noted that conditions in the supermax prison were extremely restrictive and differs significantly from conditions in other Ohio prisons. 189 F.Supp.2d at 742. Secondly, the Court noted that even with good behavior, prisoners often serve indefinite terms at the institution. 189 F.Supp.2d at 740. Having concluded that prisoners transferred to the supermax prison were entitled to due process since such confinement was both atypical and a significant hardship, 189 F.Supp.2d at 742, the Court held that prisoners were entitled to a **Wolff** hearing. 189 F.Supp.2d at 747. Since prisoners were not provided sufficient notice of the reasons for their confinement in the supermax prison, due process was violated. 189 F.Supp.2d at 749. Whether or not the **Austin** rationale will be followed in other federal jurisdictions remains to be seen.

3. What process is due prisoners transferred to mental hospitals and pretrial detainees transferred to distant state prisons?

In finding a liberty interest emanating from the Due Process Clause itself, the **Vitek** Court explained that a prisoner's transfer to a mental hospital was qualitatively different from ordinary confinement and was not within the range of confinement justified by the imposition of a prison sentence. 445 U.S. at 493. Turning to the question of what process is due, the **Vitek** Court went on to prescribe the following procedures in connection with a transfer to a state mental hospital: (a) written notice; (b) hearing in which the prisoner has the opportunity to be heard in person and to present documentary evidence; (c) an opportunity to present witnesses and confront and cross-examine witnesses called by the State; (d) an impartial decision-maker; (e) written statement by the fact finders as to the evidence relied on and reasons for the transfer; (f) counsel for indigent prisoners; and (g) effective and timely notice of all procedural rights. 445 U.S. at 494-497. The Supreme Court explained that while the inquiry involved in determining whether or not to transfer an inmate to a mental hospital is essentially medical in nature, that fact alone does not justify dispensing with due process requirements. 445 U.S. at 495. The interest of the prisoner in not being arbitrarily classified as mentally ill and

subjected to unwelcome treatment is powerful and the risk of error in making this decision is substantial enough to warrant appropriate procedural safeguards against error. 445 U.S. at 495.

In **Cobb v. Aytch**, 643 F.2d 946 (3d Cir. 1981) the Third Circuit held that pretrial detainees have liberty interests in freedom from prison transfers to distant state prisons under the Due Process Clause directly because such transfers interfere with their Sixth Amendment rights to speedy trial and effective assistance of counsel. 643 F.2d at 957. Turning to the question of what protections were necessary to satisfy due process, the **Cobb** Court held that notice and an opportunity to be heard in opposition to the transfer must be provided unless an emergency situation arises, in which case a prompt post-transfer hearing will satisfy due process. 643 F.2d at 961. See also **Muslim v. Frame**, 854 F.Supp. 1215, 1228 (E.D. PA 1994)(pretrial detainee transferred to distant county jail entitled to notice and opportunity to be heard).

F. Pre-Release Programs

Many states, including Pennsylvania, have enacted pre-release programs to reduce prison overcrowding and begin the process of reintegrating the offender back into society. One such program permits select prisoners to be transferred to a State-owned half-way house or a community corrections center to participate in educational, rehabilitative, and employment opportunities prior to parole release. We have no doubts concerning the wisdom of these programs. The question we address here is whether revocation of a prisoner's pre-release status gives rise to a liberty interest entitled to the protection of the Due Process Clause.

With respect to the application process where prison officials assess a prisoner's eligibility to enter a pre-release program, most courts agree that State rejection of a prisoner's application does not implicate due process concerns. See **DeTomaso v. McGinnis**, 970 F.2d 211, 213 (7th Cir. 1992)(Illinois regulations setting out eligibility requirements for work release do not create liberty or property interests); **Baumann v. Arizona Department of Corrections**, 754 F.2d 841, 844 (9th Cir. 1985)(Arizona prison regulations for work release

and home furlough programs did not give rise to liberty interests). Bear in mind that the Supreme Court has long recognized a constitutional distinction between the revocation of liberty one enjoys and the denial of liberty one desires. For example, in Greenholtz, the Supreme Court held that the mere possibility of parole did not by itself generate a liberty interest entitled to due process protection. 442 U.S. at 11. Greenholtz rejected the prisoner's argument that the parole release decision is sufficiently analogous to parole revocation to entitle prisoners to a Morrissey hearing. 442 U.S. at 9. According to the Court, there is a crucial distinction between being deprived of a liberty one has, as in parole, and being denied a conditional liberty that one desires. 442 U.S. at 9. In similar fashion, there is a significant difference between pre-release revocation, in which an inmate is deprived of his liberty at the half-way house and returned to prison, and pre-release denial, in which a prisoner's application is rejected. Only the former may implicate due process. A State decision to deny a prisoner admittance into a pre-release program is not a withdrawal of something he has, but merely a rejection of something he or she hopes to have.

Seasoned corrections litigators may point to the Third Circuit's *en banc* decision in Winsett v. McGinnes, 617 F.2d 996 (3d Cir. 1980) as authority that prisoners possess due process liberty interests when they meet work release eligibility requirements. 617 F.2d at 1007. (We hold that a state-created liberty interest in work release arises when a prisoner meets all eligibility requirements under the state regulations and the exercise of the prison authorities' discretion is consistent with work release policy.) We do not recommend reliance on Winsett for two reasons. First, several courts have treated Winsett as a due process aberration, incorrectly decided. See Francis v. Fox, 838 F.2d 1147, 1149 n.8 (11th Cir. 1988) (In our view, the holding in Winsett gives insufficient consideration to the highly subjective nature of the prison authorities' decision to grant or deny work-release.); Baumann, 754 F.2d at 845 (We reject the Third Circuit's reasoning in Winsett). Secondly, as noted earlier, the Supreme Court's 1996 decision in Sandin v. Conner, 515 U.S. 472 (1995) dramatically altered the state-created liberty interest doctrine by adding an atypical and significant hardship test. 515 U.S. at 484. Thus,

Winsett is no longer valid precedent. See Browning-Ferris Inc. v. Manchester Borough, 936 F.Supp. 241, 247 (M.D. PA 1996) (Not only is the reasoning in Winsett undermined by Sandin, but its conclusion is highly questionable, since it is extremely doubtful that being denied participation in a work release program would be considered an atypical or significant hardship for an inmate.)

It is State removal of a prisoner already housed in a pre-release program that raises due process concerns. The question we ask is whether such revocation gives rise to a protected liberty interest either under the Due Process Clause itself or under State law.

1. Do prisoners have a protected interest, derived from the Constitution itself, in remaining in a pre-release program?

The answer to this question depends on the degree of liberty involved in the program. In Young v. Harper, 520 U.S. 143 (1997) the Supreme Court granted certiorari to decide whether a prisoner in an Oklahoma pre-parole program was entitled to the procedural protections set forth in Morrissey prior to his removal from it. 520 U.S. at 144-145. Under the terms of the program, Harper was released from prison before the expiration of his sentence. He kept his own residence; he sought, obtained and maintained a job; and he lived a life generally free of the incidents of imprisonment. 520 U.S. at 148. In light of the substantial liberty granted Harper, the Supreme Court agreed that the Oklahoma program was equivalent to parole as understood in Morrissey, thereby triggering a protected liberty interest under the Due Process Clause itself. 520 U.S. at 147.

Following on the heels of Young was the Second Circuit's decision in Kim v. Hurson, 182 F.3d 113 (2d Cir. 1999). In Kim, a prisoner's work release program was revoked after she tested positive for drug use during a State-mandated urinalysis. 182 F.3d at 116. Under the terms of the program, Kim had been released from prison and permitted to live at home while working and reporting regularly to State authorities. 182 F.3d at 115. Citing Young, the Second Circuit held that the temporary release program is virtually indistinguishable from either

traditional parole or the Oklahoma program considered in Young, 182 F.3d at 118. Thus, the revocation of Kim's work release status implicated a liberty interest entitled to procedural protections under the Due Process Clause itself. 182 F.3d at 118.

Not all pre-release programs provide prisoners with the same degree of freedom and liberty accorded to Oklahoma prisoners in Young and New York prisoners in Kim. Accordingly, not all pre-release programs sufficiently resemble parole to fall under the due process umbrella of Morrissey. In Asquith v. Department of Corrections, 186 F.3d 407 (3d Cir. 1999) a prisoner suspected of alcohol consumption was removed from a New Jersey halfway house and returned to prison. 186 F.3d at 409. Unlike the pre-parole program in Young, Asquith lived in a strictly monitored halfway house and was subject to curfew, standing count, and intensive monitoring of his movements in the community. 186 F.3d at 411. The Third Circuit distinguished Young by concluding that while Asquith's liberty was significantly greater in the halfway house than in prison, it was still institutional confinement. 186 F.3d at 411. Citing Meachum and Montanye, the Third Circuit held that Asquith did not have a liberty interest under the Constitution itself because while a prisoner remains in institutional confinement, the Due Process Clause does not protect his interest in remaining in a particular facility. 186 F.3d at 411.

2. Do prisoners have a protected liberty interest, derived from State law, in remaining in a pre-release program?

The answer to this question is no. In Sandin v. Conner, 515 U.S. 472 (1995) the Supreme Court redirected the focus of the state-created liberty interest doctrine away from the language of state regulations and back to an assessment of the severity of the deprivation. 515 U.S. at 483. Unless a state deprivation constitutes an atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life, there is no cognizable state-created liberty interest at stake. 515 U.S. at 484.

At first blush, one would think that the transfer of a prisoner from a halfway house

(where he enjoys civilian employment and the liberty to move about the community) to a prison (where every footstep is tightly controlled and monitored) would indeed inflict an atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life. Unfortunately, our Third Circuit has adopted an extremely narrow interpretation of Sandin's ordinary incidents of prison life.

In Asquith v. Department of Corrections, 186 F.3d 407 (3d Cir. 1999) the Third Circuit held that Sandin does not permit us to compare the prisoner's own life before and after the alleged deprivation. Rather, we must compare the prisoner's liberties after the alleged deprivation with the normal incidents of prison life. 186 F.3d at 412. Since an inmate is normally incarcerated in prison, Asquith's return to prison did not impose atypical and significant hardship on him in relation to the ordinary incidents of prison life and, therefore, did not deprive him of a protected liberty interest. 186 F.3d at 412.

The First Circuit reached a similar result in Dominique v. Weld, 73 F.3d 1156 (1st Cir. 1996). There a prisoner was returned to institutional confinement after he had been allowed to participate in a work release program for almost four years. 73 F.3d at 1156. The First Circuit held that the work-release revocation did not trigger any state-created liberty interest. 73 F.3d at 1161. Citing Sandin, the Court reasoned that his transfer to a more secure facility subjected him to conditions no different from those ordinarily experienced by large numbers of others serving their sentences in customary fashion. 73 F.3d at 1160. While the return from the quasi-freedom of work release to prison may have been a significant deprivation, it was not atypical in terms of Sandin. 73 F.3d at 1160.

The Asquith and Dominique decisions are clear examples of how the courts are using Sandin to increase the unchecked authority of prison officials while eviscerating due process. By defining the ordinary incidents of prison life as those conditions normally found in prison (as opposed to the day-to-day conditions facing a pre-release prisoner at a halfway house) the Asquith and Dominique Courts were able to conclude that pre-release revocation was not an

Atypical hardship and, therefore, did not qualify for liberty interest status under Sandin. Such reasoning makes it extremely difficult to fathom what would constitute an atypical, significant deprivation, and yet not trigger protection under the Due Process Clause directly. Sandin, 515 U.S. at 490 n.2 (Ginsburg, J., dissenting).

3. What process is due prisoners deprived of protected liberty interests in the pre-release context?

A liberty interest of constitutional dimension may be derived from one of two sources: The interest may be of such severity or fundamental importance that it triggers protection from the Constitution itself, see Vitek v. Jones, 445 U.S. 480 (1980), or it may be created by the State if the deprivation is less severe but nevertheless amounts to an atypical and significant hardship. Sandin, 515 U.S. at 484.

If the prisoners pre-release program is indistinguishable from parole, as in Young and Kim, the deprivation or revocation of liberty is considered so severe that a liberty interest is triggered under the Due Process Clause directly. On the other hand, if the prisoners pre-release program resembles institutional confinement, as in Asquith and Dominique, the deprivation or revocation of liberty is considered less severe and does not trigger a State-created liberty interest unless there is an atypical and significant hardship.

Unless its rationale is subsequently undermined in some future case, the Asquith ruling precludes a finding of an atypical and significant hardship necessary to trigger a state-created liberty interest. Consequently, pre-release center prisoners transferred back to prison must therefore look to the Federal Constitution itself as the source of their liberty interest. They should concentrate upon development of a factual record as in Young and Kim indicating that the pre-release prisoner enjoys many of the same freedoms of parolees and citizens with unqualified liberty. By doing so, an argument can be made that pre-release status bears greater similarity to parole than institutional confinement and should fall under the protection of the Morrissey process. See Young v. Harper, 520 U.S. at 147 (since Oklahoma pre-

parole program was equivalent to parole, liberty interest was generated under Due Process Clause directly, thereby entitling prisoner to a Morrissey hearing, including written notice; disclosure of adverse evidence; opportunity to be heard and present evidence and witnesses; right to confront and cross-examine adverse witnesses; impartial hearing body; and written statement of the decision).

G. Parole Release and Clemency Decisions

1. Parole Release

Whether and to what extent the Due Process Clause applies to parole release decisions was addressed by the Supreme Court in two cases, one involving Nebraska prisoners, see Greenholtz v. Inmates of Nebraska Penal & Correctional Complex, 442 U.S. 1 (1979), and the other concerning Montana prisoners. See Board of Pardons v. Allen, 482 U.S. 369 (1987). In each case prisoners alleged that state officials violated their Fourteenth Amendment rights by conducting parole hearings which failed to satisfy due process requirements.

In both decisions, the Supreme Court made clear that prisoners do not enjoy a protected interest, emanating from the Constitution itself, in obtaining parole release. See Allen, 482 U.S. at 373 (the presence of a parole system by itself does not give rise to a constitutionally protected liberty interest in parole release); Greenholtz, 442 U.S. at 7. (There is no constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence.). The Court reasoned that a prisoner's conviction, accompanied by all its procedural safeguards, extinguishes his right to liberty for the duration of his sentence. See Greenholtz, 442 U.S. at 7. That the prisoner might possibly be released on parole prior to the expiration date of his sentence is a mere hope rather than a constitutionally-protected liberty interest. 442 U.S. at 11.

Although there is no entitlement to parole under the Constitution directly, the Supreme Court found in both cases a liberty interest, grounded in State law, sufficient to trigger the application of due process. Thus, a Nebraska statute mandating that the Board of Parole shall release the offender unless one of four

specified reasons were found by the Board to defer release created a legitimate expectation of parole release that is entitled to some measure of constitutional protection. Greenholtz, 442 U.S. at 12. In similar fashion, a Montana law specifying that its Board of Pardons shall release on parole a prisoner who is able and willing to fulfill the obligations of a law-abiding citizen also created a protected liberty interest. See Allen, 482 U.S. at 376-381. In both cases, the discretion of parole authorities was considered sufficiently restricted by mandatory language and substantive criteria to give rise to a state-created liberty interest.

Having found a protected liberty interest, the Greenholtz Court then considered what procedures were necessary to ensure that the prisoner's interest was not arbitrarily abrogated. The Court acknowledged that due process remains a flexible concept and calls only for such procedural protections as the particular situation demands. Greenholtz, 442 U.S. at 12. Applying the balancing approach developed in Matthews v. Eldridge, 424 U.S. 319, 334-335 (1976), the Court held that the Nebraska procedure affords an opportunity to be heard, and when parole is denied it informs the inmate in what respects he falls short of qualifying for parole; this affords the process that is due under these circumstances. The Constitution does not require more. Greenholtz, 442 U.S. at 16.

While state-created liberty interests were found to exist in Greenholtz and Allen, prisoners should bear in mind the Supreme Court's warning that these statutes contained unique structure and language and thus whether any other state statute provides a protectible entitlement must be decided on a case-by-case basis. Greenholtz, 442 U.S. at 12. Indeed, unlike Montana and Nebraska, the parole release statutes of most states lack the mandatory language and limitations on official discretion that the pre-Sandin Courts deemed necessary to give rise to a protected liberty interest. See Sultenfuss v. Snow, 35 F.3d 1494, 1502 (11th Cir. 1994)(Georgia); Creel v. Kane, 928 F.2d 707, 712 (5th Cir. 1987)(Texas); Scales v. Mississippi State Parole Board, 831 F.2d 565, 566 (5th Cir. 1987)(Mississippi); Dace v. Mickelson, 816 F.2d 1277, 1281 (8th Cir. 1987).

Pennsylvania's parole release statute

provides the Parole Board with broad discretion, stating only that it can grant parole whenever in its opinion the best interests of the convict justify or require his being paroled and it does not appear that the interests of the Commonwealth will be injured thereby. See 61 Pa.Stat. Ann. § 331.21. Unlike the statutes considered in Greenholtz and Allen, Pennsylvania's parole release statute contains: (1) no substantive predicates or criteria to guide parole authorities in deciding whether to grant parole; and (2) no mandatory language requiring that parole shall be granted unless specified conditions exist to deny release. Every court that has considered this issue has agreed that Pennsylvania's parole release statute does not create an expectation or entitlement to parole sufficient to trigger due process. See Rauso v. Vaughn, 79 F.Supp.2d 550, 552 (E.D.PA 2000)(parole is not a protected liberty interest in Pennsylvania); Rodgers v. Parole Agent SCI-Frackville, Wech, 916 F.Supp. 474, 477 (E.D.PA 1996)(under Pennsylvania law, the granting of parole is not a constitutionally protected liberty interest); McCreery v. Mark, 823 F.Supp. 288, 294 (E.D.PA 1993)(Pennsylvania law cannot be said to create an expectation of parole); Tubbs v. Pennsylvania Board of Probation and Parole, 620 A.2d 584, 586 (1993)(it is well settled under Pennsylvania law that a prisoner has no constitutionally protected liberty interest in being released from confinement prior to the expiration of his sentenced maximum term).

Since Pennsylvania's parole statute lacks the requisite combination of mandatory language (shall and unless) and substantive predicates (criteria for parole release) that the Greenholtz and Allen Courts considered essential for state-created liberty interests, prisoners have no due process protection when denied parole. The lack of mandatory statutory language, however, is not the only problem facing Pennsylvania prisoners considering due process challenges to parole release decisions. In Sandin v. Conner, 515 U.S. 472 (1995) the Supreme Court criticized the methodology used in Greenholtz and Allen and shifted the mode of analysis away from an intensive statutory language search to a test of atypical and significant hardship. Sandin, 515 U.S. at 484. Although the Sandin Court noted that its abandonment of Hewitt's methodology does not technically require us to overrule any holdings of this Court, 515 U.S. at 483 n.5, it is

difficult to perceive what, if anything, remains of Greenholtz and Allen. Neither Greenholtz or Allen were grounded on a foundation of atypical and significant hardships. Thus, their precedential value to today's due process litigation is extremely narrow. But see Ellis v. District of Columbia, 84 F.3d 1413, 1418 (D.C. Cir. 1996). (Until the Court instructs us otherwise, we must follow Greenholtz and Allen because, unlike Sandin, they are directly on point. Both cases deal with a prisoner's liberty interest in parole; Sandin does not.)

Applying Sandin, the lower courts must ask whether a prisoner's rejection for parole release constitutes an atypical and significant hardship? 515 U.S. at 484. Satisfying this rigorous standard will be uphill work for two reasons. First, today's Parole Board rejects as many prisoners as it approves for parole release. Accordingly, parole denial cannot reasonably be described as atypical. Secondly, a prisoner's original conviction and sentence, with all its procedural safeguards, has legally extinguished his liberty interest in release. See Meachum, 427 U.S. at 224. Therefore, how would making no change in a prisoner's incarcerated status (via a parole rejection) impose a significant hardship? See Ohio Adult Parole Authority v. Woodward, 523 U.S. 272, 283 (1998) (denial of clemency does not impose atypical and significant hardship under Sandin. A denial of clemency merely means that the inmate must serve the sentence originally imposed.); Jacks v. Crabtree, 114 F.3d 983, 986 n.4 (9th Cir. 1997) (holding that federal statute authorizing one-year sentence reduction for completion of drug treatment program did not create liberty interest since denial did not impose atypical and significant hardship. In fact, denial merely means that the inmate will have to serve out his sentence as expected.)

In conclusion, Pennsylvania prisoners have no due process-protected liberty interests emanating from the Due Process Clause itself or from State law, in parole release. The Supreme Court has made clear there exists no constitutional right to parole. Furthermore, even if Greenholtz and Allen remain good law after Sandin, Pennsylvania's parole release statute fails to contain the requisite mandatory language and substantive predicates that the Greenholtz and Allen Courts deemed vital to give rise to a

state-created liberty interest. Finally, in light of Sandin, a prisoner faces a difficult if not impossible task of proving that his or her parole rejection amounts to an atypical and significant hardship.

That prisoners have no due process rights in the context of parole release decisions does not mean they are stripped of all constitutional protections. The Third Circuit has held that Sandin did not change the law with respect to retaliation claims. See Allah v. Sierveling, 229 F.3d 220 (3d Cir. 2000). In Allah, the Third Circuit held that a prisoner's claim he was confined in administrative segregation in retaliation for having filed litigation stated a claim for relief despite the absence of a Sandin liberty interest. 229 F.3d at 224. Retaliation may be actionable, however, even when the retaliatory action does not involve a liberty interest. 229 F.3d at 224. Likewise, in Burkett v. Love, 89 F.3d 135 (3d Cir. 1996) a prisoner brought a habeas corpus petition alleging he was denied parole in retaliation for the successful pursuit of relief in various federal habeas corpus proceedings. 89 F.3d at 136. Citing Greenholtz, the Third Circuit agreed that no liberty interest is created by the expectation of parole under Pennsylvania law. 89 F.3d at 139. The Burkett Court, however, distinguished due process challenges to parole release decisions for claims that parole rejection was ordered in retaliation for the exercise of constitutional rights. 89 F.3d at 140. In this case, the Third Circuit recognized that an allegation that parole was denied in retaliation for the successful exercise of the right of access to the courts states a cognizable claim for relief. 89 F.3d at 142. See also: Ohio Adult Parole Authority v. Woodward, 523 U.S. at 289 (Connor, J., concurring opinion) (although clemency decisions are committed to the discretion of the Governor, some minimal procedural safeguards apply to clemency proceedings. Judicial intervention might, for example, be warranted in the face of a scheme whereby a state official flipped a coin to determine whether to grant clemency, or in a case where the State arbitrarily denied a prisoner any access to its clemency process.)

2. Clemency

Clemency is an integral part of our

criminal justice system. Although in recent years it has become thoroughly politicized, it does permit the Governor to grant mercy and correct injustice for lawfully convicted individuals who otherwise have no remedy to reduction or elimination of their sentence.

The Supreme Court has reviewed the due process implications of State clemency proceedings in two decisions. In **Connecticut Board of Pardons v. Dumschat**, 452 U.S. 458 (1981), a life-sentenced prisoner brought suit claiming that the failure of the Connecticut Board of Pardons to provide a written explanation for denying his commutation application violated due process. 452 U.S. at 461. Citing **Greenholtz**, and noting the similarities between commutation and parole decisions, the Supreme Court held that prisoners have no constitutional right to sentence commutations. 452 U.S. at 464. A prisoner's expectations of commutation, the **Dumschat** Court noted, is much like his expectation of parole release B simply Aa unilateral hope. 452 U.S. at 465. The Court also concluded that no state-related liberty interest was at stake because, unlike the Nebraska statute in **Greenholtz**, the Connecticut statute did not contain any criteria or mandatory language specifying that commutation shall be granted. 452 U.S. at 466. (AThe Connecticut commutation statute, having no definition, no criteria, and no mandated shall, creates no analogous duty or constitutional entitlement.)

In the second case, the Supreme Court granted certiorari to decide whether prisoners have a protected life or liberty interest in State clemency proceedings. See **Ohio Adult Parole Authority v. Woodard**, 523 U.S. 272 (1998)(plurality opinion). In **Woodard**, an Ohio death-row prisoner brought suit, alleging in part that State clemency hearings conducted without counsel violated his due process rights under the Fourteenth Amendment. 523 U.S. at 277. In a plurality opinion joined by three other Justices, Chief Justice Rehnquist held that a death-row prisoner's petition for clemency does not rise to the level of an interest protected by the Due Process Clause itself. 523 U.S. at 282. Relying upon **Dumschat** and **Greenholtz**, the Court held that a prisoner's interest in clemency, like that in commutation and parole release, was nothing more than a unilateral hope. 523 U.S. at 280. The Court also concluded that Ohio's clemency

procedures did not create a substantive expectation of clemency since the Governor retains broad discretion in determining whether or not to grant clemency. 523 U.S. at 282. Finally, the denial of clemency does not impose an atypical and significant hardship under **Sandin**. A denial of clemency merely means that the inmate must serve the sentence originally imposed. 523 U.S. at 283.

Like Connecticut and Ohio, Pennsylvania also maintains a clemency and pardons system. Its authority derives from Article IV, section 9 of the Pennsylvania Constitution, which provides that the Governor has the power to grant reprieves and commutations of sentences in all criminal cases except impeachment, but no pardon shall be granted, nor sentence commuted, except on the recommendation in writing of a majority of the Board of Pardons, and in the case of a sentence of death or life imprisonment, on the unanimous recommendation in writing of the Board of Pardons after full hearing in open session, upon due public notice. Pa. Const. Art. IV, '9. See also, **Pennsylvania Prison Society v. Commonwealth of Pennsylvania**, 776 A.2d 971 (PA 2001)(upholding 1997 amendments to Article IV, '9, requiring, among other provisions, a unanimous recommendation of Board of Pardons in cases of death- or life-sentence).

In light of the **Greenholtz-to-Woodard** line of cases, Pennsylvania prisoners have no due process-protected life or liberty interests originating from the Constitution itself. Additionally, Article IV, '9 of the Pennsylvania Constitution contains no mandatory language directing that prisoners shall or will be granted commutation of sentence; nor does there exist any criteria, standards or factors limiting the Governor's discretion. Hence, there exists no State-created liberty entitlement to commutation. See **McCreary v. Mark**, 823 F.Supp. 288, 294 (E.D.PA 1993)(Nor does plaintiff have a liberty interest in the possibility of a pardon or commutation.); **Hennessey v. Pennsylvania Board of Pardons**, 655 A.2d 218, 220 (PA Comwlth. 1995)(A prisoner has no liberty interest in the possibility of commutation of his sentence.)

V. EIGHTH AMENDMENT ISSUES

The Eighth Amendment to the United States Constitution provides that, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. Amend. VIII. During its first one hundred years of existence, the Eighth Amendment was rarely invoked and then only as a protection against torture and other barbarous methods of punishment. See Wilkerson v. Utah, 99 U.S. 130 (188). In recent years, however, the Supreme Court has given the Eighth Amendment a broader interpretation. It has concluded that the phrase "cruel and unusual" prohibits punishments which, although not physically barbarous, involve "unnecessary and wanton infliction of pain," see Gregg v. Georgia, 428 U.S. 153, 173 (1976), and are incompatible with "the evolving standards of decency that mark the progress of a maturing society." See Trop v. Dulles, 356 U.S. 86, 101 (1958). Made applicable to the States in Robinson v. California, 370 U.S. 660, 667 (1962), the Eighth Amendment's ban against cruel and unusual punishment serves as the primary source of constitutional protection for prisoners subject to inhumane conditions of confinement. See Helling v. McKinney, 509 U.S. 25, 31 (1993) ("the treatment a prisoner receives in prison and the conditions under which he is confined are subject to scrutiny under the Eighth Amendment").

The Supreme Court has established a two-prong inquiry for determining whether prison conditions violate the Eighth Amendment. See Farmer v. Brennan, 511 U.S. 825, 834 (1994) ("Our cases have held that a prison official violates the Eighth Amendment only when two requirements are met."). The first prong consists of a judicial examination into the objective component of the Eighth Amendment. The inquiry will focus on whether conditions of confinement are objectively serious enough to justify Eighth Amendment scrutiny. See Farmer, 511 U.S. at 834. When considering this matter, bear in mind that simply because prison conditions are harsh is insufficient because the Constitution "does not mandate comfortable prisons." Rhodes v. Chapman, 452 U.S. 337, 349 (1981). Prisoners claiming Eighth Amendment violations must prove that they are either deprived of "the minimal civilized

measure of life's necessities" such as essential food, clothing, medical care, and sanitation, see Rhodes, 452 U.S. at 347, or are "incarcerated under conditions posing a substantial risk of serious harm." Farmer, 511 U.S. at 834.

Assuming that confinement conditions are sufficiently serious enough to trigger Eighth Amendment scrutiny, the inquiry then turns to the subjective component which requires prisoners to show a "sufficiently culpable state of mind" on the part of responsible prison officials. See Wilson v. Seiter, 501 U.S. 294, 297 (1991). The degree of culpability, however, varies depending on the type of conduct challenged. See Wilson, 501 U.S. at 302. "Wantonness does not have a fixed meaning but must be determined with due regard for differences in the kind of conduct against which an Eighth Amendment objection is lodged" (citations omitted). For example, in cases of prison riots and disturbances, where State authorities must act in haste and under pressure, prisoners must prove that prison officials acted "maliciously and sadistically for the very purpose of causing harm." See Whitley v. Albers, 475 U.S. 312, 320-321 (1986). In regards to overall prison conditions, however, prisoners need only prove that the actions of prison officials constitute deliberate indifference. See Wilson, 501 U.S. at 303 (whether one characterizes prisoner's treatment as inhumane conditions of confinement or failure to attend his medical needs, it is appropriate to apply the deliberate indifference standard).

In conclusion, the proper analysis of Eighth Amendment challenges to prison conditions involves both an objective and subjective component: the conditions complained of must be objectively serious, and the officials responsible for those conditions must be subjectively culpable.

A. Health Care

In Estelle v. Gamble, 429 U.S. 97 (1976) the Supreme Court first considered a prisoner's claim that the inadequacy of medical care constituted cruel and unusual punishment under the Eighth Amendment. Gamble, a Texas prisoner, brought suit alleging that he received inadequate medical care following a back injury sustained while working. 429 U.S. at 98. Justice Marshall, writing for the majority, held that

Deliberate indifference to serious medical needs of prisoners constitutes the **unnecessary and wanton infliction of pain** proscribed by the Eighth Amendment. 429 U.S. at 104. Justice Marshall reasoned that since incarceration denies prisoners the ability to care for themselves, the government has an obligation to provide medical care for them. 429 U.S. at 103. The **Estelle** Court went to great lengths to point out, however, that not every claim by a prisoner that he was denied adequate medical treatment states an Eighth Amendment violation. 429 U.S. at 105. An accidental or inadvertent failure to provide adequate medical care does not rise to an Eighth Amendment level. 429 U.S. at 105. Nor do claims of negligence or medical malpractice constitute constitutional violations. 429 U.S. at 106. In order to state a cognizable claim, a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs. 429 U.S. at 106.

Applying these principles to the case before it, the **Estelle** Court held that Gamble did not state an Eighth Amendment deliberate indifference claim because medical personnel saw him on seventeen occasions during a three-month period and treated him with bed rest, muscle relaxants, and pain relievers. 429 U.S. at 107. The Court further noted that Gamble's complaint that an X-ray should have been conducted of his back is a classic example of a matter for medical judgment and, at most, constitutes medical malpractice which is insufficient to state an Eighth Amendment claim. 429 U.S. at 107.

As in every Eighth Amendment case, the standard enunciated by the **Estelle** Court is two-pronged. It requires the prisoner's medical needs to be serious (the objective component) and it requires deliberate indifference on the part of prison officials (the subjective component). See **Kost v. Kozakiewicz**, 1 F.3d 176, 185 (3d Cir. 1993); **Durmer v. O'Carroll**, 991 F.2d 468, 471 (3d Cir. 1987); **West v. Keve**, 571 F.2d 158, 161 (3d Cir. 1978).

We therefore conclude that deliberate indifference to serious medical needs of prisoners constitutes the unnecessary and wanton infliction of pain, proscribed by the Eighth Amendment. This is true whether the

indifference is manifested by prison doctors in their response to the prisoner's needs or by prison guards in intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed. Regardless of how evidenced, deliberate indifference to a prisoner's serious illness or injury states a cause of action under section 1983.

Estelle v. Gamble, 429 U.S. 97, 104-105 (1976)(citation omitted.)

The **Estelle** deliberate indifference standard applies to pretrial detainees as well as convicted, sentenced prisoners. Pretrial detainees, however, must ground their constitutional rights to medical care based upon the Due Process Clause of the Fourteenth Amendment. Unlike prisoners, pretrial detainees have not been convicted of crime and are not protected by the Eighth Amendment. See **Bell v. Wolfish**, 441 U.S. 520, 535 n.16 (1979)(The State does not acquire the power to punish with which the Eighth Amendment is concerned until after it has secured a formal adjudication of guilt in accordance with due process of law. Where the State seeks to impose punishment without an adjudication, the pertinent constitutional guarantee is the Due Process Clause of the Fourteenth Amendment.)(citation omitted).

The Supreme Court has not yet formulated a specific test to determine the medically-related constitutional rights of pretrial detainees, but has stated that these rights are at least as great as the Eighth Amendment protections available to a convicted prisoner. See **City of Revere v. Massachusetts General Hospital**, 463 U.S. 239, 244 (1983). Applying this rationale, the Third Circuit has agreed that the **Estelle** standard applies to pretrial detainees, holding that deliberate indifference to serious medical needs violates the Due Process Clause of the Fourteenth Amendment. See **Boring v. Kozakiewicz**, 833 F.2d 468, 472 (3d Cir. 1987); **Brown v. Borough of Chambersburg**, 903 F.2d 274, 278 (3d Cir. 1990).

Before proceeding with our **Estelle** analysis, it should be pointed out that the deliberate indifference standard applies to serious mental or emotional illnesses as well as physical needs. See **Inmates of Allegheny County Jail v. Pierce**, 612 F.2d 754, 763 (3d Cir. 1979).

Cir. 1979)(Although most challenges to prison medical treatment have focused on the alleged deficiencies of medical treatment for physical ills, we perceive no reason why psychological or psychiatric care should not be held to the same standard.®); **Bowring v. Godwin**, 551 F.2d 44, 47 (4th Cir. 1977)(AWe see no underlying distinction between the right to medical care for physical ills and its psychological or psychiatric counterpart.®).

1. Whether the prisoner-s medical needs are Aserious®?

According to **Estelle** only Aacts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs® rise to the level of an Eighth Amendment violation. **Estelle**, 429 U.S. at 106. Exactly what constitutes a Aserious medical need® B the first prong of the **Estelle** standard B is determined on a case-by-case basis. The Third Circuit has joined other lower courts in generally defining a serious medical need as one that has been diagnosed by a physician as requiring treatment or one that is so obvious that a lay person would easily recognize the necessity for a doctor-s attention. See **Monmouth County Correctional Institutional Inmates v. Lanzaro**, 834 F.2d 326, 347 (3d Cir. 1987); **Garrett v. Stratman**, 254 F.3d 946, 949 (10th Cir. 2001).

Under this widely-accepted definition, life-threatening emergencies and injuries or illnesses involving substantial pain and suffering are indeed serious medical needs within the meaning of **Estelle**. See **Sanville v. McCaughtry**, 266 F.3d 724, 733 (7th Cir. 2001)(suicidal behavior is serious mental illness); **Sherrod v. Lingle**, 223 F.3d 605, 610 (7th Cir. 2000)(appendix on verge of rupture is serious medical condition); **Rouse v. Plantier**, 182 F.3d 192, 197 (3d Cir. 1999)(insulin-dependent diabetes is serious medical illness); **Reed v. McBride**, 178 F.3d 849, 853 (7th Cir. 1999)(internal bleeding, violent cramps and periods of unconsciousness serious medical need); **Durmer v. O-Carroll**, 991 F.2d 64, 67 (3d Cir. 1993)(stroke serious medical need); **Weeks v. Chaboudy**, 984 F.2d 185, 187 (6th Cir. 1993)(paralysis from waist down serious); **Aswegan v. Bruhl**, 965 F.2d 676, 677 (8th Cir. 1992)(chronic pulmonary disease serious); **Hill v. Marshall**, 962 F.2d 1209, 1214 (6th Cir. 1992)(tuberculosis serous medical need);

Warren v. Fanning, 950 F.2d 1370, 1373 (8th Cir. 1991)(infected toenails serious medical need); **Mandel v. Doe**, 888 F.2d 783, 788 (11th Cir. 1989)(fractured hip and collapsed leg serious); **Robinson v. Moreland**, 655 F.2d 887, 890 (6th Cir. 1981)(broken hand serious medical need).

On the other hand, a number of conditions have been found not to be Aserious® medical needs and unworthy of Eighth Amendment protection. See **Banuelos v. McFarland**, 41 F.3d 232, 235 (5th Cir. 1995)(ankle injury absent deformity, fracture, lesions or impairment in motion not serious medical need); **Kost v. Kozakiewicz**, 1 F.3d 176, 189 (3d Cir. 1993)(lice infestation not serious medical need); **Davis v. Jones**, 936 F.2d 278, 284 (5th Cir. 1990)(swollen wrists with some bleeding due to handcuffs not serious); **Shabazz v. Barnauskas**, 790 F.2d 1536, 1538 (11th Cir. 1986)(irritated skin caused by shaving not serious).

The problem with **Estelle**-s Aserious medical needs® test concerns those ailments lying between these two extremes. For example, while a brain tumor obviously constitutes a serious medical need and the common cold does not, at what point, if ever, do other ailments such as tooth cavities, fever, neurosis, poor vision, and obesity constitute serious medical needs? See e.g., **Harrison v. Barkley**, 219 F.3d 132, 137 (2d Cir. 2000)(while tooth cavity is not normally a serious medical need, if left untreated indefinitely, it is likely to produce pain and require extraction, thereby rising to the level of a serious medical condition).

In **Boring v. Kozakiewicz**, 833 F.2d 468 (3d Cir. 1987) the Third Circuit resolved this matter by holding that expert testimony is necessary to show that a prisoner-s illness was Aserious® within the meaning of **Estelle**. 833 F.2d at 473. In **Boring**, three prisoners brought suit against the Allegheny County Jail alleging inadequate medical treatment for a variety of minor ailments including nerve injury, temporary tooth fillings, and migraine headaches. 833 F.2d at 469-470. The trial court dismissed the case, ruling that there was no evidence in the record indicating that such ailments were Aserious® medical needs. 833 F.2d at 470. The Third Circuit agreed, holding that without expert

medical opinion, the jury would not be in a position to decide whether any of the conditions described by plaintiffs could be classified as "serious." 833 F.2d at 473. The Third Circuit further warned prisoners that an inability to pay for expert testimony would not be a valid excuse. 833 F.2d at 474. The plaintiffs' dilemma in being unable to proceed in this damage suit because of the inability to pay for expert witnesses does not differ from that of non-prisoner claimants who face similar problems. 833 F.2d at 474.

Applying **Boring**, the district court in **Shoop v. Dauphin County**, 766 F.Supp. 1327 (M.D.PA 1991) dismissed an arrestee's due process-based medical claim, holding that her failure to submit expert opinion showing that her condition was "serious" barred relief. 766 F.Supp.2d at 1331-1332. On the other hand, in **McCabe v. Prison Health Services**, 117 F.Supp.2d 443 (E.D.PA 1997) the district court held that a prisoner need not present expert testimony regarding the "seriousness" of a medical condition where the severity is acknowledged by prison doctors or would be apparent to a lay person. 117 F.Supp.2d at 452.

2. Whether State officials were deliberately indifferent to a prisoner's serious medical needs?

Establishing that a prisoner's illness or injury constitutes an objectively "serious" medical need is only the first half of the **Estelle** test. The Eighth Amendment also contains a subjective component which requires proof that prison officials have a "sufficiently culpable state of mind." See **Farmer**, 511 U.S. at 834. In the medical mistreatment context, the appropriate level of culpability of State officials is one of "deliberate indifference." See **Farmer**, 511 U.S. at 834. In prison-conditions cases that state of mind is one of "deliberate indifference" to inmate health or safety. See **Estelle**, 429 U.S. at 104. (We therefore conclude that deliberate indifference to serious medical needs of prisoners constitutes the "unnecessary and wanton infliction of pain," proscribed by the Eighth Amendment.) (citation omitted).

What is "deliberate indifference"? According to the Supreme Court, deliberate indifference is a state of mind more blameworthy

than mere negligence but less culpable than purposeful misconduct. See **Farmer**, 511 U.S. at 835. Deliberate indifference holds that a prison official will be held liable under the Eighth Amendment **only if he knows that inmates face a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it.** 511 U.S. at 847. Under this test, prisoners alleging Eighth Amendment violations need not show that a prison official acted or failed to act believing that harm actually would befall an inmate; it is enough that the official acted or failed to act despite his knowledge of a substantial risk of serious harm. 511 U.S. at 842.

We reject petitioner's invitation to adopt an objective test for deliberate indifference. We hold instead that a prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.

Farmer v. Brennan, 511 U.S. 825, 837 (1994).

Under the Supreme Court's deliberate indifference standard, a prison official cannot be held liable under the Eighth Amendment for the denial of medical care unless the prisoner proves: (1) that the official had knowledge of the inmate's serious medical need; and (2) despite such knowledge, he failed to take reasonable action to abate it. See **Farmer**, 511 U.S. at 847; see also: **Sanville v. McCaughtry**, 266 F.3d 724, 734 (7th Cir. 2001); **Beers-Capitol v. Whetzel**, 256 F.3d 120, 131 (3d Cir. 2001); **Harrison v. Barkley**, 219 F.3d 132, 137 (2d Cir. 2000); **Nicini v. Morra**, 212 F.3d 798, 811 (3d Cir. 2000); **Johnson v. Quinones**, 145 F.3d 164, 167 (7th Cir. 1998).

(a) Knowledge requirement

The Supreme Court's deliberate indifference test requires proof of two key elements: knowledge and failure to act despite such knowledge. State officials must have knowledge of a prisoner's serious medical need

and fail to act despite such knowledge. See Waldrop v. Evans, 871 F.2d 1030, 1036 (11th Cir. 1989) (holding that prison officials have an obligation to take action or to inform competent authorities once the officials have knowledge of a prisoner's need for medical or psychiatric care). Unless a prisoner proves that a prison official possessed knowledge of his or her serious medical need, that official must be exonerated of Eighth Amendment liability. See Farmer, 511 U.S. at 838 (**An official's failure to alleviate a significant risk that he should have perceived but did not, while no cause for commendation, cannot under our causes be condemned as the infliction of punishment.**).

The Supreme Court's knowledge requirement limits the Eighth Amendment's reach to only those State officials who were aware that a prisoner faces a serious medical risk. See Farmer, 511 U.S. at 837 (the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference). State officials are shielded by the knowledge requirement and will escape Eighth Amendment liability until the prisoner provides the Court with direct evidence that the official in question knew of the prisoner's serious medical condition. For example, in Sanville v. McCaughtry, 266 F.3d 724 (7th Cir. 2001) a prison doctor interviewed a prisoner (who subsequently committed suicide) and incorrectly determined he was neither mentally ill or medicated with anti-psychotics. 266 F.3d at 735. Although acknowledging that the doctor's conclusions may have been negligent, the Seventh Circuit held that they did not violate the Eighth Amendment since the doctor failed to recognize the prisoner's mental illness. 266 F.3d at 735. Likewise, in Hudson v. McHugh, 148 F.3d 859 (7th Cir. 1998) the director and assistant director of a halfway-house were held not to be deliberately indifferent where they lacked knowledge that the prisoner was being denied epilepsy medication. In Singletary v. Pennsylvania Department of Corrections, 266 F.3d 186 (3d Cir. 2001), the mother of an SCI-Rockview prisoner who committed suicide brought suit, claiming that the prison warden was deliberately indifferent to her son's mental health needs. 266 F.3d at 189. Citing Farmer, the Third Circuit affirmed dismissal of the suit, holding that the mother failed to provide evidence showing that the prison warden knew or was

aware of her son's serious medical needs. 266 F.3d at 192 n.2.

Since State officials are under no constitutional duty to act absent knowledge of a substantial risk to inmate health, prisoners should establish a paper trail to each potential defendant. Utilizing the Request slip or grievance system, a prisoner should explain his or her current illness or injury (detailing its seriousness) and the corresponding need for medical treatment. Bear in mind that State attorneys and federal judges will likely review such documents so they should be drafted clearly, succinctly and politely. This process of acquiring written documentation, no matter how time-consuming and frustrating, is invaluable for two reasons. First, a supervisory official may order corrective medical treatment, thereby eliminating unnecessary pain and risk to inmate health. Secondly, if the matter does end up in court, such documentation will make it extremely difficult for prison officials to plead ignorance by contending they had no prior knowledge of a prisoner's serious medical condition. See Farmer, 511 U.S. at 847. (Even apart from the demands of equity, an inmate would be well advised to take advantage of internal prison procedures for resolving inmate grievances. When those procedures produce results, they will typically do so faster than judicial processes can. And even when they do not bring constitutionally required changes, the inmates' task in court will obviously be much easier.); Reed v. McBridge, 178 F.3d 849, 854 (7th Cir. 1999) (finding that prison officials had knowledge of prisoner's serious medical condition in light of prisoner's written grievances).

(b) Failure to Act

Under the Supreme Court's deliberate indifference standard, knowledge is an absolute prerequisite for Eighth Amendment liability. No matter how life-threatening a prisoner's illness or injury is, a prison official cannot be held liable under the Eighth Amendment for the denial of medical care absent proof that the official had knowledge of a serious medical risk.

Satisfying the knowledge requirement, however, is not the only element of deliberate

indifference. Prisoners must also prove that, despite such knowledge, prison officials failed to take reasonable action to abate this serious medical risk. See **Farmer**, 511 U.S. at 847 (prison official is liable under Eighth Amendment only if he knows that inmates face a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it). Prison officials will not be held liable under the Eighth Amendment if they take reasonable action in the face of a serious risk to inmate health. See **Farmer**, 511 U.S. at 845 (prison officials who act reasonably cannot be found liable under the Cruel and Unusual Punishments Clause).

What is reasonable action in light of a prisoner's serious medical need? Under **Estelle**, State officials act reasonably when they provide whatever treatment the medical professional decides is appropriate. In contrast, State officials act unreasonably or with deliberate indifference when they deny, delay, obstruct or otherwise interfere with needed or prescribed medical treatment. See **Estelle**, 429 U.S. at 104-105 (deliberate indifference can be manifested by prison doctors in their response to the prisoner's needs or by prison guards in intentionally denying or delaying access to medical treatment or intentionally interfering with the treatment once prescribed); **Rouse v. Plantier**, 182 F.3d 192, 197 (3d Cir. 1999) (deliberate indifference exists when a prison official: (1) knows of a prisoner's need for medical treatment but intentionally refuses to provide it; (2) delays necessary medical treatment based on a non-medical reason; or (3) prevents a prisoner from receiving needed or recommended medical treatment.).

We address first allegations of deliberate indifference directed at non-medical personnel such as prison guards and other State officials, and secondly, take up the more difficult medical mistreatment claims against medical professionals themselves.

When prison officials are confronted with a serious medical need and refuse to provide inmate access to a medical professional, deliberate indifference exists. For example, in **Fields v. Bosshard**, 590 F.2d 105 (5th Cir. 1979) a prisoner suffering from delirium tremens was committed to the custody of a county jail. 590 F.2d at 107. Despite pleas from the prisoner and his family for medical assistance, jailers refused

to provide treatment based upon their belief he was faking. 590 F.2d at 107-108. The prisoner's condition tragically worsened as the days progressed, eventually culminating in his death. 590 F.2d at 108. The Fifth Circuit affirmed the damages award to his family, agreeing that deliberate indifference existed. 590 F.2d at 110. See also: **Aswegan v. Bruhl**, 965 F.2d 676, 677-678 (8th Cir. 1992) (deliberate indifference found when prison officials denied 70-year-old prisoner access to medical personnel for coronary heart disease and denied timely access to prescribed medication); **Hill v. Marshall**, 962 F.2d 1209, 1211 (6th Cir. 1992) (deliberate indifference found when prison official interrupted prisoner's prescribed tuberculosis medication); **Lawson v. Dallas County**, 112 F.Supp.2d 616, 636 (N.D.Tex. 2000) (deliberate indifference found when prison officials failed to provide even minimal medical care to paraplegic prisoner suffering from decubitus ulcers despite prescribed treatment instructions from hospital physicians). These cases confirm that when prison officials deny a prisoner access to a medical professional or intentionally block that professional's prescribed medical treatment, deliberate indifference exists.

Prison officials who intentionally delay a prisoner's access to a medical professional or delay that professional's prescribed medical treatment also exhibit deliberate indifference. See **Estelle**, 429 U.S. at 104-105. However, in order to state a claim of deliberate indifference, most courts have required prisoners show that such delay exposed the prisoner to some type of prejudice or harm such as unnecessary pain. See **Berry v. Bunnell**, 39 F.3d 1056, 1057 (9th Cir. 1994) (2-hour delay in medical treatment for bladder infection not deliberate indifference absent proof of harm); **Harris v. Coweta County**, 21 F.3d 388, 393-394 (11th Cir. 1994) (The tolerable length of delay in providing medical attention depends on the nature of the medical need and the reason for the delay. A few hours delay in receiving medical care for emergency needs such as broken bones and bleeding cuts may constitute deliberate indifference.); **Patterson v. Pearson**, 19 F.3d 439, 440 (8th Cir. 1994) (one-month delay in medical treatment for tooth infection states claim for deliberate indifference where prisoner experienced significant pain and swollen jaw); **Breakiron v. Neal**, 166 F.Supp.2d 1110, 1114 (N.D. Tex.

2001)(ninety-minute delay in treating hand injury was not deliberate indifference where it was not alleged that delay exacerbated or aggravated his injuries or otherwise damaged him).

Prison officials who are merely negligent in their response to a prisoner's serious medical needs, however, are not liable under the Eighth Amendment. See **Farmer v. Brennan**, 511 U.S. at 835 (deliberate indifference describes a state of mind more blameworthy than negligence); **Daniels v. Williams**, 474 U.S. 327, 328 (1986)(the Due Process Clause is simply not implicated by a negligent act of an official); **Estelle v. Gamble**, 429 U.S. at 106 (a complaint that a physician has been negligent in diagnosing or treating a medical condition does not state a valid claim of medical mistreatment under the Eighth Amendment). Thus, in **Freedman v. City of Allentown**, 853 F.2d 1111 (3d Cir. 1988) the Third Circuit held that the failure of prison guards to recognize scars on an inmate's arms as suicide hesitation cuts amounted only to negligence rather than deliberate indifference. 853 F.2d at 1116.

Thus far it is clear that when prison officials, confronted with a serious medical need, intentionally deny a prisoner access to a medical professional or intentionally interfere with the professional's prescribed treatment, deliberate indifference exists. The Eighth Amendment question becomes much more complicated and problematic, however, when allegations of deliberate indifference are aimed at the medical professional himself.

Under the **Estelle** standard, the courts give tremendous deference to the opinions and judgments of medical professionals not only in deciding which illnesses or injuries qualify as serious, see **Monmouth County Correctional Institutional Inmates v. Lanzaro**, 834 F.2d 326, 347 (3d Cir. 1987)(a serious medical condition is diagnosed by a physician as requiring treatment) but also in deciding the proper course of treatment for a serious illness. See **Estelle**, 429 U.S. at 105 (intentional interference by prison guards with a professional's prescribed medical treatment is deliberate indifference). Under the **Estelle** test, a prisoner is constitutionally entitled to whatever treatment the medical professional deems appropriate under the circumstances.

The lower courts will find deliberate indifference on the part of prison doctors and other medical professionals only if they fail to exercise a medically professional judgment. See **Estelle**, 429 U.S. at 104 n.10 (stating that a doctor's choice of the easier and less efficacious treatment of throwing away a prisoner's ear rather than stitching the stump may be deliberate indifference rather than the exercise of professional judgment); **Estate of Cole by Pardue v. Fromm**, 94 F.3d 254, 261-262 (7th Cir. 1996)(deliberate indifference may be inferred when the medical professional's decision is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible did not base the decision on such a judgment). For example, in **Mandel v. Doe**, 888 F.2d 783 (11th Cir. 1989) a prisoner sustained a fractured hip joint when he jumped off a pick-up truck. 888 F.2d at 785. Despite repeated pleas from the prisoner and his family for access to a physician and X-rays, the prison's medical assistant prescribed only Motrin and five days of bed rest. 888 F.2d at 785. The Eleventh Circuit concluded that the record amply demonstrated deliberate indifference. 888 F.2d at 787. When the need for treatment is obvious, medical care which is so cursory as to amount to no treatment at all may amount to deliberate indifference. 888 F.2d at 789. See also: **Sherrod v. Lingle**, 223 F.3d 605, 611-612 (7th Cir. 2000)(if knowing that a patient faces a serious risk of appendicitis, the prison official gives the patient an aspirin and an enema and sends him back to his cell, a jury could find deliberate indifference although the prisoner was not simply ignored); **Robinson v. Moreland**, 655 F.2d 887, 889-890 (8th Cir. 1981)(providing only an ice pack for a broken hand constitutes deliberate indifference); **Lemarbe v. Wisneski**, 266 F.3d 429, 437-438 (6th Cir. 2001)(prisoner stated deliberate indifference claim against prison doctor who knew that prisoner had a bile leak yet failed to take timely action to abate leak which was obvious to anyone with a medical education and to most lay people).

As long as a prison physician's opinions and treatment are within a zone of reasonableness commensurate with medical science and professional standards, the courts will not find deliberate indifference even if the diagnosis and treatment are incorrect and result in tragic consequences. See **Farmer**, 511 U.S.

at 845 (State officials who respond reasonably to serious risk are free of Eighth Amendment liability even if the harm ultimately was not averted).

Accordingly, it is well settled that mere allegations of medical malpractice, negligent diagnosis, and differences of opinions between prisoners and their physicians do not rise to the level of deliberate indifference. For example, in Estelle, the Supreme Court held that a prisoner's contention that State officials should have provided an X-ray for his back injury failed to state a claim of deliberate indifference. 429 U.S. at 107. A medical decision not to order an X-ray, or like measures, does not represent cruel and unusual punishment. At most it is medical malpractice, and as such the proper forum is the state court under the Texas Tort Claims Act. 429 U.S. at 107.

In Brown v. Borough of Chambersburg, 903 F.2d 274 (3d Cir. 1990) a county prisoner complaining of chest pains was diagnosed as having only a bruise after a brief visual examination by the prison physician. 903 F.2d at 278. Upon release, however, the prisoner went to his local hospital where two ribs were found to be broken. 903 F.2d at 278. Despite the shoddy diagnosis, the Third Circuit agreed that deliberate indifference did not exist. The most that can be said of plaintiff's claim is that it asserts the doctor's exercise of deficient professional judgment. 903 F.2d at 278.

In Sanville v. McCaughtry, 266 F.3d 724 (7th Cir. 2001) the mother of a mentally-ill prisoner who committed suicide brought suit, claiming that prison doctors were deliberately indifferent to her son's serious mental illness. 266 F.3d at 734. During a screening process, one doctor incorrectly determined that the prisoner was not mentally ill or medicated with anti-psychotics. 266 F.3d at 735. The Seventh Circuit held that the doctor's conclusions may have been negligently drawn but were not deliberate indifference. 266 F.3d at 735. Another physician advised the suicidal prisoner to discontinue taking his medication based upon the prisoner's request and his professional judgment that the medication was causing stomachaches. 266 F.3d at 735. Under the circumstances of the case, the Seventh Circuit held that advising a mentally ill prisoner to discontinue his psychotropic medication was not a substantial

departure from accepted professional judgment. 266 F.3d at 735. Although we wish Dr. Pareek could have prevented Matt's suicide, physicians do not practice with a crystal ball in hand. 266 F.3d at 736. See Also Beck v. Skon, 253 F.3d 330, 3334 (8th Cir. 2001) (Beck's disagreements with the prison medical staff about his care do not establish deliberate indifference and is not actionable.); Johnson v. Quinones 145 F.3d 164, 168 (4th Cir. 1998) (failure of prison doctors to properly diagnose pituitary tumor may support a claim for negligence (in state court), but not a claim under the Eighth Amendment); Ledoux v. Davies, 961 F.2d 1536, 1537 (10th Cir. 1992) (prisoner's contention that he needed medication other than that prescribed by prison physician did not constitute deliberate indifference); Rouse v. Plantier, 182 F.3d 192, 197 (3d Cir. 1999) (claims of negligence or medical malpractice do not constitute deliberate indifference); Allegheny County Jail v. Pierce, 612 F.2d 754, 760 (3d Cir. 1979) (disagreement between jail physicians and prisoners over the length of methadone treatment for drug detoxification did not constitute deliberate indifference).

Since large institutions typically have several medical professionals on staff (in addition to outside hospital physicians), it is not uncommon for prisoners to receive different diagnoses and conflicting treatments with mixed results. Once again, where a prisoner has received medical treatment of some kind, the Estelle standard requires the courts to give great deference to the physician's medical opinions and treatment as long as they are the product of professional judgment. For example, in White v. Napoleon, 897 F.2d 103 (3d Cir. 1990) a New Jersey prisoner's ear infection was successfully treated with Valisone ointment. 897 F.2d at 106. Upon transfer to another institution, however, another doctor refused to administer Valisone and instead chose another course of treatment which was both unsuccessful and painful. 897 F.2d at 106. The Third Circuit held that no claim is stated when a doctor disagrees with the professional judgment of another doctor. There may, for example, be several acceptable ways to treat an illness. 897 F.2d at 110. If the doctor's judgment is ultimately shown to be mistaken, at most what would be proved is medical malpractice, not an Eighth Amendment violation. 897 F.2d at 110. The Third Circuit

remanded **White** back to the lower court based upon the possibility, however remote, that the prisoner could prove his allegations that the doctor chose such treatment solely to inflict pain and for no valid medical purpose. 897 F.2d at 111.

A similar conclusion was reached by the Third Circuit in **Durmer v. O-Carroll**, 991 F.2d 64 (3d Cir. 1993). There, a prison doctor ignored the recommendations of a prior physician and neurologist that a prisoner who had suffered a stroke receive physical therapy immediately. 991 F.2d at 66. The Third Circuit held that if the failure to provide physical therapy was simply an error in medical judgment, no claim existed; but, if the failure to provide adequate care in the form of physical therapy was deliberate, and motivated by non-medical factors, then Durmer has a viable claim. 991 F.2d at 69.

As noted previously, once a prisoner's illness or injury is determined to be serious, the **Estelle** standard requires that he or she receive treatment prescribed by a physician through the exercise of professional medical judgment. When a medical professional prescribes treatment for a prisoner's serious medical condition, the State cannot overrule that decision based solely upon non-medical financial or budgetary considerations. See **Monmouth County Correctional Inmates v. Lanzaro**, 834 F.2d at 337 (while economic factors may be considered in choosing methods to provide constitutionally-mandated services, the cost of protecting a constitutional right cannot justify its total denial); **Harris v. Thigpen**, 941 F.2d 1495, 1509 (11th Cir. 1991) (lack of funds will not excuse the failure of correctional system to maintain a certain minimum level of medical services necessary to avoid imposition of cruel and unusual punishment). In a related matter, the courts have upheld medical co-payment policies which charge prisoners a small fee for medical services. See **Reynolds v. Wagner**, 128 F.3d 166 (3d Cir. 1997); **Shapley v. Nevada Board of State Prison Commissioners**, 766 F.2d 404 (9th Cir. 1985); **Breakiron v. Neal**, 166 F.Supp.2d 1110 (N.D. Tex. 2001). In **Reynolds**, the Third Circuit upheld a Berks County Prison Policy in which inmates were charged a \$3 fee for certain medical services. 128 F.3d at 170. Under the program, inmates without funds were still provided medical treatment, however, their trust

accounts were debited for the relevant charges. 128 F.3d at 170. We reject the plaintiffs' argument that charging inmates for medical care is per se unconstitutional. If a prisoner is able to pay for medical care, requiring such payment is not deliberate indifference to serious medical needs. Instead, such a requirement simply represents an insistence that the prisoner bear a personal expense that he or she can meet and would be required to meet in the outside world. 128 F.3d at 174.

Finally, it is well settled that a prisoner need not wait until he or she suffers physical injury or some other tragic event before seeking relief. See **Farmer**, 511 U.S. at 845. If there exists significant deficiencies in medical staff or equipment which exposes prisoners to an ongoing objectively serious risk of harm to inmate health, they may file suit seeking a court-ordered injunction correcting those deficiencies. These type of class action suits are brought by experienced counsel and challenge a prison's entire medical treatment system. See **Tillery v. Owens**, 719 F.Supp. 1256 (W.D.PA. 1989) (injunction issued requiring prison officials to develop comprehensive plan to improve medical and mental health system), affirmed, 907 F.2d 418 (3d Cir. 1990). Once again, the appropriate standard in all medical mistreatment cases is whether there exists deliberate indifference to serious medical needs.

In conclusion, medical mistreatment of a prisoner violates the Eighth Amendment only when two conditions are met. First, the prisoner's injury or illness must be objectively serious to trigger constitutional scrutiny. Secondly, the prisoner must prove deliberate indifference by establishing that the State official or officials in question had knowledge of this serious medical risk but failed to take any reasonable action to abate it. Negligent medical care, unsuccessful medical treatment, erroneous diagnoses, and medical malpractice do not qualify as deliberate indifference. As long as the medical professional's opinions and treatment are within the zone of professional medical judgment, there does not exist deliberate indifference. An Eighth Amendment violation requires nothing less than a conscious disregard of a prisoner's serious medical needs.

B. Prison Conditions

The Supreme Court first considered whether prison conditions may constitute a violation of the Eighth Amendment in Hutto v. Finney, 437 U.S. 678 (1978). In Hutto, the Supreme Court granted certiorari to review a district court's remedial order restricting confinement in Arkansas isolation cells to no more than thirty days. 437 U.S. at 680. Although acknowledging that solitary confinement is not *per se* unconstitutional, the Hutto Court held that it may become so depending on the duration of the confinement and the conditions thereof. 437 U.S. at 685. "A filthy, overcrowded cell and a diet of grue" might be tolerable for a few days and intolerably cruel for weeks and months. 437 U.S. at 686-687. In this case, the Hutto Court looked at the conditions including more prisoners in isolation cells than beds, the inmate violence and vandalism, the "grue" diet, the frequent use of nightsticks and mace by guards, and the arbitrary length of isolation and agreed that, taken as a whole, conditions in the isolation cells continued to violate the prohibition against cruel and unusual punishment. 437 U.S. at 687. The Hutto Court firmly established that, "Confinement in a prison or in an isolation cell is a form of punishment subject to scrutiny under the Eighth Amendment." 437 U.S. at 685.

In 1979 the Supreme Court faced its first case in which prison overcrowding was a central issue. In Bell v. Wolfish, 441 U.S. 520 (1979) the Court considered whether it was unconstitutional to "double bunk" pretrial detainees at a federal detention center in New York City. 441 U.S. at 530. Since the detainees had not been convicted of a crime, the Court first ruled that the appropriate standard to be applied was the Due Process Clause, not the Eighth Amendment. 441 U.S. at 535 n.16. The Court went on to hold that the government may subject a pretrial detainee **to the restrictions and conditions of the detention facility so long as those conditions and restrictions do not amount to punishment, or otherwise violate the Constitution.** 441 U.S. at 536-537. Whether a particular condition of confinement amounts to punishment depends on whether the detainee can show either an express intent to punish on the part of prison officials or the absence of a reasonable relationship to a legitimate governmental objective. 441 U.S. at

538-539. Applying this standard to the case before it, the Bell majority found no constitutional violation with double-celling pretrial detainees in cells intended for one inmate. 441 U.S. at 541. The Court reasoned that since the detainees were required to spend only seven hours each day in their cells, were provided adequate sleeping space, and were confined at the detention facility for less than 60 days, the conditions were not severe enough to constitute punishment. 441 U.S. at 543. The Court admitted, however, that double-celling prisoners for an extended period of time with genuine privations and hardship might indeed amount to punishment and violate the Due Process Clause. 441 U.S. at 542.

Two years later, the Supreme Court heard a second double-celling case, this time involving convicted offenders. See Rhodes v. Chapman, 452 U.S. 337 (1981). Although acknowledging that confinement in prison is a form of punishment subject to Eighth Amendment scrutiny, 452 U.S. at 345, the Court again rejected prisoners' claims that housing two inmates in a cell designed for one constitutes cruel and unusual punishment. 452 U.S. at 348. The Court reasoned that **the Constitution does not mandate comfortable prisons and to the extent that such conditions are restrictive and even harsh, they are part of the penalty that criminal offenders pay for their offenses against society.** 452 U.S. 347 and 349. The Court did note, however, that prison conditions **alone or in combination, may deprive inmates of the minimal civilized measure of life's necessities** and thus violate the Eighth Amendment's ban on cruel and usual punishment. 452 U.S. at 347. In the case of the Ohio prison before it, however, double-celling had not deprived prisoners of essential food, medical care, or sanitation. 452 U.S. at 348. Nor had it increased violence or created other intolerable conditions. 452 U.S. at 348. Hence, the Court concluded that prison conditions were not serious enough to form the basis for an Eighth Amendment violation. 452 U.S. at 348.

In Estelle v. Gamble, we held that the denial of medical care is cruel and unusual punishment because, in the worst case, it can result in physical torture, and, even in less serious cases, it can result in pain without any penological purpose. 429 U.S. at 103. In Hutto v. Finney,

the conditions of confinement in two Arkansas prisons constituted cruel and unusual punishment because they resulted in unquestioned and serious deprivation of basic human needs. Conditions other than those in **Gamble** and **Hutto**, alone or in combination, may deprive inmates of the minimal civilized measure of life-s necessities.

Rhodes v. Chapman, 452 U.S. 337, 347 (1981)

Subsequent to the **Rhodes** decision, prison conditions that resulted in **Aserious deprivation of basic human needs** or which **Adeprive inmates of the minimal civilized measure of life-s necessities** were held to violate the Cruel and Unusual Punishment Clause. 452 U.S. at 347. As we shall see, however, **Rhodes** was decided solely on an objective inquiry, that is, whether prison conditions were serious enough to implicate the Eighth Amendment. Since the **Rhodes** Court agreed that double-celling in that particular prison did not deprive inmates of life-s basic necessities or human needs, prison conditions were not considered serious enough to satisfy the objective component of the Eighth Amendment. The **Rhodes** Court never reached the question as to whether a subjective state-of-mind inquiry was warranted in Eighth Amendment prison conditions litigation. This resulted in confusion between the lower courts, necessitating additional clarification by the Supreme Court.

In 1991 the Supreme Court granted certiorari in yet another Ohio case to decide **Awhether a prisoner claiming that conditions of confinement constitute cruel and unusual punishment must show a culpable state of mind on the part of prison officials, and, if so, what state of mind is required.** See **Wilson v. Seiter**, 501 U.S. 294, 296 (1991). In **Wilson**, a prisoner alleged that his Eighth Amendment rights were violated due to his confinement in an overcrowded facility with inadequate heating and cooling, improper ventilation, unsanitary restroom and dining facilities, excessive noise, and insufficient locker and storage space. 501 U.S. at 296.

Writing for the majority, Justice Scalia held that in addition to **Rhodes** requirement that prison deprivations must be objectively serious, prisoners alleging cruel and unusual punishment

must also prove a subjective component, which shows that prison officials **Apossessed a culpable state of mind.** 501 U.S. at 297. In the context of inadequate conditions of confinement, Justice Scalia held that **Adeliberate indifference** would constitute sufficient wantonness to satisfy the Eighth Amendment. 501 U.S. at 303.

Applying these standards to the case before it, the Supreme Court remanded **Wilson** back to the lower court for further proceedings. 501 U.S. at 306. In regards to the objective component, the Court held that Wilson must prove that the conditions of confinement deprived him of **Athe minimal civilized measure of life-s necessities** or of **Aa single, identifiable human need** such as food, warmth or exercise. 501 U.S. at 304. Justice Scalia specifically noted that the lower courts cannot find an Eighth Amendment violation on the basis of prison overcrowding alone, unless it leads to a deprivation of one or more core human needs or necessities. 501 U.S. at 305 (**ANothing so amorphous as overall conditions** can rise to the level of cruel and unusual punishment when no specific deprivation of a single human need exists.). Secondly, Wilson must establish that prison officials were deliberately indifferent to such serious conditions. 501 U.S. at 303. In other words, it is no longer sufficient for a prisoner to prove that he is confined under intolerable conditions. He must also prove that those intolerable conditions were the product of **Adeliberate indifference** on the part of prison officials. In this case, the lower court had failed to apply the deliberate indifference standard in **Wilson**, thus necessitating the remand. 501 U.S. at 305-306.

Of more recent vintage is **Hope v. Pelzer**, 122 Sup. Ct. 2508 (June 27, 2002) in which the Supreme Court was required to determine whether prison officials were entitled to qualified immunity (protection from monetary damages) for handcuffing an Alabama prisoner to a hitching post. . According to the record, Larry Hope was handcuffed to the hitching post (thus requiring him to remain standing) on two occasions: first, a two-hour period for arguing with another inmate; secondly, a more serious seven-hour period for arguing and fighting with a guard. During this second period, Hope was required to remove his shirt (exposing him to the sun) and was given water only once or twice and

no bathroom break. In addition, guards not only ignored or denied inmate requests for water or access to toilet facilities, but taunted them while they were clearly suffering from dehydration. 122 S.Ct. at 2521 n.8.

The Supreme Court, in a 6-3 decision, agreed that the attachment of Hope to the hitching post under the circumstances alleged in this case violated the Eighth Amendment. S.Ct. at 2511. The majority noted that despite the lack of an emergency, prison guards knowingly subjected him to a substantial risk of physical harm, to unnecessary pain caused by the handcuffs and the restricted position of confinement for a 7-hour period, to unnecessary exposure to the heat of the sun, to prolonged thirst and taunting, and to a deprivation of bathroom breaks that created a risk of particular discomfort and humiliation. The Supreme Court also rejected prison officials' request for qualified immunity protection, finding that reasonable officials should have realized that the use of the hitching post under such alleged circumstances violated the Eighth Amendment.

Some conditions of confinement may establish an Eighth Amendment violation in combination when each would not do so alone, but only when they have a mutually enforcing effect that produces the deprivation of a single, identifiable human need such as food, warmth or exercise. For example, a low cell temperature at night combined with a failure to issue blankets. Compare Spain v. Procunier, 600 F.2d 186, 199 (9th Cir. 1979) (outdoor exercise required when prisoners otherwise confined in small cell almost 24 hours per day), with Clay v. Miller, 626 F.2d 345, 347 (4th Cir. 1980) (outdoor exercise not required when prisoners otherwise had access to dayroom 18 hours per day). To say that some prison conditions may interact in this fashion is a far cry from saying that all prison conditions are a seamless web for Eighth Amendment purposes. Nothing so amorphous as overall conditions can rise to the level of cruel and unusual punishment when no specific deprivation of a single human need exists.

Wilson v. Seiter, 501 U.S. 294, 304-305 (1991).

What principles should be gained from the direction the Supreme Court has taken in

terms of Eighth Amendment prison conditions litigation? First off, the mere fact that two prisoners are housed in a cell designed for one is not per se unconstitutional. See Bell v. Wolfish, 441 U.S. 520, 542 (1979) (there is no lone man, one cell principle lurking in the Due Process Clause). Secondly, merely because a prison is overcrowded does not by itself translate into an automatic Eighth Amendment violation. See Hutto v. Finney, 737 U.S. at 686 (It is perfectly obvious that every decision to remove a particular inmate from the general prison population for an indeterminate period could not be characterized as cruel and unusual.); Rhodes v. Chapman, 452 U.S. at 348 (where there is no evidence that double celling either inflicts unnecessary or wanton pain or is disproportionate to the crime, there is no cruel and unusual punishment); Nami v. Fauver, 82 F.3d 63, 66 (3d Cir. 1996) (While Rhodes may stand for the proposition that double-celling does not per se amount to an Eighth Amendment violation, it does not stand for the proposition that double-celling can never amount to an Eighth Amendment violation.). Thirdly, a lower court cannot find an Eighth Amendment violation unless prison conditions are objectively serious in the sense that such conditions deprive prisoners of at least a single identifiable human need. See Wilson v. Seiter, 501 U.S. at 304. Thus, mere allegations of double-celling, prison overcrowding or the totality of conditions are insufficient to state a cruel and unusual punishment claim unless such conditions specifically result in the deprivation of one or more core human needs such as food, clothing, medical care and sanitation. See Wilson v. Seiter, 502 U.S. at 304. The denial of nonessential activities such as job and educational opportunities, although clearly desirable, are not objectively serious enough to rise to an Eighth Amendment level. See Rhodes v. Chapman, 452 U.S. at 348. Finally, prisoners claiming prison conditions constitute cruel and unusual punishment must prove that prison officials acted with a subjective culpable state of mind. See Wilson v. Seiter, 501 U.S. at 303. This requires proof that the prison officials responsible for the conditions of confinement were deliberately indifferent, that is, they had knowledge of the harmful conditions yet failed to take reasonable measures to abate those conditions. See Farmer v. Brennan, 511 U.S. 825, 847 (1994).

The Third Circuit has on several occasions applied these principles to Eighth Amendment litigation before it. In Hassine v. Jeffes, 846 F.2d 169 (3d Cir. 1988) three prisoners brought suit claiming that overcrowded conditions at SCI-Graterford deprived them of basic human needs in violation of the Eighth Amendment. 846 F.2d at 171. Specifically, they alleged that a 63% increase in prison population had escalated inmate violence, deteriorated cellblock conditions to the point of posing serious health risks, and rendered the health care system inadequate. 846 F.2d at 171-172. Although acknowledging that conditions at Graterford were a sub-standard, 846 F.2d at 173, the Third Circuit upheld the trial judge's finding that the Eighth Amendment rights of the prisoners were not violated. 846 F.2d at 175. Noting that the Cruel and Unusual Punishment Clause is violated only when conditions, alone or in combination, deprive inmates of the minimal civilized measure of life's necessities, the Third Circuit held that there was sufficient evidence from which the trial judge could conclude that the conditions, although in need of improvement, did not operate to deprive the complainants of the basic necessities. 846 F.2d at 175.

A similar conclusion was reached in Peterkin v. Jeffes, 855 F.2d 1021 (3d Cir. 1988) where death-row prisoners brought suit contending that prison conditions violated their Eighth Amendment rights. Once again, the Third Circuit emphasized that the pivotal question in Eighth Amendment jurisprudence is whether prison conditions deprive inmates of the minimal civilized measure of life's necessities. 855 F.2d at 1024. And once again, the Third Circuit upheld the trial judge's findings that the conditions in question withstood Eighth Amendment scrutiny. 855 F.2d at 1027. Cell space was limited but constitutionally adequate, ventilation was reduced but did not pose a risk to inmate health, more cell lighting was preferable, but current lighting is more than adequate, cellblock noise was irritating but not cruel and unusual, and while many cells were dirty, they were not intolerable. 855 F.2d at 1026-1027. In short, while prison conditions were restrictive and even harsh, they did not deprive death-row prisoners of basic human needs, and accordingly, did not violate the Eighth Amendment.

While proving an Eighth Amendment

violation is a formidable task given the constitutional constraints established by the Supreme Court, it is not impossible. See Tillery v. Owens, 907 F.2d 418 (3d Cir. 1990). There the Third Circuit upheld the trial judge's findings that the overcrowded, dilapidated, and unsanitary conditions at SCI-Pittsburgh violated the Eighth Amendment. 907 F.2d at 428. Unlike Hassine and Peterkin, the Tillery prisoners presented sufficient evidence linking prison conditions to the deprivation of basic human needs. The Third Circuit noted that double-celling is permissible when general prison conditions are otherwise adequate; however, double-celling has been found to be unconstitutional where it has been imposed in a decaying physical plant with inadequate staff and security. 907 F.2d at 427. In this case, insufficient cell lighting, inadequate ventilation, pervasive vermin, old and cracked plumbing, broken showers, widespread prisoner violence, insufficient fire safety equipment, and a deficient health care system all combined to deprive prisoners of their Eighth Amendment rights to basic human needs to sanitation, personal safety, and medical care. 907 F.2d at 428. Bear in mind, however, that Tillery was a pre-Wilson decision based solely upon the Rhodes objective conditions test. Although it is reasonable to assume that the prison warden and other supervisory officials at Pittsburgh had knowledge of the inhumane conditions of confinement, the Third Circuit did not address this matter.

We find nothing in the Supreme Court's relevant jurisprudence that suggests that conditions as deplorable as those at SCIP may not be held to fall below constitutional standards merely because there has not yet been an epidemic of typhoid, an outbreak of AIDS, a deadly fire, or a prison riot. Such an approach is at odds with the totality of the circumstances analysis mandated by Rhodes. It also ignores the reality that while double-celling may not always cause unconstitutional levels of violence, filth, or fire hazard, double-celling in an institution plagued with such problems may be so unbearable as to deprive inmates of the minimal civilized measure of life's necessities. Rhodes, 452 U.S. at 347.

Tillery v. Owens, 907 F.2d 418, 428 (3d Cir. 1990).

In Nami v. Fauver, 82 F.3d 63 (3d Cir.

1996) the Third Circuit again addressed an Eighth Amendment challenge to prison conditions, this time involving protective custody prisoners at a New Jersey youth correctional facility. 82 F.3d at 64. In this case, prisoners alleged they were double-celled in an 80-square foot cell with only one bed, forcing one inmate to sleep on the floor by the toilet. 82 F.3d at 65-66. The prisoners contended they were forced to share cells with violent and mentally-ill inmates, resulting in rapes and assaults. 82 F.3d at 66. Finally, the ventilation system often malfunctioned, sanitation was inadequate, and the prisoners were confined to their cells for 24 hours a day with the exception of two weekly periods of exercise. 82 F.3d at 66. The Third Circuit reversed dismissal of the suit, holding that the lower court erred when it analyzed the prisoners' claims separately, by splitting them into double-celling, increased violence, and equal protection categories. 82 F.3d at 67. The Third Circuit concluded that double-celling can amount to an Eighth Amendment violation in combination with other adverse conditions to produce conditions at odds with contemporary standards of decency. 82 F.3d at 67.

In review, Supreme Court precedent mandates that an Eighth Amendment claim will not be sustained unless the plaintiff proves that: (a) prison conditions are objectively serious in the sense they deprive prisoners of basic human needs and life-s necessities; and (b) prison officials were subjectively culpable because they were deliberately indifferent to those serious prison conditions. That is, they had knowledge of the harmful conditions yet failed to remedy those conditions.

What are basic life-s necessities or human needs which, when deprived to prisoners, offends the Cruel and Unusual Punishment Clause? The Supreme Court has yet to definitively define these phrases or provide an exhaustive list of basic human needs. However, we can safely assume these phrases apply to those essential needs (such as food, water and shelter), without which sustenance would be impossible. We can also safely assume those phrases were meant to include those needs which, although not necessarily life-threatening, would inflict pain and health risks on the individual when denied. See Rhodes v. Chapman, 452 U.S. at 347 (Conditions must not involve the wanton and unnecessary infliction of

pain, nor may they be grossly disproportionate to the severity of the crime warranting imprisonment). Thus, in Farmer v. Brennan, the Supreme Court identified food, clothing, shelter, medical care and reasonable protection as Eighth Amendment requirements. 511 U.S. at 832. Likewise, in Wilson v. Seiter, the Court cited food, warmth, and exercise as identifiable human needs. 501 U.S. at 304. And the Rhodes Court mentioned food, medical care, sanitation, and protection from violence as basic life-s necessities. 452 U.S. at 348. In contrast, the denial of job and educational opportunities are not life-s necessities since their deprivation does not inflict pain. See Rhodes, 452 U.S. at 348; see also: Doe v. Welborn, 110 F.3d 520, 524 (7th Cir. 1997)(fear of assault is not denial of basic life-s necessities); Douglas v. DeBruyn, 936 F.Supp. 572, 578 (S.D. IN 1996)(telephone access is not basic human need).

Whether or not a particular deprivation is objectively serious by rising to the level of a core human need turns not only on the nature and severity of the deprivation, but also on its duration. See Hutto v. Finney, 437 U.S. at 686-687 (A filthy overcrowded cell and diet of grue might be tolerable for a few days and intolerably cruel for weeks or months); Wilson v. Seiter, 501 U.S. at 304-305 (comparing denial of outdoor exercise for prisoners confined almost 24 hours in small cell [violation] with denial of outdoor exercise for prisoners granted dayroom access for 18 hours daily [no violation]); Talib v. Gilley, 138 F.3d 211, 214 n.3 (5th Cir. 1998)(whether deprivation of food constitutes denial of life-s necessities depends on the amount and duration of the deprivation); Harris v. Flemming, 839 F.2d 1232 (7th Cir. 1988)(temporary denial of hygienic items for five days not objectively serious); Richardson v. Spurlock, 260 F.3d 495, 498 (5th Cir. 2001)(intermittent exposure to second-hand tobacco smoke during bus rides not objectively serious).

Keep in mind also that when providing these basic human needs and life-s necessities, the Eighth Amendment does not require the States to provide the best or most desirable conditions; it mandates only reasonably adequate conditions. See Rhodes v. Chapman, 452 U.S. at 347 (that prison conditions are restrictive and even harsh is part of the penalty that criminal offenders pay for their offenses). Thus, while

prisoners are not entitled to clothing of their own choosing, they are entitled to clothing adequate for climate and work conditions. See **Gordon v. Faber**, 973 F.2d 686, 688 (8th Cir. 1992)(Eighth Amendment violation when prisoners ordered outside in sub-freezing temperature without adequate protective clothing); **Fruit v. Norris**, 905 F.2d 1147, 1151 (8th Cir. 1990)(forcing prisoners to work around raw sewage posing health risks without adequate protective clothing states Eighth Amendment claim). Similarly, while prisoners are not entitled to specially-prepared diets (absent health or religious needs), they are entitled to a diet which is nutritionally and calorically adequate. See **Lunsford v. Bennet**, 17 F.3d 1574, 1580 (7th Cir. 1994)(occasional cold and poorly-prepared food not objectively serious where prisoners received three nutritional meals per day); **Jones v. Diamond**, 636 F.2d 1364, 1378 (5th Cir. 1981)(jailhouse diet consisting of mostly starch and vegetables, though dull and tasteless, held constitutional where nutritionally adequate). Likewise, while prisoners are not entitled to a spotless hospital-like setting, prisoners are entitled to reasonable sanitation. See **Helling v. McKinney**, 509 U.S. 25, 35 (1993)(prisoner stated Eighth Amendment claim by alleging that State officials were deliberately indifferent to his future health by exposing him to unreasonable levels of tobacco smoke); **Powell v. Lennon**, 914 F.2d 1459 (11th Cir. 1990)(forcing prisoner to live in dormitory filled with friable asbestos particles states cruel and unusual punishment claim).

Of course, it is insufficient to prove only that prison conditions are objectively serious. Prisoners claiming Eighth Amendment violations must also prove that prison officials have a sufficiently culpable state of mind which, in prison conditions cases, has been defined as deliberate indifference. See **Wilson v. Seiter**, 501 U.S. at 303. Accordingly, a prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety. See **Farmer v. Brennan**, 511 U.S. at 837. Prisoners are not required to show that prison officials failed to correct inhumane confinement conditions for the sole purpose of harming prisoners; however, they must demonstrate that each prison official being sued had knowledge of such conditions yet failed

to take remedial action. See **Beers-Capitol v. Whetzel**, 256 F.3d 120, 138 (3^d Cir. 2001)(deliberate indifference standard requires more than evidence that the defendants should have recognized the excessive risk and responded to it, it requires evidence that the defendant must have recognized the excessive risk and ignored it.); **Burton v. Armontrout**, 975 F.2d 543, 546 (8th Cir. 1992)(where evidence was insufficient to indicate that prison guards knew raw sewage was contaminated with infectious diseases and posed health risks, deliberate indifference not established); **Masonoff v. DuBois**, 853 F.Supp. 26, 29 (D. Mass. 1994)(prisoners not entitled to injunction where they failed to show that prison warden had actual knowledge of harmful conditions).

In conclusion, the lower courts will sustain those Eighth Amendment challenges to prison conditions only when prisoners satisfy the objective and subjective components. For example, in **Palmer v. Johnson**, 193 F.3d 346 (5th Cir. 1999) a prison warden ordered 49 inmates on an outside labor detail to remain overnight in a field for making profane remarks. 193 F.3d at 349. The prisoners were not provided jackets, blankets or other means of keeping warm. 193 F.3d at 349. Meanwhile, the guards wore jackets, stayed by a fire, and periodically retreated to a heated vehicle. 193 F.3d at 349. The Fifth Circuit agreed that the prisoner had demonstrated a violation of his clearly established rights under the Eighth Amendment. 193 F.3d at 353. First, prison officials= refusal to provide the prisoners any protection from the wind and cold constituted denial of basic life-s necessities. 193 F.3d at 353. Secondly, the evidence was clear that the prison warden was deliberately indifferent to the prisoners= health and safety needs because he ordered the overnight confinement in the field and was present during the evening. 193 F.3d at 353.

In **Delaney v. Detella**, 256 F.3d 679 (7th Cir. 2001) a prisoner alleged that his Eighth Amendment rights were violated when he was denied all out-of-cell exercise for six months. 256 F.3d at 681. In discussing the objective component, the Seventh Circuit distinguished short-term denials of exercise, see **Harris v. Fleming**, 839 F.2d 1232, 1236 (7th Cir. 1988)(28 days denial of exercise not serious deprivation), from Delaney=s case in which for six months, he

Remained in a cell the size of a phone booth without any meaningful chance to exercise. 256 F.3d at 684. The Court agreed that Delaney's claim constituted an objectively serious deprivation warranting Eighth Amendment scrutiny. 256 F.3d at 685. Turning to the subjective prong, Delaney alleged that he repeatedly complained to each of the named defendants, filed a grievance, and requested medical attention because of the lack of exercise. 256 F.3d at 686. The Seventh Circuit agreed that Delaney's allegations that the defendants did nothing despite awareness of the medical risks due to the lack of exercise satisfied the subjective element of the Eighth Amendment. 256 F.3d at 686.

In Simmons v. Cook, 154 F.3d 805 (8th Cir. 1998) two paraplegic prisoners brought suit, claiming their Eighth Amendment rights were violated while confined in a segregation unit. 154 F.3d at 806. During their thirty-two hours of segregation, both prisoners missed four consecutive meals because their wheelchairs could not pass the cell bunk to reach the door where the food trays were set. 154 F.3d at 807. Upon being informed of their dilemma, a prison guard responded that "if you get hungry enough, you'll find a way." 154 F.3d at 807. The Eighth Circuit agreed that the prisoners satisfied both the objective and subjective components of the Eighth Amendment. 154 F.3d at 808. Denial of food is a life necessity yet the defendants knew but failed to ensure that appropriate steps were made to avoid the substantial risks associated with confining these paraplegic, wheelchair-bound inmates in these maximum security cells. 154 F.3d at 808.

Finally, in Harris v. Angelina County, Texas, 31 F.3d 331 (5th Cir. 1994) prisoners brought suit claiming that overcrowded conditions at a Texas county jail were unconstitutional. 31 F.3d at 333. In this case, the county jail contained exactly 111 bunks, yet housed as many as 159 inmates, resulting in prisoners sleeping on the floors. 31 F.3d at 335. The overcrowded conditions also led to considerable abuse and intimidation of weaker inmates by stronger prisoners; inadequate medical care; illegal drug use; inadequate recreation; and a total breakdown in security, including the operation of a homemade still and sexual relations between inmates and between inmates

and guards. 31 F.3d at 335. The Fifth Circuit agreed that overcrowding had resulted in a denial of basic human needs of the prisoners. 31 F.3d at 335.

C. Prison Violence

It is well settled that the Constitution does not mandate comfortable prisons. Rhodes v. Chapman, 452 U.S. at 349, and to the extent that such conditions are restrictive and even harsh, they are part of the penalty that criminal offenders pay for their offenses against society. 452 U.S. at 347. It is equally well settled, however, that the Constitution does not permit inhumane conditions of confinement, see Farmer v. Brennan, 511 U.S. at 832, and being violently assaulted by another inmate is simply not part of the penalty that criminal offenders pay for their offenses against society. 511 U.S. at 834.

The Eighth Amendment implications of prisoner violence was addressed in Farmer v. Brennan, 511 U.S. at 825 (1994). At issue in the case was the alleged beating and rape of Dee Farmer at the United States Penitentiary in Terre Haute, Indiana. 511 U.S. at 830. Farmer, a transsexual prisoner with feminine characteristics, contended that prisoner officials violated his Eighth Amendment rights when they transferred him to Terre Haute and placed him in the general population despite knowledge that the institution had a history of prisoner assaults and that Farmer, as a transsexual, would be particularly vulnerable to sexual attack. 511 U.S. at 830-881. The Supreme Court granted certiorari to resolve the differences between the federal courts of appeals over the meaning of "deliberate indifference" in Eighth Amendment litigation. 511 U.S. at 829.

Justice Souter, writing for the Court, began his analysis by acknowledging that prison officials have a duty to protect prisoners from violence at the hands of other prisoners. 511 U.S. at 833. Having confined prisoners for criminal, often violent, conduct and having stripped them of virtually every means of self-protection and foreclosed their access to outside aid, the government and its officials are not free to let the state of nature take its course and permit prisoners to prey upon one another. 511 U.S. at 833. Justice Souter made clear, however,

that not every injury suffered by one prisoner at the hands of another translates into constitutional liability for prison officials. 511 U.S. at 834. Our cases have held that a prison official violates the Eighth Amendment only when two characteristics are met. 511 U.S. at 834. First, the prison condition in question must be objectively serious; this requires a prisoner to prove **that he is incarcerated under conditions posing a substantial risk of serious harm.** 511 U.S. at 834.

What exactly is a substantial risk of serious harm which would satisfy the objective component and trigger further Eighth Amendment scrutiny? The **Farmer** Court gave little guidance in this matter, leaving the lower courts to decide for themselves when prison conditions reach a point of excessive risk of harm. See 511 U.S. at 834 n.3 (At what point a risk of inmate assault becomes sufficiently substantial for Eighth Amendment purposes is a question this case does not present, and we do not address it.). Further clouding the water is the fact that all prisons to some extent are dangerous because they house people with anti-social, depraved, and sometimes violent tendencies. See **Hudson v. Palmer**, 468 U.S. 517, 526 (1984)(stating that prisons are places of involuntary confinement of persons who have demonstrated proclivity for anti-social, criminal, and often violent conduct.). Consequently, incarceration of and by itself would not give rise to a substantial risk of harm. Rather, the prisoner must show either that prisoner violence is widespread, pervasive and uncontrolled or that for reasons specific to the individual prisoner, a substantial or excessive risk of harm exists.

The second requirement B the subjective component B requires proof that prison officials were **deliberately indifferent** to this substantial risk of serious harm. 511 U.S. at 834. Deliberate indifference, according to **Farmer**, should be defined in terms of criminal law recklessness. 511 U.S. at 837. That is to say, a prison official will not be considered reckless or deliberately indifferent unless he **knows of and disregards an excessive risk to inmate health or safety.** 511 U.S. at 837. Thus, prison officials must have knowledge of a substantial risk to inmate safety and disregard that risk to satisfy the deliberate indifference standard. Merely alleging that a prison official should have known of some

substantial risk of harm is no longer sufficient to state an Eighth Amendment claim. See **Farmer**, 511 U.S. at 838 (An official's failure to alleviate a significant risk that he should have perceived but did not, while no cause of commendation, cannot under our cases be condemned as the infliction of punishment).

To establish a constitutional violation, a prisoner need not show that a prison official acted or failed to act believing that harm actually would befall an inmate; it is enough that the official acted or failed to act despite his knowledge of a substantial risk of serious harm. 511 U.S. at 842. Nor will prison officials who are aware of a substantial risk to inmate safety escape liability by arguing that they didn't know beforehand that prisoner A would attack prisoner B. 511 U.S. at 843 (It does not matter whether the risk comes from a single source or multiple sources, any more than it matters whether a prisoner faces an excessive risk of attack for reasons personal to him or because all prisoners in his situation face such a risk.).

In conclusion, a prison official will be held liable under the Eighth Amendment for failure to protect **only if he knows that inmates face a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it.** 511 U.S. at 847. Prisoners can prove these elements in the usual ways, including inference from circumstantial evidence and a fact finder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious. 511 U.S. at 842 (citation omitted).

One scenario which meets the two-part **Farmer** test is when prison officials actually witness an assault by one prisoner upon another and fail to take reasonable action. For example, in **Stubbs v. Dudley**, 849 F.2d 83 (2d Cir. 1988) the plaintiff (Stubbs) was confronted by approximately twenty to thirty prisoners, some armed with weapons. 849 F.2d at 84. Stubbs ran down a corridor yelling for help with his attackers in pursuit. 849 F.2d at 84. A corrections officer, however, closed and locked the corridor door, leaving Stubbs to be severely beaten and stabbed. 849 F.2d at 84. The Second Circuit affirmed the jury award of \$26,000 in compensatory damages, finding deliberate indifference since the prison guard had adequate

time to assess the serious threat facing Stubbs, and a fair opportunity to afford him protection at no risk to himself or the security of the prison but nevertheless callously refused to permit Stubbs to pass with him to safety behind the administration door. 849 F.2d at 86-87. Although a pre-**Farmer** decision, **Stubbs** is a classic example of an Eighth Amendment violation: First, there existed a substantial risk of harm to Stubbs= safety (objective component). Secondly, a prison guard failed to take reasonable action despite knowledge of that serious risk (subjective component).

Similarly, in **Walker v. Norris**, 917 F.2d 1449 (6th Cir. 1990) the evidence revealed one prisoner (Falls) being chased by another prisoner (Eggleston) armed with a knife. 917 F.2d at 1451. Upon reaching a locked grill door, a prison guard refused to allow Falls to pass through despite pleas that he would be killed. 917 F.2d at 1451. Other guards arrived on the scene yet failed to restrain and disarm Eggleston, thereby permitting the attack to continue until it culminated in Falls= death. 917 F.2d at 1451. The Sixth Circuit upheld the \$175,000 compensatory damages award, concluding that the guards= inaction constituted deliberate indifference. 917 F.2d at 1453. Although a pre-**Farmer** decision, **Walker** is consistent with the two essential elements of an Eighth Amendment violation: a serious risk of harm existed (objective component) and failure by State officials to take reasonable action despite knowledge of that risk (subjective component).

These cases do not mean, however, that prison guards must jeopardize their own safety by jumping between two knife-wielding convicts. See **Arnold v. Jones**, 891 F.2d 1370, 1373 (8th Cir. 1989)(failure to intervene in fight involving prisoner armed with lead pipe not deliberate indifference where unarmed guards were vastly outnumbered and intervention may have escalated disturbance); **Williams v. Willits**, 853 F.2d 586, 591 (8th Cir. 1988)(where one guard attempted to physically intervene in fight only to be grabbed and threatened, failure to further intervene while guards were outnumbered was not unreasonable). Keep in mind that the Constitution requires only reasonable action from prison guards in the face of a serious risk of harm, and what is reasonable varies with the circumstances facing them. See **Farmer**, 511

U.S. at 844 (prison officials who actually knew of a substantial risk to inmate safety may be found free from liability if they responded reasonably to the risk, even if the harm ultimately was not averted); **Jones v. Kelly**, 918 F.Supp. 74, 79 (W.D.N.Y. 1995)(even though risk of harm was substantial and prison officials had knowledge of the risk, no deliberate indifference established because timely and reasonable measures were taken to investigate and address plaintiff's concerns for his safety).

Another scenario which would support liability under **Farmer** is where prison officials have knowledge of a substantial risk of harm involving a particular inmate yet fail to take reasonable safety measures to avert the subsequent violence. For example, in **Hamilton v. Leavy**, 117 F.3d 742 (3d Cir. 1997) a Delaware prisoner brought suit claiming that prison officials knew of and disregarded an excessive risk to his safety by placing him in the general population. 117 F.3d at 744. In this case, the plaintiff (Hamilton) was transferred out of Delaware and into the federal prison system for his own protection after several attacks by other inmates, including two stabbings and an assault with a chair. 117 F.3d at 744. Upon return to Delaware, Hamilton cooperated with State authorities in an investigation of drug trafficking at the prison, resulting in the arrest of both guards and inmates. 117 F.3d at 745. Despite being previously assaulted by other inmates and his "snitch" label, Hamilton was housed in the general population where he was again attacked, this time resulting in a fractured jaw. 117 F.3d at 745. The Third Circuit held that Hamilton adequately stated an Eighth Amendment claim and remanded the case back to the lower court for further proceedings. 117 F.3d at 749. First, in light of Hamilton's long history of being assaulted and his widely-known cooperation with State authorities, the Court agreed that placing him in the general population posed a significant risk of harm. 117 F.3d at 747. Secondly, the Court stated that the prison wardens' failure to remove Hamilton from the general population and confine him in protective custody, despite the recommendation of her staff and her personal knowledge of the risk facing Hamilton, suggested deliberate indifference. 117 F.3d at 747-748. See also: **Hutchinson v. McCabe**, 168 F.Supp.2d 101, 103 (S.D.N.Y. 2001)(prison officials who returned assaulted

prisoner back to his cellblock, rather than place him in protective custody as requested, were liable for second assault occurring several hours later).

In **Robinson v. Prunty**, 249 F.3d 862 (9th Cir. 2001) a prisoner brought suit, claiming that prison guards in a California segregation unit were deliberately indifferent to a substantial risk of harm by pairing him together with prisoners of different racial gangs in exercise yards. 249 F.3d at 864. In this case, Robinson, an African-American, was twice placed in the exercise yard with Mexican-American prisoners, both times resulting in fights and use of force by prison guards. 249 F.3d at 864. Robinson made his proof of an objectively serious risk of harm by presenting prison videotapes and incident reports verifying the numerous physical confrontations between inmates of different races. 249 F.3d at 865. The Ninth Circuit affirmed the lower court's rejection of qualified immunity for prison officials, noting that Robinson's evidence paints a gladiator-like scenario, in which prison guards are aware that placing inmates of different races in the yard at the same time presents a serious risk of violent outbreaks. 249 F.3d at 867.

In **Newman v. Holmes**, 122 F.3d 650 (8th Cir. 1997) two prisoners (Newman and Chestnut) were attacked by a third prisoner (Johnson) armed with a knife. 122 F.3d at 651. At the time of the attack, Johnson was under disciplinary lockdown status, requiring him to remain in his cell at all times unless handcuffed and escorted by a prison official. 122 F.3d at 651. The Eighth Circuit affirmed the jury's award of \$500 compensatory damages based upon an Eighth Amendment violation. 122 F.3d at 651. First, the Court agreed that Johnson's release out of his locked cell created an objectively serious risk of harm to both Newman and Chestnut given prison officials' testimony that disciplinary status prisoners are potentially dangerous to others. 122 F.3d at 652. Second, the Court agreed that the jury possessed sufficient circumstantial evidence that the guard's opening of Johnson's cell door in violation of prison regulations amounted to deliberate indifference. 122 F.3d at 653.

In **Miller v. Shelby County**, 93 F.Supp.2d 892 (W.D.Tenn. 2000) a district judge awarded a prisoner \$40,000 compensatory

damages for injuries he sustained while confined in a protective custody unit. 93 F.Supp.2d at 902. In this case, the plaintiff (Miller) was confined in protective custody due to gang-related threats. 93 F.Supp.2d at 895. Miller was attacked and seriously injured when prison officials simultaneously released him and two administratively-segregated gang members from their cells for their daily one-hour exercise and shower period. 93 F.Supp.2d at 895. Oddly enough, Miller, the protective custody prisoner who had committed no misconduct, was required to wear leg irons outside his cell while the two gang members, confined in segregation for fighting and other rule violations, were not. 93 F.Supp.2d at 895. In regards to the objective component, the Court agreed that given the violent and disruptive propensities of the two gang members, prison officials were on notice that the pair posed a physical threat to other inmates in general, and Miller in particular. 93 F.Supp.2d at 899. Secondly, prison officials were deliberately indifferent (subjective component) to this serious risk of assault by allowing the two gang members out of their cells (without leg irons) at the very time Miller was permitted out of his cell (with leg irons). 93 F.Supp.2d at 901.

And in **Marsh v. Butler County Alabama**, 268 F.3d 1014 (11th Cir. 2001) two prisoners severely beaten at the hands of other county inmates brought suit alleging that prison officials were deliberately indifferent to dangerous conditions at the facility. 268 F.3d at 1014. The Eleventh Circuit agreed that the risk of inmate-on-inmate attacks was objectively serious where there was no adequate classification system separating violent from nonviolent prisoners; the cell locks were not functional, allowing inmates to roam freely at all hours; homemade weapons were readily available; and no staff were assigned to maintain security in the housing unit. 268 F.3d at 1029. Turning to the subjective deliberate indifference component, the Court agreed the plaintiffs stated an adequate claim where they alleged that the Warden was both aware of the dangerous risks (since she was provided inspection reports of the jail by state agencies and in light of the many complaints she received from prisoners) and failed to act reasonably in light of those known risks where she did absolutely nothing to alleviate the conditions at the jail, despite repeated warnings and recommendations for how conditions could

be improved.@ 268 F.3d at 1029.

These cases confirm that when a substantial risk of harm exists regarding a particular prisoner, prison officials will be held accountable under the Eighth Amendment when they have knowledge of that risk and fail to respond with reasonable safety measures. Knowledge of a serious risk and failure to act reasonably are the key **Farmer** elements.

On the other hand, the **Farmer** Court made clear that prison officials who have no knowledge of a substantial risk of harm to a particular inmate will not be subject to Eighth Amendment liability. 511 U.S. at 844. For example, in **Smith v. Gray**, 259 F.3d 933 (8th Cir. 2001) segregation prisoners flooded their housing unit in protest over not receiving clean linen. 297 F.3d at 933. Prison officials released one prisoner (Smith) out of his cell to mop up the water despite threats from other prisoners. 259 F.3d at 933. Prison officials then released another prisoner out of his cell who immediately attacked Smith, inflicting various injuries. 259 F.3d at 934. The Eighth Circuit affirmed judgment for the defendants, holding that Smith's evidence did not show that the officers knew that allowing the unrestrained inmate out of his cell presented a significant risk to Smith.@ 259 F.3d at 934.

Likewise, in **Perkins v. Grimes**, 161 F.3d 1127 (8th Cir. 1998) a pretrial detainee (Perkins) arrested for public intoxication was double-celled with another detainee (Wilson) arrested for the same offense. 161 F.3d at 1129. Perkins had previously celled with Wilson without incident. 161 F.3d at 1129. This time, however, Wilson threw Perkins against a wall and raped him. 161 F.3d at 1129. The Eighth Circuit agreed that there was no Eighth Amendment violation since Perkins failed to present sufficient evidence that prison officials knew, or had reason to know, that Wilson was a violent sexual aggressor. 161 F.3d at 1130.

Similarly, in **Webb v. Lawrence County**, 149 F.3d 1131 (8th Cir. 1998) a pretrial detainee (Webb) was double-celled with a maximum security prisoner (Wyman) who subsequently attacked and raped him. 149 F.3d at 1133. The Eighth Circuit agreed that Webb failed to satisfy Eighth Amendment requirements since there

was no evidence that defendants actually knew that Wyman posed a substantial risk of harm to Webb.@ 149 F.3d at 1135. Although the defendants knew that inmate rape is pervasive in the nation's prison system, there was no evidence or allegations that inmate rape is a common occurrence in this particular jail.@ 149 F.3d at 1135. Additionally, while the defendants knew that Wyman was a sex offender, there was no evidence that Wyman had assaulted other prisoners; in fact, Webb had requested Wyman as a cellmate. 149 F.3d at 1135.

In **Baker v. Lehman**, 932 F.Supp. 666 (E.D.PA 1996) a prisoner (Baker) was seriously injured by another prisoner (Jones) armed with a pair of scissors at SCI-Graterford's clothing plant. 932 F.Supp. at 668. Baker survived his wounds and filed suit despite being stabbed repeatedly in the chest. 932 F.Supp. at 669. Citing **Farmer**, the district court concluded that Baker failed to establish an Eighth Amendment violation. First, there existed no evidence that the defendants knew of any tension between the two prisoners or any other facts indicating a substantial risk of assault existed. 932 F.Supp. at 671. The Court also rejected Baker's contentions that the defendants' failure to screen inmates for work in the clothing plant, the availability of scissors, and the presence of one guard for 150 prisoners was sufficient evidence of deliberate indifference. 932 F.Supp. 671. The district judge noted that there was only one other incident of violence inside the clothing plant for the past thirty years. 932 F.Supp. at 671. See also: **Oetken v. Ault**, 137 F.3d 613, 614 (8th Cir. 1998)(where there was no evidence indicating that prison officials knew cellmate posed excessive risk to prisoner, no Eighth Amendment violation despite subsequent attack); **Lewis v. Richards**, 107 F.3d 549, 553 (7th Cir. 1997)(where sexually-assaulted prisoner neither advised authorities that his safety was in jeopardy nor pointed out any facts that authorities possessed to demonstrate he was at risk, Eighth Amendment not violated).

Finally, in **Butera v. Cottey**, 285 F.3d 601 (7th Cir. 2002) prison officials conceded that the plaintiff (Butera) was raped while confined in the local county jail. 285 F.3d at 603. Nonetheless, the Seventh Circuit rejected Eighth Amendment liability since Butera presented no evidence that the Sheriff had prior knowledge of a substantial risk of harm. 285 F.3d at 607. First,

the Court concluded that Butera's vague statements to guards that he was having problems on the block were insufficient to give notice of a specific risk. 285 F.3d at 606. Secondly, the Court agreed that a telephone call from Butera's mother to an unidentified jail employee was likewise insufficient to put the Sheriff on notice of a substantial risk to Butera's safety. 285 F.3d at 607. A finding of deliberate indifference requires a showing that the Sheriff was aware of a substantial risk of serious injury to Butera but nevertheless failed to take appropriate steps to protect him from a known danger. 285 F.3d at 605.

These cases confirm that prison officials are under a constitutional duty to act only when they possess knowledge of a substantial risk of serious harm to inmate safety. Prison officials who have no knowledge of a substantial risk of assault will not be held liable under the Eighth Amendment. See Farmer, 511 U.S. at 844 (Prison officials who lacked knowledge of a risk cannot be said to have inflicted punishment). In addition, prison officials who knew the underlying facts but believed (albeit unsoundly) that the risk to which the facts gave rise was insubstantial or nonexistent also will escape Eighth Amendment liability. Farmer, 511 U.S. at 844; see also Snell v. DeMello, 44 F.Supp.2d 386, 391 (D. Mass. 1999) (where conversation between prisoner and sheriff may have informed sheriff that prisoner faced some risk, there did not exist sufficient evidence to show that sheriff subjectively believed prisoner faced a substantial risk of injury). Finally, prison officials who actually knew of a substantial risk to inmate health or safety may be found free from liability if they responded reasonably to the risk, even if the harm ultimately was not averted. Farmer, 511 U.S. at 844.

To counter these defenses, the plaintiff-prisoner must present clear evidence to the Court establishing that a substantial risk of harm existed either stemming from a particular inmate or inmates in general and that prison authorities were aware of this risk and yet failed to take reasonable safety measures. A prisoner does not have to prove that prison officials intended to harm him through the hands of another inmate. See Farmer, 511 U.S. at 842 (An Eighth Amendment claimant need not show that a prison official acted or failed to act believing that harm actually would befall an

inmate). Nor is it required that a prisoner prove that he gave advance warning to prison officials that he would be assaulted. See Farmer, 511 U.S. at 849 n.10 (Advance notification of a substantial risk of assault posed by a particular fellow prisoner is not required). A prisoner must, however, prove: (1) that he faced an excessive risk of attack (whether from a particular prisoner for reasons personal to him or because all prisoners in his situation face such risks); (2) that prison officials were aware of this excessive risk of harm; and (3) prison officials failed to take reasonable measures to abate this risk. See Farmer, 511 U.S. at 843-844.

Where inmate violence is so widespread and rampant that it creates a pervasive risk of harm to all prisoners (as opposed to a particular inmate), prison officials can also be held liable under the Eighth Amendment if they fail to implement reasonable safety measures to control the violence. See Farmer, 511 U.S. at 842 (where evidence indicates that prisoner violence is longstanding, pervasive, well-documented, or expressly noted by prison officials in the past, a fact finder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious).

For example, in Smith v. Arkansas Department of Corrections, 103 F.3d 637 (8th Cir. 1996) two prisoners were brutally stabbed in an open dormitory-style barracks while asleep. 103 F.3d at 640. One of the prisoners was seriously injured while the other prisoner died of his wounds. 103 F.3d at 640. The injured prisoner and the Estate of the deceased prisoner filed suit, claiming that prison officials' failure to even post a guard inside the open barracks violated their Eighth Amendment rights. 103 F.3d at 640. The Eighth Circuit affirmed both the lower court's injunctive relief (requiring at least two prison guards inside the open barracks) and liability for the stabbing incident. 103 F.3d at 642. The Court noted that violence, robbery, rape, gambling, and use of weapons by inmates are prevalent in the open, unsupervised barracks. 103 F.3d at 645. The evidence clearly supports the existence of an objectively substantial risk of personal injury to Rudd and others who live in these conditions. 103 F.3d at 645. The Court also agreed that prison officials were aware of this objectively intolerable risk of harm and subjectively disregarded it. 103 F.3d at 645.

At what point the number of assaults reaches the level of a pervasive risk of harm to all inmates to be actionable under the Eighth Amendment remains uncertain. See **Farmer**, 511 U.S. at 834 n.3 (AT what point a risk of inmate assault becomes sufficiently substantial for Eighth Amendment purposes is a question this case does not present, and we do not address it.®). Until the Supreme Court grants certiorari in another case to clarify this question, prisoners must rely upon lower court precedent. See **Alberti v. Klevenhagen**, 790 F.2d 1220, 1226-1227 (5th Cir. 1986)(Eighth Amendment violation established based upon 1200 reported acts of prisoner violence each year and prison officials= deliberate indifference to this serious risk of harm by failing to hire adequate staff, ensure regular security patrols, and establish vital stationing of guards); **Stokes v. Delcambre**, 710 F.2d 1120, 1125 (5th Cir. 1983)(Eighth Amendment violation established based upon A reign of terror® at jail and prison officials= deliberate indifference to substantial threat to inmate safety based upon inadequate classification of prisoners and failure to adequately monitor cellblocks); **Tillery v. Owens**, 719 F.Supp. at 1276-1277 (Eighth Amendment violation established based upon 487 reported acts of violence in five-year period and prison officials= deliberate indifference to substantial risks based upon staff shortage, and inadequate searches of prisoners, cellblocks, and work areas).

In conclusion, the Supreme Court in **Farmer** emphasized that prison officials will not be held liable under the Eighth Amendment unless the inmate proves: (1) that a substantial risk of serious harm existed; and (2) prison officials were deliberately indifferent to this substantial risk in the sense they possessed actual knowledge of the risk yet failed to take reasonable security measures to abate it. 511 U.S. at 847.

The **Farmer** Court provided little elaboration as to what it meant by a A substantial risk of serious harm.® Since all prisons are potentially dangerous, the mere fact of being incarcerated is not sufficient by itself to constitute a substantial risk. We believe that a substantial risk of assault means something more than a mere possibility of attack; there must exist facts

indicating that there is at least a strong likelihood of harm. This can be demonstrated from a variety of circumstances. For example, a prisoner required to double-cell with an inmate with a long history of predatory assaultive behavior would face a substantial risk of assault. Likewise, a prisoner who belongs to some identifiable inmate sub-class (such as inmate-informants, child sex offenders, young and weaker inmates, and rival gang members) that are often singled out for prisoner violence may face a substantial risk of assault. Finally, any prisoner placed in an institution in which violence is pervasive and widespread could indeed face a substantial risk of serious harm.

Of course, establishing a substantial risk of serious harm is only the first and objective half of **Farmer's** Eighth Amendment test. Prisoners must also establish that prison officials were subjectively culpable by providing evidence of deliberate indifference. A Deliberate indifference® under **Farmer** consists of two sub-parts: First it requires proof that prison officials had actual knowledge of a substantial risk of serious harm. Second, it requires proof that despite the known risk, prison officials failed to take reasonable action to avert an assault.

Satisfying the knowledge requirement can be accomplished by introducing documentary evidence (such as inmate request slips and grievances) verifying that a particular prison official had direct actual knowledge of a specific and substantial risk of harm. See **Farmer**, 511 U.S. at 847 (urging prisoners to take advantage of inmate grievances which brings safety concerns to the attention of State officials in order to avert prisoner violence and to ease the prisoner's burden in court if the assault does transpire). The knowledge requirement can also be satisfied by circumstantial evidence to the effect that the excessive risk was so obvious that the prison official must have known of the risk. **Farmer**, 511 U.S. at 842. As for the failure to act reasonably in the face of a known risk, the requisite proof will depend on the circumstances of the assault.

D. Sexual Abuse of Female Prisoners

For the most part prisoners= interests in the protections provided by the Eighth Amendment are gender-neutral. That is to say,

all prisoners, male and female, seek adequate medical care when seriously ill, sufficient clothing and shelter to protect them from the elements, and adequate safety and sanitation. Female prisoners, however, face a unique brand of mistreatment subject to Eighth Amendment scrutiny which male prisoners rarely, if ever, encounter: sexual assault by male prison guards. But see **Mathie v. Fries**, 121 F.3d 808, 810-811 (2d Cir. 1997)(male prisoner awarded \$450,000 damages where male prison guard handcuffed him to pipe and raped him).

Judging by newspaper reports, sexual assaults upon female prisoners by male prison guards are a growing problem within local, state and federal correctional systems. More female prisoners are coming forward not only to report sexual abuse by rogue guards but also to file lawsuits against them and their supervisors based on Eighth Amendment's Cruel and Unusual Punishments Clause. In this section, we try to provide some guidance regarding constitutional torts involving allegations of sexual assaults. We do not analyze sexual harassment claims. See **Adkins v. Rodriguez**, 59 F.3d 1034 (10th Cir. 1995)(holding that verbal sexual harassment of female prisoner was not objectively serious enough to constitute cruel and unusual punishment); but see **Berry v. Oswald**, 143 F.3d 1127, 1133 (8th Cir. 1999)(sexual harassment of female prisoner by male prison guard in form of nonroutine patdown searches and verbal harassment stated Eighth Amendment claim where harassment resulted in fear and frustration that was objectively serious and guard's action consistent with Aobduracy and wantonness@).

The key precedent is **Farmer v. Brennan**, 511 U.S. 825 (1994) where the Supreme Court agreed that while the Constitution does not mandate comfortable prisons, it does not permit inhumane ones. 511 U.S. at 832. Being violently assaulted in prison B according to **Farmer B** is simply not part of the penalty that criminal offenders pay for their offenses against society. 511 U.S. at 834. Of course, not every injury suffered by a prisoner gives rise to a constitutional violation. 511 U.S. at 834. A prison official will be held liable under the Eighth Amendment **only if he knows that inmates face a substantial risk of serious harm and disregards that risk by failing to take**

reasonable measures to abate it. 511 U.S. at 847.

Applying this principle to the topic at hand, female prisoners asserting cruel and unusual punishment claims must prove: (1) that there existed an objectively serious risk of harm; and (2) that prison officials were deliberately indifferent to this risk of harm in the sense they possessed knowledge of the risk yet failed to take reasonable safety measures to abate it. 511 U.S. at 842-843.

In most Eighth Amendment sexual assault cases, female prisoners file suit against two sets of individual defendants: (a) the male guard who committed the sexual assault; and (b) the supervisors with oversight responsibilities of the male guard. See **Beers-Capitol v. Whetzel**, 256 F.3d 120 (3d Cir. 2001). We do not address the feasibility of litigation against a State (in cases involving state prisons) or a local municipality (in cases involving a local or county jail). See **Will v. Michigan Department of State Police**, 491 U.S. 58, 71 (1989)(monetary damages suits against States are barred by Eleventh Amendment); **Monell v. Department of Social Services**, 436 U.S. 658, 690-691 (1978)(suits against municipalities allowed only where municipality's policy or custom caused constitutional violation at hand). We confine our analysis solely to state actors sued in their individual capacities for sexual assaults.

Before analyzing the mechanics of Eighth Amendment litigation, a few suggestions for those unfortunate few who find themselves subject to such brutal behavior. We strongly recommend that female prisoners sexually assaulted by male prison guards report the crime immediately without hesitation. No matter how degrading and intrusive post-assault medical examinations and official inquiries are, the alternative is infinitely worse. Sexual predators rarely stop. By reporting the assault immediately (and resisting what must be an overwhelming temptation to cleanse one's body), physical evidence can be gathered and preserved, and credibility will be sustained. Bear in mind that male prison guards confronted with accusations of sexual assault will vehemently deny the misconduct given the enormous stakes at issue (criminal charges and incarceration; termination of employment and loss of pension plan; divorce

and public humiliation). The fact that the accuser is a convicted felon only increases the likelihood that he will deny the assault and rely upon a strategy of testing the female prisoners' credibility. Accordingly, it is critical that the crime be immediately reported in order that physical evidence is preserved and the sexual predator is scientifically tied to his assault.

Assuming a female prisoner can conclusively establish that she was in fact sexually assaulted by a male prison guard, see Carrigan v. Davis, 70 F.Supp.2d 448 (D.Del. 1999)(female prisoner kept condom used in sexual assault rather than throw it away as ordered by guard), satisfying Farmer's Eighth Amendment liability criteria against the sexually assaultive prison guard should be relatively easy.

Under Farmer, a female prisoner must first satisfy the objective component of the Eighth Amendment which requires her to prove that she is incarcerated under conditions posing a substantial risk of serious harm. 511 U.S. at 834. Most judges, even those traditionally opposed to prisoners' rights, are likely to concede that a sexually-assaultive male prison guard does pose a significant risk of serious harm to female prisoners. See Beers-Capitol v. Whetzel, 256 F.3d 120, 130 (3d Cir. 2001)(noting that both parties agreed that Whetzel's sexual assaults upon female juveniles constituted an objectively serious risk of harm); Carrigan v. Davis, 70 F.Supp.2d 448, 454 (D. Del. 1999)(prison guard's sexual contact with female prisoner was objectively serious).

Turning to the subjective component of the Eighth Amendment under Farmer, a female prisoner must establish deliberate indifference which requires proof that a prison official knows that inmates face a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it. 511 U.S. at 847. Obviously, a sexually-assaultive prison guard cannot escape Eighth Amendment liability by claiming a lack of knowledge of his own sexual assault or that he acted reasonably under the circumstances. See Carrigan v. Davis, 70 F.Supp.2d 448, 453 (D. Del. 1999)(sexual contact between a prison inmate and a prison guard constitutes deliberate indifference toward the plaintiff prisoner's well-being, health and safety). Accordingly, a female prisoner with basic

litigation skills (assuming she cannot obtain services of counsel) should find Farmer a low hurdle to clear in terms of Eighth Amendment liability against the sexually abusive prison guard himself. See Beers-Capitol, 256 F.3d at 125 (noting that plaintiffs obtained a \$200,000 judgment against a sexually-assaultive male staff member at a juvenile facility).

Establishing Eighth Amendment liability against supervisory personnel, however, is very difficult under Farmer. Unless a female prisoner is confined in a prison dominated by chaos and dangerous conditions obvious to everyone, see Newby v. District of Columbia, 59 F.Supp.2d 35, 37 (D.D.C. 1999)(Eighth Amendment violation where female prisoners were forced by prison guards to participate in strip-shows), it is challenging to satisfy Farmer's deliberate indifference standard. Keep in mind that the doctrine of respondeat superior (supervisor is automatically liable for acts of his subordinate) is not acceptable as a basis of liability under 42 U.S.C. § 1983. See Rhodes v. Dellarciprete, 845 F.2d 1195, 1207 (3d Cir. 1988); Hampton v. Holmesburg Prison Officials, 546 F.2d 1077, 1082 (3d Cir. 1976). A supervisory official's liability must stem from his own actions or omissions such as personal direction or actual knowledge and acquiescence in the subordinate's conduct.

For example, in Beers-Capitol v. Whetzel, 256 F.3d 120 (3d Cir. 2001) two former female juveniles brought suit claiming a violation of their Eighth Amendment rights after being sexually assaulted by a male staff member (Whetzel). 256 F.3d at 125. Having won a \$200,000 judgment against Whetzel, plaintiffs sought additional damages against Whetzel's supervisors and co-workers for failing to take reasonable protective action in response to Whetzel's history of sexual misconduct against female juveniles. 256 F.3d at 125. Citing Farmer, the Third Circuit held that the defendants could be found liable under the Eighth Amendment only if the officials knew of and disregarded an excessive risk to inmate health and safety. 256 F.3d at 131. Since both parties agreed that the sexual assaults by Whetzel constituted an objectively serious risk of harm, the only question before the Court was whether the supervisors and co-workers were deliberately indifferent to this risk. 256 F.3d at 130. The

Third Circuit agreed that all defendants except one did not have knowledge of Whetzel's sexual assaults against female juveniles. 256 F.3d at 140 (plaintiffs have failed to present evidence that directly shows that Flecher either knew of the excessive risk to the plaintiffs or was aware of such a risk). Accordingly, all defendants were absolved of Eighth Amendment liability with the exception of one counselor who had heard general rumors from the residents that Whetzel was having sex with some of the female residents. 256 F.3d at 141. The Third Circuit concluded that such rumors may have provided the counselor with enough information so as to trigger reasonable action to protect the plaintiffs from sexual assault. 256 F.3d at 142. The matter, however, was not resolved but remanded back to the lower court for further proceedings. 256 F.3d at 144.

Likewise, in Hovater v. Robinson, 1 F.3d 1063 (10th Cir. 1993) a female prisoner brought suit alleging that her Eighth Amendment rights were violated when she was sexually assaulted by a prison guard. 1 F.3d at 1064. The Tenth Circuit held that Hovater failed to establish a claim against the Sheriff since there existed no evidence that the Sheriff had knowledge that the prison guard was a threat to female prisoners. 1 F.3d at 1068 (Had Sheriff Hill possessed information that Mr. Robinson as an individual posed a threat to the safety of female inmates, our decision would be different). The Tenth Circuit also rejected Hovater's argument that allowing a single male officer to have sole custody of a female prisoner for an extended period of time creates by itself a significant risk of assault. 1 F.3d at 1068 (there is no evidence in the present case of an obvious risk that male detention officers will sexually assault female inmates if they are left alone).

In Daniels v. Delaware, 120 F.Supp.2d 411 (D.Del. 2000) a female prisoner (Daniels) brought suit against a prison guard (Hawkins) and his supervisors, claiming her Eighth Amendment rights were violated when she was raped by Hawkins. 120 F.Supp.2d at 416. The supervisor moved for summary judgment, contending that the evidence failed to satisfy Eighth Amendment requirements. 120 F.Supp.2d at 419. The district court agreed. First, plaintiff presented no evidence that the supervisors knew of or acquiesced in defendant Hawkins

conduct. 120 F.Supp.2d at 423. Secondly, even if the supervisor knew that male prison guards were sexually assaulting female prisoners, it was clear that their response including vigorous investigations, disciplinary action against guards, and implementation of strict procedures was sufficient to preclude liability. 120 F.Supp.2d at 421.

In Berry v. Oswald, 143 F.3d 1127 (8th Cir. 1998) a female prisoner brought federal constitutional and state claims against Arkansas prison officials, alleging that she was raped by one male prison guard and sexually harassed by another. 143 F.3d at 1129. According to the record, Laura Berry was raped by Oswald under the threat of disciplinary action and physical violence. 143 F.3d at 1129. Weeks later, Oswald attempted to make Berry take quinine and turpentine to abort the pregnancy. 143 F.3d at 1129. The Eighth Circuit affirmed the jury's finding of liability and damages against Oswald, agreeing that the Eighth Amendment's objective and subjective elements were satisfied by the evidence. 143 F.3d at 1130. The sexual harassment claim was remanded back to the lower court for further proceedings. 143 F.3d at 1131. In regards to Oswald's supervisors, the Eighth Circuit rejected Eighth Amendment liability, stating that the evidence did not show that the supervisors had an awareness that Tucker guards posed a substantial risk to Tucker inmates, or to Berry specifically. 143 F.3d at 1131.

The Farmer Court held that State authorities violate the Eighth Amendment only if **the official knows of and disregards an excessive risk to inmate health or safety.** 511 U.S. at 837. While satisfying this standard against supervisory officials is difficult in sexual assault cases (since sexual predator guards attempt to conceal such outrageous and criminal behavior), it is not impossible.

In Ware v. Jackson County, Mo., 150 F.3d 873 (8th Cir. 1998) a female prisoner (Sylvia Ware) brought suit against prison officials and the local municipality claiming an Eighth Amendment violation when a male prison guard (Toomer) raped her at a county jail. 150 F.3d at 876. The Eighth Circuit affirmed the \$50,000 damages award by the jury against the County and the Director of the county jail. 150 F.3d at 876. In

this case, the evidence revealed that sexual assaults against female prisoners were not limited to a single rogue guard or *Abad apple*. Rather, there existed *Aa* continuing, widespread, and persistent pattern of unconstitutional conduct. 150 F.3d at 881. Male prison guards not only raped female prisoners, conducted strip searches and fondled them at their pleasure, but permitted male prisoners access to their cells to commit sexual assaults and even observe them using the toilet. 150 F.3d at 876-879. Despite receiving complaints regarding the sexual assaults, the failure of Toomer and other guards to pass polygraph tests, and the existence of forensic evidence indicating that female prisoners were being assaulted, the Director of the county jail (Megerman) took no disciplinary action against Toomer and other guards. 150 F.3d at 877. Citing **Farmer**, the Eighth Circuit agreed that *Athe* County's deliberate indifference is evidenced by its failure to discipline CO Toomer and other officers who engaged in sexual misconduct when there was ample evidence that female inmates were placed at substantial risk of serious harm. Further, there is sufficient evidence that the County had notice because Megerman, a final policymaker, knew of CO Toomer's and other officers' sexual misconduct. 150 F.3d at 883.

Another successful ' 1983 prosecution of supervisory officials for a sexual assault on a female prisoner is **Riley v. Olk-Long**, 282 F.3d 592 (8th Cir. 2002). In this case, a male prison guard (Link) with a *Ahistory* of predatory behavior throughout his employment at the prison, 282 F.3d at 594, sexually assaulted prisoner Pamela Riley after several weeks of inappropriate comments and activity. 282 F.3d at 593-594 (confirming once again the absolute need of female prisoners to report suspicious activity by male prison guards). Link was eventually terminated, criminally charged, and convicted of sexual misconduct under Iowa law. 282 F.3d at 594. Riley filed suit alleging that the warden and security director had prior knowledge of Link's sexual misconduct towards female prisoners, including a suspension and work reassignment with limited prisoner contact. 282 F.3d at 596. Citing **Farmer**, the Eighth Circuit affirmed the \$45,000 compensatory and punitive damages award, concluding that the jury could have reasonably concluded that *ALink* was far too significant of a risk to be allowed unsupervised

contact with inmates (objective component of Eighth Amendment) and that the warden and security director were *Adeliberately indifferent* to that substantial risk of harm by failing to take reasonable action to protect Riley despite prior knowledge of the risk Link presented to the female population (subjective component). 282 F.3d at 597.

These cases confirm that absent proof that a particular supervisor had knowledge of a subordinate's sexually assaultive behavior or that sexual assaults against female prisoners were so pervasive and widespread that he must have known of such serious risks, deliberate indifference under **Farmer** is not established.

E. Excessive Force

The use of force to quell prison disturbances and unruly prisoners is a common occurrence in our nation's correctional system. Overcrowded conditions and repressive rules combine with angry and sometimes violent prisoners to produce a tinderbox ready to explode. While prison officials are accorded wide latitude in responding to disturbances and defiant prisoners, their use of force becomes unconstitutional when it is not applied *Ain* a good faith effort to maintain or restore discipline but rather is applied *Amaliciously* and *asadistically* for the very purpose of causing harm. See **Hudson v. McMillian**, 503 U.S. 1, 7 (1992); **Whitley v. Albers**, 475 U.S. 312, 320-321 (1986).

Take the infamous 1971 Attica prison revolt as a hypothetical lesson in excessive force law. See **Al-Jundi v. Mancusi**, 113 F.Supp.2d 441 (W.D.N.Y. 2000) (announcing settlement of Attica prison riot case after nearly two decades in litigation). When state police and prison officials decided after four days of failed negotiations to storm the prison yard using deadly force, it is arguable that the initial use of force was not constitutionally excessive despite the enormous loss of life. Bear in mind that prisoners had moved blindfolded guards onto a catwalk and held knives to their heads immediately prior to the massive assault. 113 F.Supp.2d at 565. While certainly there was indiscriminate shooting, a jury may have concluded that the initial use of force was a *Agood faith effort* to save the lives of the hostages and end the uprising. What transpired after the revolt was put down and state police had

regained control of the facility, however, would unquestionably violate today's Eighth Amendment standards. Prisoners wounded by the gunfire were often left to lie where they fell without medical attention. The remainder of the prisoners were stripped naked and required to run through a gauntlet of state police who beat them senseless with batons and axe handles. 113 F.Supp.2d at 448. Certain prisoners marked as inmate leaders were tortured; one prisoner was forced to lie naked on a table with a football under his chin and told that he would be killed if he moved. 113 F.Supp.2d at 553. Once inside cells, prisoners were further beaten and some subject to Russian roulette. 113 F.Supp.2d at 448. Such post-riot force cannot reasonably be described as a good faith effort to maintain or restore discipline but rather was applied maliciously and sadistically for the very purpose of causing harm. **Whitley**, 475 U.S. at 320-321.

At what point the use of force crosses the line to constitute cruel and unusual punishment has been addressed by the Supreme Court in two cases. At issue in the first case, **Whitley v. Albers**, 475 U.S. 312 (1986) was an Oregon prison riot in which a prison guard was taken hostage. 475 U.S. at 314-315. Whitley, the prison's security manager, led an armed assault team into the cellblock to rescue the hostage. 475 U.S. at 316. Shooting quickly erupted and Albers, a prisoner not involved in the riot, was wounded in the leg. 475 U.S. at 316. The Supreme Court granted certiorari to decide what standard governs a prisoner's right to be free from cruel and unusual punishment when that prisoner is shot by prison officials attempting to quell a prison disturbance. 475 U.S. at 314.

Writing for the majority, Justice O'Connor began by noting that only the unnecessary and wanton infliction of pain constitutes cruel and unusual punishment. 475 U.S. at 319. What constitutes an unnecessary and wanton infliction of pain, however, depends on the context in which the violation is alleged to have occurred. 475 U.S. at 320. For example, in the medical mistreatment context, prisoners need only establish that State officials were deliberately indifferent to serious medical needs because the State's responsibility to attend to the medical needs of prisoners does not ordinarily clash with other equally important governmental responsibilities. 475 U.S. at 320. Under the

tense and dangerous circumstances of a prison riot, however, with the lives of prisoners and staff at stake, a higher state-of-mind standard more deferential to State authorities is required. 475 U.S. at 320.

The **Whitley** majority held that the Eighth Amendment is not violated when prison officials use force to suppress a prison disturbance as long as the force is used in a **good faith effort to maintain or restore discipline** and is not used **maliciously and sadistically for the very purpose of causing harm**. 475 U.S. at 320-321. In determining whether prison officials acted in good faith or maliciously and sadistically depends upon the evaluation of such factors as:

1. the need for the application of force;
2. the relationship between the need and the amount of force actually used;
3. the extent of injury inflicted;
4. the extent of the threat to the safety of staff and inmates, as reasonably perceived by responsible officials on the basis of the facts known to them; and
5. the efforts made to lessen the severity of the use of force.

Whitley, 475 U.S. at 321.

Applying these factors to the case at hand, Justice O'Connor concluded that prison officials had not violated Albers' Eighth Amendment rights because the shooting was part and parcel of a good faith effort to restore order and protect the life of the hostage. 475 U.S. at 326.

Before proceeding, it should be emphasized that the **Whitley** Court focused solely upon the subjective component of Eighth Amendment law. Since Albers had been shot in the leg, the adequacy of Albers' proof of an objectively serious injury was not at issue.

Whereas **Whitley** focused upon the subjective component of the Eighth Amendment

and held that a malicious and sadistic test was the appropriate level of proof in an excessive force case, the Supreme Court's review in Hudson v. McMillian, 503 U.S. 1 (1992) would focus on the objective component. At issue in Hudson was the beating of Louisiana prisoner Keith Hudson by two prison guards. 503 U.S. at 4. According to the record, the guards punched and kicked Hudson while he was handcuffed and shackled. 503 U.S. at 4. Their supervisor watched the beating, only interjecting to tell the two guards not to have too much fun. 501 U.S. at 4. As a result, Hudson suffered minor bruises and swelling in addition to loosened teeth and a cracked dental plate. 503 U.S. at 4. The Supreme Court granted certiorari to decide whether the use of excessive force against a prisoner constitutes cruel and unusual punishment when the prisoner does not suffer serious injury. 503 U.S. at 4.

By a 7-2 vote, the Supreme Court held that the use of excessive force against a prisoner may constitute cruel and unusual punishment despite the absence of significant injury. 503 U.S. at 9. Justice O'Connor, once again writing for the majority, held that whenever prison officials are accused of using excessive force, **the core judicial inquiry is that set out in Whitley: whether force was applied in a good faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm.** 503 U.S. at 7. The Court thus extended the subjective state-of-mind standard previously adopted in Whitley to all cases involving allegations of excessive force. 503 U.S. at 6-7.

Turning to the matter of Hudson's injuries, Justice O'Connor acknowledged that the extent of a prisoner's injuries should be considered in an excessive force case. 503 U.S. at 7. However, the seriousness of an injury is but one factor to consider when determining whether the force was used in a good faith effort to maintain or restore discipline or was an unjustified and wanton infliction of harm. 503 U.S. at 7. Other determinate factors include whether the force was necessary, the relationship between the necessity and the amount of force applied, the threat to the prison officials' safety and any efforts made to temper the severity of a forceful response. 503 U.S. at 7. Thus, while the extent of a prisoner's injuries is one factor that the courts may consider, significant injury to the

prisoner is not a threshold or dispositive requirement for an excessive force claim. 503 U.S. at 9. **(When prison officials maliciously and sadistically use force to cause harm, contemporary standards of decency always are violated. This is true whether or not significant injury is evident.)** (citation omitted). Otherwise, reasoned Justice O'Connor, the Eighth Amendment would permit any physical punishment, no matter how diabolic or inhuman, inflicting less than some arbitrary quantity of injury. 503 U.S. at 9. Justice O'Connor went on to note, however, that not every malevolent touch by a prison guard gives rise to a federal cause of action. 503 U.S. at 9. De minimis uses of force are still excluded from the purview of the Eighth Amendment. 503 U.S. at 10. In this case, however, the Court determined that Hudson's injuries, including bruises, swelling, loosened teeth, and a cracked dental plate are not de minimis for Eighth Amendment purposes. 503 U.S. at 10.

In light of Whitley and Hudson, it is clear that whether the force used against a prisoner constitutes unnecessary and wanton pain, and hence cruel and unusual punishment, hinges on one pivotal question: Was the force applied in a good faith effort to maintain or restore discipline, or was it applied maliciously and sadistically to cause harm? In asking this determination, the lower courts will examine all of the Whitley factors and not simply the extent of the prisoner's injuries. When prison officials use force maliciously and sadistically to cause harm, the Eighth Amendment is automatically violated whether or not significant injury is evident. Hudson, 503 U.S. at 9. Accordingly, while the fact that a prisoner did not suffer a significant injury may weaken his claim that prison guards used force maliciously and sadistically, the absence of significant injury is not dispositive in excessive force cases. Hudson, 503 U.S. at 7.

For example, in Brooks v. Kyler, 204 F.3d 102 (3d Cir. 2000) a Camp Hill prisoner brought suit, claiming that prison guards repeatedly punched and kicked him while he was handcuffed to a waist restraint belt. 204 F.3d at 104. The district court granted summary judgment to the defendants, accepting their argument that the medical evidence in the record only revealed a few scratches to Brooks' neck and wrists and therefore constitutes only a de

de minimis use of force. 204 F.3d at 105. The Third Circuit reversed and remanded the case back to the lower court. 204 F.3d at 109. First, the Third Circuit held that Brooks' allegations of three guards repeatedly punching and kicking him, rendering him unconscious, Arises far above the de minimis level and thus created a dispute of material fact which could not be resolved on summary judgment. 204 F.3d at 107. Secondly, the Third Circuit held that the extent of injury is but one factor to be considered in the **Hudson** analysis and that the absence of objective proof of non-de minimis injury does not alone warrant dismissal. 204 F.3d at 108.

So what proof should a prisoner make to establish an excessive force claim under **Whitley** and **Hudson**? In regards to the objective component of the Eighth Amendment, he should provide evidence (such as prison medical records) documenting whatever injuries were sustained during the incident. Keep in mind that if a prisoner's injuries were not de minimis, the use of force creating such injuries was not de minimis either. While the **Hudson** Court agreed that a showing of significant injury was not required, the extent of a prisoner's injury is one factor examined by the courts to determine whether the force applied was maliciously and sadistically motivated. 503 U.S. at 7. Consequently, the prisoner should introduce at the complaint stage and at trial all available evidence of injury even if the only injury sustained was psychological in nature. See **Hudson**, 503 U.S. at 16-17 (Blackmun, J., concurring).

Under **Hudson** and **Whitley**, a finding of an Eighth Amendment violation is dependent upon the subjective intent of the prison guards applying the force: Was it a good faith effort to maintain or restore discipline or was the force used maliciously and sadistically for the very purpose of causing harm? See **Whitley**, 475 U.S. at 321; **Hudson**, 503 U.S. at 7. Based upon consideration of these factors, inferences may be drawn as to whether the use of force could plausibly have been thought necessary, or instead evinced such wantonness with respect to the unjustified infliction of harm as is tantamount to a knowing willingness that it occur. **Whitley**, 475 U.S. at 321.

In **Jeffers v. Gomez**, 267 F.3d 895 (9th Cir. 2001) the plaintiff-prisoner was shot in the

neck by a prison guard during one of the largest disturbances in the history of the California Department of Corrections. 267 F.3d at 901. The prison riot, involving 150-200 prisoners, was triggered when Hispanic inmates attacked African-American inmates in the yard. 267 F.3d at 901. Prison guards responded with batons, pepper spray, .37MM launchers, and mini-14 rifles to quell the disturbance. 267 F.3d at 901. One prisoner was killed, fourteen prisoners and staff were sent to the outside hospital for emergency treatment, and sixty people were treated at the prison clinic. 267 F.3d at 916. The plaintiff in this case was playing chess at a bench when he was attacked by a Hispanic inmate armed with a weapon. 267 F.3d at 902. During the struggle between the two prisoners, a prison guard opened fire shooting plaintiff in the neck. 267 F.3d at 902. Citing **Whitley**, the Ninth Circuit held that the shooting did not violate the Eighth Amendment since it was neither malicious nor sadistic but rather a good faith attempt to bring the disturbance under control. 267 F.3d at 912.

When prison officials maliciously and sadistically use force to cause harm, contemporary standards of decency always are violated. This is true whether or not significant injury is evident. Otherwise, the Eighth Amendment would permit any physical punishment, no matter how diabolic or inhuman, inflicting less than some arbitrary quantity of injury.

Hudson v. McMillian, 503 U.S. 1, 9 (1992).

In **Williams v. Burton**, 943 F.2d 1572 (11th Cir. 1991) a prisoner (Williams) with a long history of disciplinary violations, including assault and inciting riots, cursed at and threatened to kill prison guards during his weekly administrative review. 943 F.2d at 1574. Other inmates joined in the commotion while Williams yelled, cursed and spit on prison guards. 943 F.2d at 1574. Fearing the unrest was getting out of control, prison officials placed Williams into four-point restraints in his cell and taped gauze padding over his mouth. 943 F.2d at 1574. The Eleventh Circuit concluded that prison officials, faced with a potential spreading of the disturbance, did not apply force maliciously and sadistically. 943 F.2d at 1575. The restraints were necessary to prevent Williams from harming himself or prison guards and the tape was needed to prevent Williams from encouraging others to join in the

unrest. 943 F.2d 1575. Although the Court had difficulty with the fact that Williams was restrained for over twenty-eight hours (absent short breaks to eat, use the toilet, and exercise), the force was nonetheless upheld given the substantial deference owed to prison officials. 943 F.2d 1576.

In **Jones v. Shields**, 207 F.3d 491 (8th Cir. 2000) the prisoner was sprayed with pepper spray after he questioned a prison guard's order to return to his barracks after refusing to mop the floor. 207 F.3d at 492-493. The Eighth Circuit found that the pepper spraying was not malicious or sadistic but rather a de minimis use of force to control a recalcitrant inmate. 207 F.3d at 496-497. The Court specifically relied on the fact that the chemical agent was not used in excessive quantities and had no lingering effects since the prisoner was provided medical treatment within minutes of the spraying. 207 F.3d at 497.

In **Fuentes v. Wagner**, 206 F.3d 335 (3d Cir. 2000) a Berks County prisoner claimed cruel and unusual punishment when county authorities placed him in a restraint chair after a physical melee with prison guards. 206 F.3d at 335. According to the record, Fuentes was placed in the restraint chair for eight hours, during which his arms were handcuffed behind his back, his legs were shackled, and restraint belts were fastened across his chest and lap. 206 F.3d at 339-340. Fuentes was checked every fifteen minutes and released every two hours for a ten-minute period of stretching, exercise and use of the toilet. 206 F.3d at 340. The Third Circuit rejected Fuentes' Eighth Amendment challenge, concluding there is no evidence that prison officials placed him in the chair maliciously and sadistically to cause harm. 206 F.3d at 345. This case is disturbing not only because it approves the use of such medieval-like torture devices, but also because of its questionable analysis. Since prison officials conceded that Fuentes was neither resisting or physically combative prior to placement in the restraint chair, why was any further force authorized or deemed constitutionally acceptable? The general rule is that once the need for force evaporates, no further force is allowed. The Third Circuit panel, however, provided little analysis of the **Whitley** factors other than stating that even if prison officials overreacted by using the restraint

chair, such overreaction would still fall short of supporting a finding that prison officials acted maliciously and sadistically to cause harm. 206 F.3d at 346.

In **Outlaw v. Newkirk**, 259 F.3d 833 (7th Cir. 2001) a prisoner brought suit alleging excessive force when a prison guard slammed shut on his hand the small cuffport opening in a cell door. 259 F.3d at 834. The Seventh Circuit concluded that closing the door opening on the prisoner's hand was either accidental (which is not cognizable under the Eighth Amendment) or was intentional to achieve a legitimate security interest (to prevent prisoners from throwing feces, urine and other harmful matter at guards through the cuffport openings). 259 F.3d at 839. The Court held that closing the cuffport opening was a de minimis use of force where the prisoner's injury was minor and there was no other credible evidence that the guards shut the door maliciously and sadistically for the very purpose of causing harm. 259 U.S. at 840.

These cases confirm that the lower courts will not sustain a prisoner's Eighth Amendment claim unless he introduces evidence satisfying the **Whitley** and **Hudson** malicious-and-sadistic test. The use of force becomes an Eighth Amendment violation when the intent of prison guards is not to maintain or restore discipline but rather to maliciously and sadistically cause harm to the prisoner; To make this requisite proof, prisoners should closely examine all the circumstances surrounding the use of force in light of the five **Whitley** factors to determine what evidence exists to support a malicious-and-sadistic standard. Was there a need to apply force? Was the force actually used reasonably related to its need? What were the extent of the prisoner's injuries? Did there exist a threat to the safety of staff and other inmates when the force was applied? Did prison guards make any efforts to lessen the severity of the use of force? Only through an honest application of these factors to a particular use of force can the prisoner-litigant identify relevant evidence which would support inferences that the force applied was done so maliciously and sadistically.

At issue in **Skrnich v. Thornton**, 280 F.3d 1295 (11th Cir. 2002) was the appropriateness of awarding qualified immunity to prison officials involved in a severe beating of a

prisoner. 280 F.3d at 1299. In this case, a prisoner confined in segregation for stabbing a prison guard and other disciplinary infractions refused to vacate his cell for a cell search. 280 F.3d at 1299. A cell extraction team entered the cell and used an electronic shield to shock the prisoner, knocking him to the floor. 280 F.3d at 1299. Although no longer resisting, prison guards repeatedly kicked and punched the prisoner, requiring him to be airlifted to an outside hospital. 280 F.3d at 1300. (noting that doctors found shoe impressions on the prisoner's back and chest from the beating). Citing Whitley, the Eleventh Circuit rejected qualified immunity, holding that the law was clearly established that prison officials cannot use force maliciously and sadistically for the very purpose of causing harm. 280 F.3d at 1301. In this case, it was conceded that the initial use of the electronic shield to shock the prisoner was lawful in light of his noncompliance to submit to a cell search. 280 F.3d at 1301-1302. However, once incapacitated by the electronic shield and no longer resisting, the use of force must stop when the need for it to maintain or restore discipline no longer exists. 280 F.3d at 1304. **The argument that beating a prisoner for noncompliance with a guard's orders after the prisoner has ceased to disobey or resist turns the clearly established law of excessive force on its head and changes the purpose of qualified immunity in excessive force cases from one of protection for the legitimate use of force into a shield for clearly illegal conduct.** 280 F.3d at 1304.

In Fouk v. Charrier, 262 F.3d 687 (8th Cir. 2001) a prisoner brought suit claiming excessive force when a prison guard sprayed him with pepper spray. 262 F.3d at 692. In this case, Fouk became agitated and threatening when prison guards woke him several times to eat. 262 F.3d at 692. Prison guards entered the cell, ordered Fouk to stand against the wall, and then removed the bed and other items from the cell. 262 F.3d at 692. As they left the cell, a prison guard sprayed Fouk with pepper spray. 262 F.3d at 692. When Fouk asked who sprayed him, a guard told him to come to the door to see his name tag. 262 F.3d at 692. When Fouk did as the guard suggested, and put his face up to the screened window, he was sprayed a second time directly into the face. 262 F.3d at 692. Fouk was not provided any medical assistance and could not wipe his face clean of the chemical

agent since there was no running water in the cell. 262 F.3d at 692. The Eighth Circuit agreed that the use of force was malicious and sadistic. 262 F.3d at 702. The Court noted that the guard enticed Fouk to put his face up to the screened window for the sole purpose of spraying him directly in the face. 262 F.3d at 701. At the time, the cell door was locked and Fouk had been compliant with the guard's orders. 262 F.3d at 701. Finally, Fouk was never given any medical attention to lessen the severity of the pepper spray and had no ability to wash it off for several days. 262 F.3d at 701.

In Davis v. Locke, 936 F.2d 1208 (11th Cir. 1991) a prisoner was recaptured after attempting to escape and confined in a dog cage in the back of a truck with his hands handcuffed behind his back. 936 F.2d at 1210. Prison guards pulled him from the cage by his ankles, resulting in severe psychological injuries when he landed on his head. 936 F.2d at 1210. The Eleventh Circuit agreed that the force used was clearly excessive since Davis posed no threat to prison guards after his recapture and confinement in the dog cage. 936 F.2d at 1212-1213.

In Thomas v. Stalter, 20 F.3d 298 (7th Cir. 1994) a prisoner attempted to resist the efforts of prison officials to extract a court-ordered blood sample to aid in an investigation of a stabbing at the facility. 20 F.3d at 300. Although physically resisting, ten prison guards eventually placed Thomas on a gurney and held him down. 20 F.3d at 302. One prison guard, however, drew back and hit Thomas in the mouth with a clenched fist. 20 F.3d at 302. Viewing the evidence in the light most favorable to Mr. Thomas, Officer Heath hit Mr. Thomas in the mouth with a clenched fist while Mr. Thomas was held immobilized by at least nine other people. A punch in the face to subdue Mr. Thomas was not necessary to carry out the court order. The apparent lack of reason for the blow, the fact that Heath used a clenched fist, and the fact that Heath then said "shut up" can be interpreted reasonably as establishing that Heath's action was not a good faith effort to maintain or restore discipline, but rather was done maliciously and sadistically to cause harm. 20 F.3d at 302 (citation omitted).

In conclusion, the Cruel and Unusual

Punishments Clause of the Eighth Amendment is violated only when prison guards use force maliciously and sadistically for the very purpose of causing harm. To satisfy this standard, the courts do not require an express confession or admission from prison guards that their intent was to harm the prisoner. Nor must a prisoner prove significant or serious injury to satisfy the malicious-and-sadistic test. However, he must present evidence in which reasonable inferences can be drawn that the intent of prison guards was not to maintain or restore discipline but rather to inflict harm.

VI. EQUAL PROTECTION AND EX POST FACTO RIGHTS

A. Equal Protection

The Equal Protection Clause of the Fourteenth Amendment mandates that no State shall deny to any person within its jurisdiction the equal protection of the laws. U.S. Const. Amend. XIV, '1. This provision creates no substantive rights. See Vacco v. Quill, 521 U.S. 793, 799 (1997). Instead, it is essentially a direction that all persons similarly situated should be treated alike. City of Cleburne, Texas v. Cleburne Living Center, 473 U.S. 432, 439 (1985); see also Vacco, 521 U.S. at 799 (Equal Protection Clause embodies a general rule that States must treat like cases alike but may treat unlike cases accordingly).

To prevail on an equal protection claim, a prisoner must prove: (1) that the State treated him or her differently from others who were similarly situated; and (2) that the difference in treatment was not rationally related to any legitimate governmental interest. See Village of Willowbrook v. Olech, 528 U.S. 562, 564 (2000) (per curiam) (equal protection claim requires plaintiff to allege that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment).

1. Similarly-situated

At its core, the Equal Protection Clause prohibits the disparate treatment of similarly situated individuals. See City of Cleburne, 475 U.S. at 439; Plyler v. Doe, 456 U.S. 202, 216 (1982). Thus, the threshold question in every

equal protection challenge to State policy is whether the plaintiff was treated differently than others who were similarly situated. Unless the group or class of persons which receives favorable treatment is similarly situated to the plaintiff, there is no valid equal protection claim. See Johnson v. Smith, 696 F.2d 1334, 1337 (11th Cir. 1983) (If the group to which the petitioner belongs is not situated similarly to the group receiving the benefits to which he claims entitlement, no equal protection problem is presented. If the two groups are similarly situated, then a rational reason for the disparate treatment must exist in order to avoid a denial of equal protection of the laws.).

In Timm v. Gunter, 917 F.2d 1093 (8th Cir. 1990) male prisoners brought suit alleging that their equal protection rights were violated because female prisoners were provided more privacy protection at all-female facilities than male prisoners were afforded at all-male institutions. 917 F.2d at 1103. The Eighth Circuit rejected the claim, finding that male prisoners and female prisoners were not similarly situated since the security concerns at male prisons (greater violence, escapes and contraband) were different than the security concerns at female facilities. 917 F.2d at 1103.

In Keevan v. Smith, 100 F.3d 644 (8th Cir. 1996) female prisoners brought suit alleging that State prison officials discriminated against them on the basis of gender by failing to provide them access to educational programs and prison industry employment equal to that provided male prisoners. 100 F.3d at 645. Once again, the Eighth Circuit rejected the claim, concluding that female inmates as a group and male inmates as a group simply cannot be considered similarly situated for purposes of comparing the availability and variety of prison programming. 100 F.3d at 649.

In Noble v. U.S. Parole Commission, 194 F.3d 152 (D.C. Cir. 1999) a District of Columbia (D.C.) prisoner transferred to the federal prison system (due to overcrowding) alleged that he was denied credit for parole time while other D.C. prisoners housed in D.C. prisons were given time credits for parole time. 194 F.3d at 154. The Court held that Noble was not similarly situated to the other D.C. prisoners. 194 F.3d at 154. A Noble cannot show that he has

been treated differently from prisoners under the supervision of the U.S. Parole Commission because all have been treated in exactly the same way.,@ 194 F.3d at 154.

In summary, equal protection of the law requires that all persons similarly situated be treated alike; where persons of different classes are treated differently, there is no equal protection violation.

2 Whether a Rational relationship exists. ?

When State statutory or regulatory law treats similarly situated persons differently, the disparate treatment will be upheld as long as it bears a rational relation to some legitimate end.@ Romer v. Evans, 517 U.S. 620, 631 (1996); see also: Heller v. Doe, 509 U.S. at 320 (A classification cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose@); City of Cleburne, 473 U.S. at 440 (The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest.@).

Rational relationship@ review has been described by the Supreme Court as the most relaxed and tolerant form of judicial scrutiny under the Equal Protection Clause.@ See Dallas v. Stanglin, 490 U.S. 19, 26 (1989). The essential question of rational basis scrutiny is not whether the State's policy lacks wisdom, fairness and logic but simply whether it is rational in light of the State's objectives. See Heller, 509 U.S. at 319-320. State policy is presumed constitutional and must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification. See FCC v. Beach Communications, Inc., 508 U.S. 307, 313 (1993). That State policy is based upon Rational speculation unsupported by evidence or empirical data,@ is insufficient to sustain an equal protection challenge. Beach Communications, 508 U.S. at 315. That state policy is unwise or works to the disadvantage of a particular group or if the rationale seems tenuous is likewise insufficient to sustain an equal protection challenge. See Romer, 517 U.S. at 632. Finally, the state Ahas

no obligation to produce evidence to sustain the rationality of a statutory classification.@ Heller, 509 U.S. at 320. Rather, the burden is on the one attacking the legislative arrangement to negate every conceivable basis which might support it. See Heller, 509 U.S. at 320.

(A) classification neither involving fundamental rights nor proceeding along suspect lines is accorded a strong presumption of validity. Such a classification cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose.

Heller v. Doe, 509 U.S. 312, 319-320 (1993)(citation omitted).

Under Rational relationship@ review, the lower courts make a two-part inquiry: First, the lower courts must determine whether a legitimate governmental interest is at stake (such as prison security, inmate rehabilitation, deterrence of crime, etc.). Secondly, the courts will determine whether the differential treatment of similarly situated persons is rationally related to this legitimate governmental interest. State legislative and regulatory acts will be upheld under rational basis review so long as it is rationally related to some legitimate governmental interest.

In Glauder v. Miller, 184 F.3d 1053 (9th Cir. 1999) a prisoner alleged that his equal protection rights were violated because Nevada law required only sex offenders to obtain preparole certification that they were Anot a menace to the health, safety, or morals of others.@ 184 F.3d at 1054. The Ninth Circuit rejected the challenge, finding that since sex offenders have a higher recidivism rate than other criminals, the requirement that only sex offenders obtain preparole certification was rationally related to the State's legitimate interest in crime prevention. 184 F.3d at 1054.

In Shifrin v. Fields, 39 F.3d 1112 (10th Cir. 1994) a prisoner alleged that his equal protection rights were violated because Oklahoma law excluded only repeat and violent offenders from receiving Aemergency time credits.@ 39 F.3d at 1113. The Tenth Circuit rejected the challenge, finding that the differential treatment was rationally related to the State's

legitimate interest in protecting society because repeat and violent offenders pose greater threats than other prisoners. 39 F.3d at 1113; see also: **Keeton v. Oklahoma**, 32 F.3d 451 (10th Cir. 1994)(same).

In **Griffin v. Vaughn**, 112 F.3d 703 (3d Cir. 1997) a prisoner alleged that his equal protection rights were violated because prison classification policies allowed him to be confined in segregation longer for investigative purposes than prisoners actually found guilty of misconduct. 112 F.3d at 709. The Third Circuit rejected the challenge, holding that the differential treatment was rationally related to the prison's legitimate security interests in controlling prisoners suspected of misconduct. 112 F.3d at 709.

Since a rational relationship review is extremely deferential to State authority, it is not surprising that prisoners' equal protection challenges are rarely successful. This test demands a strong presumption of constitutionality of State action and the courts will invalidate only those laws which have no rational relationship to any legitimate governmental interest. See **Romer v. Evans**, 517 U.S. at 635 (striking down Colorado's Amendment 2, under rational relationship review, which prohibited all government action designed to protect homosexuals from discrimination).

The general rule that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest, **City of Cleburne**, 473 U.S. at 440, gives way, however, when State legislation burdens a fundamental right or targets a suspect class. When State law impacts a fundamental right or categorizes on the basis of an inherently suspect characteristic such as race, alienage, national origin or gender a heightened standard of equal protection review is applied. To these matters, we now turn.

3. Suspect classifications

State laws, regulations and practices which burden a suspect class are subject to strict scrutiny review and will be sustained only if they are suitably tailored to serve a compelling state interest. See **City of Cleburne**, 473 U.S.

at 440. The Supreme Court has reasoned that such factors are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy. A view that those in the burdened class are not as worthy or deserving as others. **City of Cleburne**, 473 U.S. at 440. A suspect class for equal protection purposes generally refers to a group that has suffered a history of discrimination and exhibits obvious distinguishing characteristics that define them as a discreet group. Thus far, the Supreme Court has identified three suspect classifications warranting strict scrutiny review: race, alienage and national origin. See **Adarand Constructors Inc. v. Peña**, 515 U.S. 200, 227 (1995)(all government action based on race must be analyzed by reviewing court under strict scrutiny); **City of Cleburne**, 473 U.S. at 440 (rational basis review gives way to strict scrutiny when a statute classifies by race, alienage, or national origin); **Graham v. Richardson**, 403 U.S. 365, 372 (1971)(classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny).

The courts have repeatedly held that prisoners are not a suspect class warranting a heightened standard of equal protection review. See **Abdul-Akbar v. McKelvie**, 239 F.3d 307, 317 (3d Cir. 2001)(Neither prisoners nor indigents are suspect classes); **Boivin v. Black**, 225 F.3d 36, 42 (1st Cir. 2000)(Prisoners simply are not a suspect class); **Nicholas v. Tucker**, 114 F.3d 17, 20 (2d Cir. 1997)(Inmates are not a suspect class such that a more exacting scrutiny is required). The Supreme Court has also determined that other individual characteristics such as age, mental retardation, poverty and homosexuality are likewise non-suspect classes requiring only rational basis review. See **Romer v. Evans**, 517 U.S. 620 (1996)(applying rational relationship test to Colorado Amendment banning governmental action to protect homosexuals from discrimination); **City of Cleburne**, 473 U.S. at 442 (mentally retarded are non-suspect class); **Harris v. McRae**, 448 U.S. 297, 323 (1980)(Poverty, standing alone, is not a suspect class); **Massachusetts Board of Retirement v. Murgia**, 427 U.S. 307, 313 (1976)(the aged are not suspect class).

The general rule gives way, however, when a

statute classifies by race, alienage, or national origin. These factors are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy. In a view that those in the burdened class are not as worthy or deserving as others. For these reasons and because such discrimination is unlikely to be soon rectified by legislative means, these laws are subjected to strict scrutiny and will be sustained only if they are suitably tailored to serve a compelling state interest.

City of Cleburne, Texas v. Cleburne Living Center, 473 U.S. 432, 440 (1985).

If State law explicitly treats similarly situated persons differently based on suspect classifications such as race, the status or policy will be upheld only if it is narrowly tailored to serve a compelling State interest. See **Hunt v. Cromartie**, 526 U.S. 541, 546 (1999) (When racial classifications are explicit, no inquiry into legislative purpose is necessary.); **City of Cleburne**, 473 U.S. at 440 (when statute classifies by race, alienage, or national origin, these laws are subjected to strict scrutiny and will be sustained only if they are suitably tailored to serve a compelling state interest.). Accordingly, the Supreme Court has struck down State laws which explicitly segregated citizens by race absent any compelling governmental interest. See **Brown v. Board of Education**, 347 U.S. 483 (1954) (maintenance of racially separate schools violates equal protection); **Loving v. Commonwealth of Virginia**, 388 U.S. 1, 11 (1967) (State statute banning interracial marriage violates equal protection where no legitimate overriding purpose independent of invidious racial discrimination. . . . justifies this classification.).

If State law is facially neutral, that is, it does not employ suspect classifications on its face, then the strict scrutiny test comes into play only if the plaintiff can prove that the law is intentionally enforced or applied using suspect classifications. See **Hunt v. Cromartie**, 526 U.S. at 546 (A facially neutral law, on the other hand, warrants strict scrutiny only if it can be proved that the law was motivated by a racial purpose or object, or if it is unexplainable on grounds other than race.) (citations omitted); **Village of Arlington Heights v. Metropolitan Housing**

Development, 429 U.S. 252, 265 (1977) (Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause.).

Whether or not State law and practices are motivated by intentional or purposeful discrimination is not a simple matter; on the contrary, it is an inherently complex endeavor, one requiring the trial court to perform a sensitive inquiry into such circumstantial and direct evidence of intent as may be available. See **Hunt v. Cromartie**, 526 U.S. at 546 (citations omitted). The Supreme Court has made it clear that official action will not be held unconstitutional solely because it results in a racially disproportionate impact. See **Arlington Heights**, 429 U.S. at 264-265. Proof of disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination. See **Washington v. Davis**, 426 U.S. 229, 242 (1976). Among other factors besides impact that may shed some light on whether invidious discrimination is a motivating factor behind State action would include the specific sequence of events leading up to the challenged decision and the historical background of the legislative or administrative body. See **Arlington Heights**, 429 U.S. at 267-268.

Applying these standards to the prison context, it is clear that if similarly situated prisoners are subject to differential treatment based explicitly upon race and other suspect classifications, equal protection is violated absent proof that such treatment is narrowly tailored to serve a compelling governmental interest. Thus, in **Lee v. Washington**, 390 U.S. 333 (1968) (per curiam) the Supreme Court upheld a lower court's decision that certain Alabama statutes requiring segregation of the races in prison and jails were an unconstitutional violation of the Fourteenth Amendment. 390 U.S. at 333. In a concurring opinion authored by Justice Black, however, it was noted that prison authorities have the right, acting in good faith and in particularized circumstances, to take into account racial tensions in maintaining security, discipline, and good order in prisons and jails. 390 U.S. 334.

Today's prison system, however, rarely operates pursuant to such overt and explicitly discriminatory State statutes. This does not

mean that prisons have suddenly become egalitarian; far from it, racism in the criminal justice system remains a significant problem. This does mean that State policies and practices will not be subject to Astrict scrutiny@ review unless the prisoner proves that the differential treatment was the result of intentional or purposeful racial discrimination. See **Dewalt v. Carter**, 224 F.3d 607, 618 (7th Cir. 2000)(AA plaintiff asserting an equal protection violation must establish that a State actor has treated him differently than persons of a different race and that the State actor did so purposefully.); **Simpson v. Horn**, 25 F.Supp..2d 563, 573 (E.D.PA 1998)(stating that plaintiff Acannot prevail on his equal protection claims by offering evidence that the actual policy has the effect of segregating double-celled inmates by race; he must show that it is the intent of defendants to cause such segregation.@).

4. Fundamental rights

State laws which substantially burden Afundamental rights@are also reviewed under the Astrict scrutiny@test. See **City of Cleburne**, 473 U.S. at 440 (ASimilar oversight by the courts is due when state laws impinge on personal rights protected by the Constitution.@). AFundamental rights@ generally refers to those constitutional rights as having value so essential to individual liberty that their infringement warrants Astrict scrutiny@by the courts.

Among the Afundamental rights@ recognized by the Supreme Court for Astrict scrutiny@ review are the right to procreate, see **Skinner v. Oklahoma ex rel. Williamson**, 316 U.S. 535 (1942); the right to interstate travel, see **Shapiro v. Thompson**, 394 U.S. 618 (1969); the right to vote, see **Bullock v. Carter**, 405 U.S. 134 (1972); and the right of a uniquely private matter, see **Roe v. Wade**, 410 U.S. 113 (1973). Because prisoners rarely possess such fundamental rights, further analysis in this specific area seems unwarranted.

5. Intermediate scrutiny

Prior to the 1970s the Supreme Court primarily used either the Arational basis@test or the Astrict scrutiny@standard to review legislation impinging equal protection rights. Recently, the Supreme Court has added a third mode of equal

protection analysis in regards to Aquasi-suspect classes@ such as gender-based classifications. This Aintermediate standard@ of review is more protective of individual equal protection rights than the Arational basis@test but not as difficult for the government to satisfy as the Astrict scrutiny@ standard. Under the Aintermediate standard@ of equal protection review, State law which imposes differential treatment on the basis of gender will be declared unconstitutional unless it serves important governmental objectives and the differential treatment is substantially related to the achievement of these objectives. See **United States v. Virginia**, 518 U.S. 515, 533 (1996). These government objectives Amust be genuine, not hypothesized or invented post hoc in response to litigation. And it must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females.@ 518 U.S. at 533.

Under the intermediate scrutiny standard, the lower courts will uphold a gender-based classification only if it has a Asubstantial relationship@ to an important governmental interest. Thus, in **Glover v. Johnson**, 721 F.Supp. 808 (E.D. Mich. 1989) the district court sustained its earlier finding that the failure of the Michigan state prison system to provide female prisoners with educational programs and vocational opportunities comparable to male prisoners violated equal protection. 721 F.Supp. at 80. Other courts, however, have rejected similar gender-based equal protection claims, holding that male and female prisoners were not similarly situated. See **Keevan v. Smith**, 100 F.3d 644, 650 (8th Cir. 1996); **Klinger v. Nebraska Dept. of Corrections**, 31 F.3d 727, 733 (8th Cir. 1994).

B. Ex Post Facto Laws

The United States Constitution prohibits the States from passing any Aex post facto law.@ U.S. Const. Art. I, ' 10. AEx post facto@ is a Latin phrase meaning any law passed Aafter the fact@. See **Collins v. Youngblood**, 497 U.S. 37, 41 (1990). An ex post facto law is a law that retroactively alters the definition of criminal conduct or increases the punishment for criminal acts after their commission. See **Collins**, 497 U.S. at 43.

The constitutional protection against ex

post facto laws is based upon two simple principles: First, citizens are entitled to fair warning of legislative acts in order to conform their behavior in accordance with the law. See **Weaver v. Graham**, 450 U.S. 24, 28-29 (1981). Secondly, the coercive power of government must be restrained from enacting arbitrary and potentially vindictive legislative acts. **Weaver**, 40 U.S. at 29.

The Supreme Court has recognized four categories of ex post facto criminal laws. A law violates the Ex Post Facto Clause when it:

1. punishes as a crime an act previously committed, which was innocent when done;
2. which makes more burdensome the punishment for a crime, after its commission;
3. which deprives one charged with crime of any defense available according to law at the time when the act was committed;
4. alters the legal rules of evidence, and receives less, or different testimony, than the law required at the time of the commission of the offense, in order to convict the offender.

Collins v. Youngblood, 497 U.S. at 42.

Since our focus is upon the constitutional rights of prisoners, not criminal defendants facing trial, we limit our analysis to category two laws which increase the punishment for crimes after their commission. Retroactive changes in laws governing good-time credits, parole, and even executive clemency may, in some instances, violate the Ex Post Facto Clause. See **Weaver v. Graham**, 450 U.S. 24 (1981)(good-time credits); **Garner v. Jones**, 529 U.S. 244 (2000)(parole); **Dugger v. Williams**, 593 So.2d 180 (FLA. 1991)(executive clemency). The Ex Post Facto Clause, however, does not apply to sexual predator laws under which prisoners are subject to involuntary civil commitment after completion of a criminal sentence. See **Kansas v. Hendricks**, 21 U.S. 346 (1997)(finding that Kansas law did not impose punishment and did

not have retroactive effects). Nor does the Ex Post Facto Clause apply to policy statements that do not have the force of law. See **Griggs v. Maryland**, 263 F.3d 355, 359 (4th Cir. 2001)(holding that Governor's announcement at press conference that he would not grant parole to any inmate serving a life-term for murder or rape unless the inmate was very old or terminally ill was a policy statement and not a law within the meaning of the Ex Post Facto Clause.

The States are prohibited from enacting an ex post facto law. U.S. Const. Art. I section 10, cl.1. One function of the Ex Post Facto Clause is to bar enactments which, by retroactive operation, increase the punishment for a crime after its completion. Retroactive changes in laws governing parole of prisoners, in some instances, may be violative of this precept.

Garner v. Jones, 529 U.S. 244, 249-250 (2000)(citations omitted).

Two critical elements must be present for a law to fall within the ex post facto prohibition: First, the law must be retrospective, that is, it must apply to events occurring before its enactment. See **Weaver v. Graham**, 450 U.S. 24, 31 (1981)(stating that the critical question is whether the law changes the legal consequences of acts completed before its effective date). Secondly, it must create a significant risk of increasing or prolonging a prisoner's punishment. See **Garner v. Jones**, 120 S.Ct. At 1368 (stating that the dispositive question is whether the new law creates a significant risk of prolonging respondent's incarceration).

Simply because a law is labeled procedural in nature does not remove it from ex post facto scrutiny. See **Collins v. Youngblood**, 497 U.S. 37, 46 (1990)(holding that a legislature does not immunize a law from ex post facto scrutiny by simply labeling it procedural); **Carmell**, 529 U.S. at 537 (noting that **Collins** eliminated a doctrinal hitch that had developed in our cases, which purported to define the scope of the Clause along an axis distinguishing between laws involving "substantial protections" and those that were merely "procedural"); **Lynce v. Mathis**, 519 U.S. 433, 447 n.17 (1997)(noting that there is no merit to the argument that the revocation of overcrowding credits is

constitutional because such an act is merely procedural.®).

1. Is the law retrospective?

The first inquiry under ex post facto analysis is whether a newly-enacted law is retrospective, that is, whether it applies to crimes committed prior to its enactment. The starting point for making this determination is the statute itself, focusing upon the presence or absence of express provisions limiting its reach. See Rosenberg v. XM Ventures, 274 F.3d 137, 141 (3d Cir. 2001)(Because it is presumed that Congress expresses its intent through the ordinary meaning of its language, every exercise of statutory interpretation begins with an examination of the plain language of the statute.®). If the statute is ambiguous or lacks explicit directions regarding its application to criminal conduct committed prior to its enactment, prisoners can examine its legislative history to ascertain whether the legislature intended a retrospective application. Finally, prisoners should examine the application of the new law by the appropriate government agency. In general, an agency's statutory interpretation is entitled to great deference so long as it is plausible and does not otherwise conflict with the legislature's expressed intent. See Chevron U.S.A. v. N.R.D.C., 467 U.S. 837, 844 (1984)(if the statute is silent or ambiguous, the courts will consider the agency's construction of the statute; a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.®).

2. Does the law create a significant risk of increasing a prisoner's punishment?

In Weaver v. Graham, 450 U.S. 24 (1981) the Supreme Court first considered whether a retroactive decrease in the amount of good-time® credits violated the Ex Post Facto Clause. 450 U.S. at 25. In Weaver, the petitioner had been sentenced in 1976 to prison for 15 years for second-degree murder. 450 U.S. at 25. At the time of sentencing, Florida law provided good-time credits at the rate of 5 days per month for the first two years of a sentence, 10 days per month for the third and fourth years and 15 days per month thereafter. 450 U.S. at 26. In 1978, however, the Florida legislature reduced

good-time credits from the 5-10-15 days formula to only 3, 6 and 9 days. 450 U.S. at 26. Weaver brought suit, claiming the reduction of future good-time credits violated the Ex Post Facto Clause because it effectively postponed or extended the date he would become eligible for early release. 450 U.S. at 27. The Supreme Court agreed that the 1978 statute reducing good-time credits violated ex post facto because it made the punishment for crimes committed before the enactment more onerous.® 450 U.S. at 35-36 (The new provision constricts the inmate's opportunity to earn early release and thereby makes more onerous the punishment for crimes committed before its enactment.®).

At issue in California Department of Corrections v. Morales, 514 U.S. 499 (1995) was a 1981 California amendment to its parole statutes, changing the frequency of a parole suitability hearing from once a year to once every three years. 514 U.S. at 503. The Supreme Court concluded that the change was not an ex post facto violation. 514 U.S. at 502. In this case, Morales was sentenced in 1980 to a term of 15 years to life for second-degree murder. Under California law at the time of sentencing, Morales was entitled to parole suitability hearings on an annual basis after serving his 15-year minimum sentence. 514 U.S. at 503. In 1981, however, California amended its parole laws authorizing the Board of Prison Terms® to defer subsequent parole hearings for up to three years if the prisoner had been convicted of more than one offense which involves the taking of a life® and if the Board finds that it is not reasonable to expect that parole would be granted at a hearing during the following years and states the bases for the finding.® 514 U.S. at 503. Morales was denied parole at his initial hearing and the Board opted not to reschedule another suitability hearing for three years, finding this was his second homicide and it was not reasonable to expect parole suitability until 1992. 514 U.S. at 503. Morales brought suit, claiming that the 1981 amendment eliminating the statutory right under California law to an annual parole hearing increased his punishment for the 1980 crime in violation to the Ex Post Facto Clause. 514 U.S. at 504.

The Supreme Court began by rejecting the notion that the Ex Post Facto Clause forbids any legislative change that has any conceivable

risk of affecting a prisoner's punishment. 514 U.S. at 508. Our cases have never accepted this expansive view of the Ex Post Facto Clause, and we will not endorse it here. 514 U.S. at 508. Analyzing Morales' claim, the Supreme Court noted that the 1981 California amendment did not change the punishment for second-degree murder; did not change or reduce Morales' entitlement to good-time credits; did not affect the date of Morales' initial parole suitability hearing; and did not alter the standards for determining Morales' suitability for parole. 514 U.S. at 511. The 1981 California amendment merely changed the timing only of subsequent hearings. 514 U.S. at 511. The Supreme Court concluded that such a change aimed at a small class of prisoners (those convicted of more than one homicide) for whom the likelihood of parole release is quite remote creates only the most speculative and attenuated possibility of producing the prohibited effect of increasing the measure of punishment for covered crimes, and such conjectural effects are insufficient under any threshold we might establish under the Ex Post Facto Clause. 514 U.S. at 509.

To fall within the ex post facto prohibition, a law must be retrospective—that is, it must apply to events occurring before its enactment—and it must disadvantage the offender affected by it, by altering the definition of criminal conduct or increasing the punishment for the crime.

Lynce v. Mathis, 519 U.S. 433, 441 (1997) (citations and quotations omitted).

Retrospective reduction of good-time credits came before the Supreme Court again in **Lynce v. Mathis**, 519 U.S. 433 (1997). In 1986 the petitioner (Lynce) was sentenced to 22 years in prison for attempted murder. 519 U.S. at 435. In 1992 Lynce was released from prison because he had accumulated 5,668 days of various classes of release credits. 519 U.S. at 435. Shortly after he was released, the Florida legislature canceled provisional credits (designed to relieve prison overcrowding) for prisoners convicted of certain crimes, including attempted murder. 519 U.S. at 436. As a result, Lynce (along with 164 other released offenders) was re-arrested and returned to prison. 519 U.S. at 439. Lynce brought suit, claiming the retroactive cancellation of provisional credits

violated the Ex Post Facto Clause. 519 U.S. at 436. A unanimous Supreme Court agreed that the 1992 cancellation of provisional credits by the Florida legislature violated the Ex Post Facto Clause because: (1) it was clearly retrospective, since it applied to events occurring prior to its enactment, 519 U.S. at 441; and (2) it unquestionably disadvantaged the petitioner because it resulted in his re-arrest and prolonged his imprisonment. 519 U.S. at 446-447. The Supreme Court rejected the States' argument that it should examine the purpose behind the cancellation of provisional credits, noting that it is not relevant to the essential inquiry demanded by the ex post facto clause, namely, whether cancellation of the provisional/overcrowding credits had the effect of lengthening petitioner's period of incarceration. 519 U.S. at 442-443. Moreover, even if the Court did examine the purpose behind the cancellation, it would not help Florida because it is quite obvious that the retrospective change was intended to prevent the early release of prisoners convicted of murder-related offenses who had accumulated overcrowding credits. 519 U.S. at 445.

Five years after **Morales**, the frequency of parole hearings came again before the Supreme Court in **Garner v. Jones**, 529 U.S. 244 (2000). In this case, the respondent (Jones) was convicted of a Georgia murder and sentenced to life imprisonment in 1982. 529 U.S. at 247. Under Georgia law at the time of sentencing, the Parole Board was required to consider Jones for parole every three years thereafter. 529 U.S. at 247. In 1985, however, Georgia amended its parole laws by extending parole reconsideration hearings for life-sentenced prisoners from once every three years to once every eight years. 529 U.S. at 247. Jones brought suit, claiming the retroactive application of this law was an ex post facto violation. 529 U.S. at 248.

The Supreme Court began its analysis by noting that the States are prohibited from enacting an ex post facto law which, by retroactive operation, will increase the punishment for a crime after its commission. 529 U.S. 249-250. Retroactive changes in laws governing parole of prisoners, in some instances, may be violative of this precept. 529 U.S. at 250. The dispositive question is whether the change in parole laws creates a significant risk of increasing or prolonging a prisoner's

incarceration. 529 U.S. at 251. Applying this standard to the case before it, the Supreme Court concluded that the risk of increased punishment was not apparent from the face of the statute. 529 U.S. at 251. Simply changing the timing or frequency of parole reconsideration hearings from once every three years to once every eight years and lack of procedural safeguards (such as counsel) are not dispositive according to the Court. 529 U.S. at 251. Although expressing doubt that Jones could prove an ex post facto violation, the Court remanded the case back to the lower court to permit Jones the opportunity to prove that the change in parole laws created a significant risk of increasing his punishment. 529 U.S. at 256. When the rule does not by its own terms show a significant risk, the respondent must demonstrate, by evidence drawn from the rule's practical implementation by the agency charged with exercising discretion, that its retroactive application will result in a longer period of incarceration than under the earlier rule. 529 U.S. at 255.

In light of **Weaver**, **Morales**, **Lynce** and **Garner**, we can draw the following conclusions regarding the Supreme Court's ex post facto framework. First the Supreme Court has firmly rejected the notion that the Ex Post Facto Clause forbids all legislative changes that may affect a prisoner's punishment. The Ex Post Facto Clause was never intended to result in judicial micromanagement of an endless array of legislative adjustments to parole and sentencing procedures. **Morales**, 514 U.S. at 508. Secondly, only those legislative acts that are both retrospective (applicable to past crimes) and which create a significant risk of prolonging a prisoner's incarceration constitute ex post facto violations. See **Garner**, 529 U.S. at 251 (the dispositive question is whether the change in parole laws creates a significant risk of prolonging respondent's incarceration); **Lynce v. Mathis**, 519 U.S. at 441 (the essential inquiry demanded by ex post facto analysis is whether the change in parole laws disadvantaged petitioner by increasing his punishment); **Morales**, 514 U.S. at 506 n.3 (noting that after **Collins v. Youngblood**, the focus of the ex post facto inquiry is not whether a legislative change will disadvantage the offender as determined in **Weaver**, but whether the new law increases the penalty by which a crime is punishable). Finally, if the new law creates only the most speculative

and attenuated possibility of increasing the measure of punishment, it is insufficient under any threshold of violating the Ex Post Facto Clause. See **Morales**, 514 U.S. at 509.

Applying these principles to the endless flow of criminal justice legislation originating in State capitols requires employment of an intent-effects type standard. By this we mean the lower courts will first examine the language of the statute to discern the legislature's intent. See **Garner**, 529 U.S. at 251 (noting that the requisite risk of prolonging Jones' incarceration was not inherent in the framework of Georgia statute extending parole reconsideration hearings from three to eight years). Although the intent of the legislature is not dispositive in ex post facto jurisprudence, see **Lynce v. Mathis**, 519 U.S. at 442-443, certainly an express intention to make release from incarceration more difficult will assist the plaintiff in proving that the new law creates a significant risk of increasing punishment for past crimes. See **Garner**, 529 U.S. at 262 (Souter, J., dissenting).

If the language of the statute does not indicate an unequivocal punitive motivation, the lower courts must then examine the effects of the new law to determine whether, despite its nonpunitive intent, it nonetheless creates a significant risk of increased punishment in its operation. See **Garner**, 529 U.S. at 255 (When the rule does not by its own terms show a significant risk, the respondent must demonstrate, by evidence drawn from the rule's practical implementation by the agency charged with exercising discretion, that its retroactive application will result in a longer period of incarceration than under the earlier rule). The burden of making this proof lies with the prisoner making the ex post facto challenge. Prisoners should conduct extensive pretrial discovery, seeking internal policy statements and other evidence which might infer that the retrospectively applied law poses a significant risk of prolonging his or her incarceration.

VII. AMERICANS-WITH-DISABILITIES ACT

Thus far we have examined the conflict between individual freedoms guaranteed by the Constitution and the safety, security and rehabilitative needs of prison officials in maintaining the corrections system. In case after

case, the Supreme Court has emphasized that prisoners retain those constitutional rights which are not inconsistent with the legitimate penological objectives of the corrections system. In this section, we turn our attention away from the Constitution and focus upon another source of prisoners' rights: federal legislation on behalf of disabled persons.

The Americans With Disabilities Act (ADA) is the Federal Government's most extensive attempt to address discrimination against persons with disabilities. Some have hailed it as the most important civil rights act since 1964, an Emancipation Proclamation for the disabled. Enacted in 1990, the law is predicated on the belief that a society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem. 42 U.S.C. ' 12101(a)(2).

The ADA contains three components: **Title I** prohibits discrimination by private employers in the hiring, advancement and discharge of employees. See 42 U.S.C. ' 12111-12117. **Title II** prohibits discrimination by government entities in public services and programs. See 42 U.S.C. ' 12131-12165. And **Title III** prohibits discrimination by private entities in public accommodations. See 42 U.S.C. ' 12181-12189. These three components were enacted by Congress to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities. 42 U.S.C. ' 12101(b)(1).

Since state and local prisons are public entities under the ADA, we are primarily concerned here with Title II litigation. However, we cannot restrict our discussion to that section alone. Most ADA litigation has centered around Title I's employment context. Indeed, the Supreme Court has issued several decisions in Title I cases which have important precedential consequences for prison-related Title II ADA litigation. Bearing that in mind, we begin with Title II itself, which provides:

Subject to the provisions of this subchapter, no qualified individual with a disability

shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C. ' 12132.

In the years immediately following enactment of the ADA, there was considerable disagreement in the lower courts as to whether Title II even applied to state prisons and jails. In Pennsylvania Department of Corrections v. Yeskey, 524 U.S. 206 (1998) the Supreme Court ended the debate by holding that Title II applied to state prisons, noting that the statute's language unmistakably includes State prisons and prisoners within its coverage. 524 U.S. at 209. See also: Chisolm v. McManimon, 275 F.3d 315, 325 (3d Cir. 2001) (Title II of the ADA applies to services, programs, and activities provided within correctional institutions). However, on a related matter, the Yeskey Court declined to address the States' contention that Title II is an unconstitutional exercise of Congressional power, reserving that question for future resolution. 524 U.S. at 212.

Three years after Yeskey, the Supreme Court held in a Title I employment case that Congress did exceed its constitutional authority to abrogate state sovereign immunity when it enacted the ADA. See Board of Trustees of the University of Alabama v. Garrett, 531 U.S. 356, 121 S.Ct. 955 (2001). The Garrett majority held that in order to authorize private individuals to recover money damages against the States, there must be a pattern of discrimination by the States which violates the Fourteenth Amendment, and the remedy imposed by Congress must be congruent and proportional to the targeted violation. 121 S.Ct. at 967-968. According to the Garrett majority, Title I fails on both counts. First, the legislative record of the ADA simply fails to show that Congress did in fact identify a pattern of irrational state discrimination in employment against the disabled. 121 S.Ct. at 965. Secondly, even if Congress did identify a pattern of discrimination by the States, the remedies created by the ADA far exceed what is constitutionally required.

121 S.Ct. at 967.

Garretts holding that suits by State employees to recover money damages under the ADA are barred by the Eleventh Amendment is limited to Title I. The Garrett Court specifically refused to rule on whether Title II claims were similarly barred, stating that it was not disposed to decide the constitutional issue whether Title II, which has somewhat different remedial provisions from Title I, is appropriate legislation under section 5 of the Fourteenth Amendment. 121 S.Ct. at 960 n.1. Finally, the Garrett Court acknowledged that its holding does not foreclose a disabled person from seeking other remedies such as injunctive relief:

Our holding here that Congress did not validly abrogate the States' sovereign immunity from suit by private individuals for money damages under Title I does not mean that persons with disabilities have no federal recourse against discrimination. Title I of the ADA still prescribes standards applicable to the States. Those standards can be enforced by the United States in actions for money damages, as well as by private individuals in actions for injunctive relief under Ex Parte Young, 209 U.S. 123 (1908). In addition, state laws protecting the rights of persons with disabilities in employment and other aspects of life provide independent avenues of redress.

Garrett, 121 S.Ct. at 968 n.9.

Although not binding, Garrett is a dark cloud over Title II prison-related ADA cases. Obviously, if Title I is an unconstitutional exercise of congressional authority, there is considerable danger that the same result will be reached with Title II. Some lower courts within the Third Circuit have concluded that Title II ADA suits brought by individuals against the State for monetary damages are barred by the Eleventh Amendment. See Jones v. Pennsylvania, 164 F.Supp.2d 490, 493 (E.D.PA 2001); Koslow v. Commonwealth of Pennsylvania, 158 F.Supp.2d 539, 542 (E.D.PA 2001); Doe v.

Division of Youth and Family Services, 148 F.Supp.2d 462, 489 (D.N.J. 2001).

Prisoners contemplating ADA litigation should do so carefully given the fluid and undeveloped state of Title II jurisprudence. For example, who exactly is a proper defendant in a Title II ADA suit and what relief is available? At this time, it appears that the State itself and the State agency or department in question are the only proper defendants in Title II litigation. See 42 U.S.C. § 12132 (stating that qualified disabled persons should not be excluded from services, programs, or activities of a **public entity**, or **be subjected to discrimination by any such entity**). Suits brought against State officials in their individual capacities have been rejected. See Navedo v. Maloney, 172 F.Supp.2d 276, 289 (D.Mass. 2001) (suits against government officials in their individual, non-official capacities do not appear to be contemplated by Title II of the ADA). Of course, prisoners can name State authorities as defendants in Title II ADA litigation as long as their complaints are crystal clear that such persons are sued in their official capacities only. See Kentucky v. Graham, 473 U.S. 159, 166 (1985) (suing an individual in his official capacity is treated the same as suing the entity itself).

As for available relief, prisoners should not bring Title II ADA suits seeking monetary damages from the State or State authorities (in their official capacities) unless and until the Eleventh Amendment question is resolved by the Supreme Court. Bear in mind that a growing number of courts have concluded that in light of Garrett, the Eleventh Amendment bars all claims for monetary damages. They can, however, bring litigation seeking prospective injunctive relief against State or State authorities (in their official capacities) for Title II ADA violations. See Garrett, 121 S.Ct. at 968 n.9; Randolph v. Rogers, 253 F.3d 342, 348 (8th Cir. 2001) (affirming district court's conclusion that plaintiff's action seeking prospective injunctive relief may proceed against state official in her official capacity for ADA violations); Armstrong v. Wilson, 124 F.3d 1019, 1026 (9th Cir. 1997) (Sovereign immunity presents no bar to this suit against state officials seeking prospective injunctive relief against ongoing violations of the ADA and RA in the state penal system). Accordingly, where a prisoner can

demonstrate that he or she will continue to suffer ADA violations, that prisoner may seek prospective injunctive relief without interference by the Eleventh Amendment. See Ex Parte Young, 209 U.S. 123 (1908); Gibson v. Arkansas Department of Corrections, 265 F.3d 718, 722 (8th Cir. 2001)(Aprivate individuals can sue state officials for injunctive relief under the ADA by using Ex Parte Young.)

In order to establish a Title II claim against a public entity, a prisoner must show: (1) that he or she is disabled within the meaning of the ADA; (2) that he or she is qualified for corrections services, programs or activities in that he or she meets all essential eligibility requirements; and (3) despite being qualified, he or she has been excluded from corrections services, programs or activities by reason of their disability. See Davis v. University of North Carolina, 263 F.3d 95, 99 (4th Cir. 2001); Biard v. Rose, 192 F.3d 462, 467 (4th Cir. 1999); Parker v. Unversidad de Puerto Rico, 225 F.3d 1, 5 (1st Cir. 2000); Shotz v. Cates 256 F.3d 1077, 1079 (11th Cir. 2001); Williams v. Wasserman, 164 F.Supp.2d 591, 628 (D.Md. 2001).

If a prisoner is found to have been excluded from public services, programs or activities by reason of his or her disability, the public entity must make Reasonable accommodations or Amodifications to allow participation by the disabled. Accommodation is not reasonable if it either imposes undue financial and administrative burdens on a public entity, or requires a fundamental alteration in the nature of the program.

A. Is the Prisoner Disabled Within the Meaning of the ADA?

The threshold issue in any ADA action brought against a public entity is whether the plaintiff is a person with a disability. A person is Adisabled within the meaning of the ADA if he or she has:

1. a **physical** or **mental impairment** that **substantially limits** one or more of the **major life activities** of such individual;
2. a record of such an impairment;

or

3. Is regarded as having such impairment.

See 42 U.S.C. ' 12102(2).

Accordingly, any person who suffers from, or is regarded as having, a **Aphysical or mental impairment** which **Asubstantially limits** his or her **Amajor life activities** will be considered disabled within the meaning of the ADA. These three concepts are decisive in ADA litigation because while all Aphysical or mental impairments affect peoples= lives, not all physically or mentally impaired persons are disabled within the meaning of the ADA. Courts will distinguish between impairments that merely affect a person-s life B which are not ADA disabilities B and those impairments which Asubstantially limit one or more Amajor life activities B which are ADA disabilities. See Toyota Motor v. Williams, ___ U.S. ___, 122 S.Ct. 681, 691 (2002)(to qualify for ADA protection, an Aindividual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most peoples= daily lives and Amust also be permanent or long-term).

In determining whether a plaintiff-s impairment substantially limits a major life activity and, thus, constitutes an ADA-qualified disability, the Supreme Court devised a three-part test. First, the court must determine whether the plaintiff has a physical or mental impairment. Second, the court must identify the life activity upon which the plaintiff relies and determine whether it constitutes a major life activity under the ADA. Third, tying the two statutory phrases together, we ask whether the impairment substantially limited the major life activity. See Bragdon v. Abbott, 524 U.S. 624, 631 (1998).

1. Physical or mental impairment

The first step in every ADA case is determining whether a plaintiff has a Aphysical or mental impairment. A physical or mental impairment refers to any physiological or psychological disorder affecting one or more of the various body systems. See Bragdon, 524 U.S. at 632 (listing such body systems as neurological, cardiovascular, musculoskeletal,

reproductive, digestive, respiratory, skin, etc.). Conditions meeting this definition would include cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, and emotional illness, among others. 524 U.S. at 632. In **Bragdon**, the Supreme Court held that HIV infection satisfies the statutory and regulatory definition of a physical impairment in light of the immediacy with which the virus begins to damage the infected person's white blood cells. 524 U.S. at 637.

2. Major life activity

The second step under **Bragdon** is identifying the life activity upon which the plaintiff relies and determine whether it constitutes a major life activity under the ADA. 524 U.S. at 631. Unless the physical or mental impairment affects a major life activity, there is no grounds for an ADA suit. 524 U.S. at 637 (The statute is not operative, and the definition not satisfied, unless the impairment affects a major life activity). In **Bragdon**, the Supreme Court held that reproduction is a major life activity for purposes of the ADA. 524 U.S. at 639. Other major life activities would include, but not be limited to: caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. 524 U.S. at 638-639.

3. Substantially limits

The final step ties the first two ADA criteria together, asking whether the physical or mental impairment substantially limits the major life activity asserted by the plaintiff. **Bragdon**, 524 U.S. at 639. Substantially limits means generally an inability to perform a major life activity that the average person can perform. See 29 C.F.R. '1630.2(j). In **Bragdon**, the Supreme Court held that HIV infection substantially limited the plaintiff's asserted major life activity (reproduction) by evaluating medical evidence indicating that an HIV-infected woman imposes significant risks of infecting both her male partner during conception and her child during gestation and birth. 524 U.S. at 639-640. The Court noted while conception and childbirth are not impossible for an HIV victim, it remains dangerous to public health. 524 U.S. at 641. When significant limitations result from the

impairment, the definition is met even if the difficulties are not insurmountable. 524 U.S. at 641.

A disability exists only where an impairment substantially limits a major life activity, not where it might, could, or would be substantially limiting if mitigating measures were not taken. A person whose physical or mental impairment is corrected by medication or other measures does not have an impairment that presently substantially limits a major life activity. To be sure, a person whose physical or mental impairment is corrected by mitigating measures still has an impairment, but if the impairment is corrected it does not substantially limit a major life activity.

Sutton v. United Airlines, Inc., 527 U.S. 471, 482-483 (1999)

This three-step **Bragdon** process is an individualized case-by-case, fact-specific inquiry into the effects of an impairment on a plaintiff's life to determine whether it substantially limits a major life activity. See **Sutton v. United Airlines, Inc.**, 527 U.S. 471, 483 (1999) (the determination of whether an individual has a disability is not based on the name or diagnosis of the impairment the person has, but rather on the effect of that impairment on the life of the individual); **Albertsons Inc. v. Kirkinburg**, 527 U.S. 555, 566 (1999) (lower courts must heed to the statutory obligation to determine the existence of disabilities on a case-by-case basis by examining whether the ADA claimant has proved his or her impairment substantially limits his or her major life activity).

When making this three-step inquiry into whether a physical or mental impairment substantially limits a major life activity, the courts must consider the effects of corrective measures. See **Sutton v. United Airlines Inc.**, 527 U.S. at 482 (A person whose physical or mental impairment is corrected by medication or other measures does not have an impairment that presently substantially limits a major life activity). For example, if a person with extremely poor vision is able to see and function with limitation by wearing corrective glasses or contact lenses, then he or she is not substantially limited in any major life activity. See **Sutton**, 527

U.S. at 488-489. Similarly, if a diabetic is able to function normally by monitoring his blood sugar level, controlling his diet and receiving insulin, then he is not substantially limited in a major life activity. **Sutton**, 527 U.S. at 483. And if a person with hypertension is able to reduce his high blood pressure and function normally as others through medication, he likewise is not substantially limited in any major life activity. See **Murphy v. U.P.S.**, 527 U.S. 516, 521 (1999).

4. Record of, or regarded as, disabled

Persons that actually have a physical or mental impairment that substantially limits one or more major life activities are disabled within the meaning of the ADA. See 42 U.S.C. ' 12102(2)(A). A person will also be considered disabled if there is a record of such an impairment, 42 U.S.C. ' 12102(2)(B) or if the person is being regarded as having such an impairment. 42 U.S.C. ' 12102(2)(C). Thus, even if a person does not have a physical or mental impairment which substantially limits a major life activity, he or she may still bring a viable ADA suit if the State or local government engages in discriminatory conduct based on a mistaken belief that the individual has an ADA-qualified impairment.

The purpose of the "regarded as" definition of a disability is to cover persons denied public benefits and services because of myths, fears and stereotypes associated with disabilities. See **Sutton**, 527 U.S. at 490. An individual may prove a "regarded as" ADA claim by showing that either (1) a covered entity mistakenly believes that a person has a physical impairment that substantially limits one or more major life activities; or (2) a covered entity mistakenly believes that an actual, nonlimiting impairment substantially limits one or more major life activities. See **Sutton**, 527 U.S. at 489. In both cases, it is necessary that a covered entity entertain misperceptions about the individual. It must believe that one has a substantially limiting impairment when, in fact, the impairment is not so limiting. **Sutton**, 527 U.S. at 489.

B. Is the Prisoner Qualified for Corrections Services, Programs and Activities?

Simply proving that a prisoner has a

disability within the meaning of the ADA is only the first step in establishing a Title II violation. The prisoner must also demonstrate that he or she was qualified for a particular service, program or activity but was excluded from participation by reason of his or her disability. See 42 U.S.C. ' 12132. A prisoner becomes a "qualified individual with a disability" by proving that he or she meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity. 42 U.S.C. ' 12131(2).

For most prison services, programs or activities there are little or no eligibility requirements. For example, yard and gym activities, telephone calls, work lines, visitation privileges, counseling services, religious programs, library access, and rehabilitative programs are for the most part open to all general population prisoners. One does not need a certain educational level, security classification, work experience, or job skill to qualify for most prison services, programs and activities.

Other prison programs, however, do retain eligibility requirements that must be satisfied by all prisoners, disabled and non-disabled. For example, a state prisoner will not be considered for transfer to a community corrections center or halfway house until he or she has completed one-half of their minimum sentence (among other criteria). Thus, until a disabled prisoner becomes "qualified" by meeting the eligibility requirements for participation in the pre-release program, there is no ADA violation.

In conclusion, having a disability does not, by itself, give rise to an ADA violation. A disabled person must also prove that he or she was otherwise qualified for some particular public service, program or activity yet was denied participation as a result of the disability.

C. Reasonable Accommodation

If a prisoner has a disability within the meaning of the ADA and satisfies all the eligibility requirements for a particular prison service, program or activity, ADA prohibits state officials from discriminating against him or her by reason of that disability. This means that prison officials are obligated to make "reasonable" accommodations and modifications to ensure that

disabled persons are granted equal access to all prison services, programs and activities. See 42 U.S.C. '12131(2). Such modifications may include the removal of architectural barriers for the use of wheelchairs and the provision of auxiliary aids and services such as interpreters, Braille materials, and telephones compatible with hearing aids. See 42 U.S.C. '12131(1). However, reasonable accommodations will not be required when providing them causes an undue hardship for the institution, that is, significant difficulty or expense or a direct threat to the health and safety of others. See Williams v. Wasserman, 164 F.Supp.2d at 628 (If the plaintiff states a *prima facie* case and requests relief that requires modification of a States services or programs, the State may assert, as an affirmative defense, that the requested modification would cause a fundamental alteration of a States services and programs).

Having set forth the basic framework of an ADA claim, it may be helpful to highlight a few prison-related ADA cases to see how the courts are applying these standards.

In Duffy v. Riveland, 98 F.3d 447 (9th Cir. 1996) a deaf prisoner brought suit claiming an ADA violation when he was excluded from fully participating in his disciplinary hearing due to the prison's failure to provide a qualified interpreter. 98 F.3d at 450. The Ninth Circuit agreed that Duffy's deafness was a disability within the meaning of the ADA and that he was Aqualified@ to participate in his own disciplinary hearing. 98 F.3d at 455. The Court also agreed that disciplinary proceedings were Aservices, programs or activities@ within the scope of the ADA. 98 F.3d at 455. The Ninth Circuit remanded the case back to the lower court to determine whether the prison discriminated against Duffy by failing to provide a qualified interpreter. 98 F.3d at 456. While the Court agreed that Duffy was not entitled to an interpreter certified by the National Registry of Interpreters for the Deaf, he was entitled access to someone who could understand his sign language and communicate effectively with him. 98 F.3d at 456.

In Love v. Westville Correctional Center, 103 F.3d 558 (7th Cir. 1996), a quadriplegic prisoner confined to a wheelchair filed an ADA suit, claiming that he was denied

access to prison programs based on his disability. 103 F.3d at 558-559. According to the record, Love was housed in the prison infirmary unit and was precluded from using the prison's recreational facilities, its dining hall, the visitation facilities, and all rehabilitation programs available to the general prison population, including church, work, substance abuse, and the library. 103 F.3d at 559. The Seventh Circuit affirmed the jury's finding of an ADA violation and its award of damages (this was a pre-Garrett ruling). First, there was no question that Love had an ADA-qualified disability and that he was denied participation in prison programs due to his disability. 103 F.3d at 560. The Seventh Circuit rejected prison officials' argument that they could not make reasonable accommodations due to scarce resources. Although security concerns, safety concerns and administrative exigencies should all be considered in determining whether reasonable accommodations can be made to permit a disabled prisoner to participate in institutional programs and services, the Court held that the defendants failed to present any evidence supporting their argument. 103 F.3d at 561.

In Armstrong v. Davis, 275 F.3d 849 (9th Cir. 2001), disabled prisoners confined in the California state correctional system brought suit, contending that State officials discriminated against them during parole release and parole revocation hearings. 275 F.3d at 854. Specifically, prisoners and parolees with vision, hearing and learning disabilities alleged that they were provided no accommodations to help them understand the parole release and parole revocation processes despite obvious disabilities; consequently, many disabled prisoners and parolees simply waived their rights to a hearing or were unable to attend or meaningfully participate in the hearing. 274 F.3d at 857. The Ninth Circuit agreed that the parole board violated the ADA since they failed Ato address the needs of prisoners or parolees who have problems understanding complex information or communicating through the spoken or written word.@ 275 F.3d at 862.

To prevail in a Title II ADA claim, prisoners must establish three elements. First, they must be disabled within the meaning of the ADA. This requires proof that the prisoner has a Aphysical or mental impairment@ which

Asubstantially limits@a Amajor life activity.@ Keep in mind that the lower courts will distinguish between physical and mental impairments which merely affect a prisoner=s life (which is not an ADA disability) from those that Asubstantially limit@a Amajor life activity@ (which is an ADA disability).

Secondly, prisoners must allege and prove that they were Aqualified@ for participation in the institution=s services, programs or activities in question by satisfying all eligibility requirements. Finally, prisoners must prove that despite being qualified, they were excluded from participation in such services, programs or activities because of their disabilities.

If a qualified prisoner has been excluded from participation in a prison=s services, programs or activities due to his or her disability, the State must make Areasonable accommodations@ or Amodifications@ to allow participation by the disabled unless the requested accommodation would impose an undue financial or administrative burden or pose a legitimate threat to prison security or safety.

VIII. PRISON LITIGATION REFORM ACT OF 1995

On April 26, 1996, President Clinton signed into law the **Prison Litigation Reform Act of 1995** (PLRA@). Although its legislative history is limited, the PLRA=s impact on prisoners=rights jurisprudence is immense. Henceforward every prisoner-initiated ' 1983 lawsuit challenging prison conditions must comply with the exhaustion, filing and relief requirements of the PLRA or be dismissed. In addition, the PLRA limits the remedial power of federal judges to correct unlawful conditions even if a prisoner proves his case.

The PLRA was designed to achieve two goals: First, curtail the number of frivolous prisoner suits flooding the federal courts. Second, restrict the power of federal judges to order prospective relief in conditions-of-confinement cases. See **McCoy v. Gilbert**, 270 F.3d 503, 509 (7th Cir. 2001)(AOne of the PLRA=s primary purposes is to enable prison officials to resolve complaints internally and to limit judicial intervention in the management of state and federal prisons.@); **Abdul-Akbar v. McKelvie**, 239 F.3d 307, 312 (3d Cir. 2001)(en banc)(stating that

Congress enacted the PLRA Alargely in response to concerns about the heavy volume of frivolous prisoner litigation in the federal courts.@); **Freeman v. Francis**, 196 F.3d 641, 644 (6th Cir. 1999)(the PLRA was Apassed to reduce frivolous prisoner lawsuits and to reduce the intervention of federal courts into the management of the nation=s prison system@).

The thinking behind the PLRA was that the vast majority of prisoner suits were frivolous, unable to even withstand a Fed.R.Civ.P. 12(b)(6) motion to dismiss for failure to state a claim. Consequently, new statutory disincentives were needed to deter prisoners from filing such cases. See **Abdul-Akbar**, 239 F.3d at 318 ACongress sought to put in place economic incentives that would prompt prisoners to =stop and think= before filing a complaint.@. Additionally, PLRA proponents claimed that Aliberal@ and Aoverzealous@ federal judges were Amicromanaging@ State prison operations and releasing prisoners back on the streets prior to sentence completion in order to relieve overcrowding.

Critics of the politically-popular PLRA dismiss the prisoner litigation Aexplosion@ as a fraud and half-truth. They point out that while the number of prisoner lawsuits has increased over the years, that increase was proportional to the rise in prisoner population during the 1980s and 1990s. In addition, critics complained that the PLRA was hastily passed without serious Congressional debate (it was in fact attached as a rider to an appropriations bill) and contains recklessly-drafted provisions. See **McGore v. Wigglesworth**, 114 F.3d 601, 603 (6th Cir. 1997)(stating that the PLRA contains typographical errors, creates conflicts with the Rules of Appellate Procedure, and is internally inconsistent).

For better or for worse, the PLRA is now law and prisoners have no choice but to comply with its provisions. We address first the PLRA provisions aimed at curbing frivolous prisoner lawsuits and then take up the PLRA restrictions on granting prospective relief.

A. Curbing Frivolous Prisoner Lawsuits

The PLRA contains a number of provisions designed to curb the filing of frivolous

prisoner lawsuits. Chief among them are an exhaustion requirement, a new screening and filing fee requirement, a physical injury requirement and a three-strikes provision.

1. PLRA exhaustion requirement

No action shall be brought with respect to prison conditions under ' 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.

See 42 U.S.C. ' 1997e(a).

It is now clear that any prison conditions lawsuit, filed by a prisoner who failed to first exhaust available administrative remedies, must be dismissed pursuant to 42 U.S.C. ' 1997e(a). See McCoy v. Gilbert, 270 F.3d 503, 508 (7th Cir. 2001); Massey v. Helman, 196 F.3d 727, 734 (7th Cir. 1999); Hartsfield v. Vidor, 199 F.3d 305, 309 (6th Cir. 1999); Freeman v. Francis, 196 F.3d 641, 645 (6th Cir. 1999); Harper v. Jenkin, 179 F.3d 1311, 1312 (11th Cir. 1999). The PLRA exhaustion requirement is not a jurisdictional requirement, such that failure to comply with the section would deprive federal courts of subject matter jurisdiction. Nyhuis v. Reno, 204 F.3d 65, 69 n.4 (3d Cir. 2000). However, the obligation to exhaust administrative remedies before resort to federal court is a mandatory one. Curry v. Scott, 249 F.3d 493, 501 n.2 (6th Cir. 2001).

The purpose of an exhaustion requirement is twofold: First, by requiring prisoners to comply with prison grievance procedures, it permits a State institution the opportunity to resolve the controversy internally before it becomes a federal case. See Porter v. Nussle, 534 U.S. C, C (February 26, 2002)(stating that Congress enacted ' 1997e(a) to afford corrections officials time and opportunity to address complaints internally before allowing the initiation of a federal case. In some instances, corrective action taken in response to an inmate's grievance might improve prison administration and satisfy the inmate, thereby obviating the need for litigation.);

McCarthy v. Madigan, 503 U.S. 140, 145 (1992)(exhaustion doctrine Acknowledges the commonsense notion of dispute resolution that an agency ought to have an opportunity to correct its own mistakes with respect to the program it administers before it is hailed into federal court.®). Secondly, by requiring exhaustion of administrative remedies, it promotes judicial efficiency by producing a factual record that can assist the lower court in resolving the prisoner's claim. See Booth v. Churmer, 532 U.S. 731, 737 (2001)(One may suppose that the administrative process itself would filter out some frivolous claims and foster better-prepared litigation once a dispute did move to the courtroom, even absent formal factfinding®); Porter v. Nussle, 534 U.S. at ____ (And for cases ultimately brought to court, adjudication could be facilitated by an administrative record that clarifies the contours of the controversy.®).

Although it will be years before all the questions surrounding the PLRA are resolved, the courts have begun addressing its meaning, scope, and constitutionality. One of the most divisive issues regarding the exhaustion requirement was whether prisoners seeking monetary damages for constitutional violations must submit their claims through a prison grievance process even when monetary relief cannot be obtained through that process. In Booth v. Churmer, 532 U.S. 731 (2001) the Supreme Court put the matter to rest, holding that prisoners cannot skip the administrative process simply by limiting prayers for relief to money damages not offered through grievance mechanisms.® 532 U.S. at _____. Upon review of ' 1997e(a), the Booth Court concluded that Congress intended that an inmate must exhaust irrespective of the forms of relief sought and offered through administrative avenues.® 532 U.S. at ____ n.6.

In light of Booth, it is clear that prisoners must avail themselves of the prison grievance process even if the relief sought cannot be provided. See Porter v. Nussle, 534 U.S. at ____ (Even when the prisoner seeks relief not available in grievance proceedings, notably money damages, exhaustion is a prerequisite to suit.®). We now turn to several other statutory questions the courts have labored over in regards to ' 1997e(a)'s exhaustion requirement.

First, a prisoner must complete the grievance process prior to filing suit. If he files suit while the grievance process is pending, the courts will dismiss the case as unexhausted. See **Neal v. Goord**, 267 F.3d 116, 122 (2d Cir. 2001)(PLRA requires exhaustion of available administrative remedies before bringing suit; subsequent exhaustion after suit is filed therefore is insufficient); **Graves v. Norris**, 218 F.3d 884, 885 (8th Cir. 2000)(prisoner failed to exhaust administrative remedies where grievances were in process when suit was filed); **Perez v. Wisconsin Department of Correction**, 182 F.3d 532, 535 (7th Cir. 1999)(A suit filed by a prisoner before administrative remedies have been exhausted must be dismissed; the district court lacks discretion to resolve the claim on the merits, even if the prisoner exhausts intra-prison remedies before judgment). Consequently, prisoners cannot file suit prematurely. They must first exhaust all available administrative remedies to the very end. See **Booth v. Churmer**, 532 U.S. 731, 121 S.Ct. 1819 (2001)(prisoner failed to exhaust administrative remedies when he filed formal grievance but never sought intermediate or final administrative review after the prison authority denied relief).

In order to satisfy '1997e(a)'s requirement that administrative remedies as are available are exhausted, prisoners must comply with prison grievance procedures. For example, if prison grievance procedures require inmates to file grievances within a specified period of time after the complained incident, they must do so in a timely fashion. The courts have shown little tolerance for prisoners who fail to timely pursue the grievance process and then claim that there are no administrative remedies available because their grievances are time-barred. See **Hartsfield v. Vidor**, 199 F.3d 305, 309 (6th Cir. 1999)(We have previously held that an inmate cannot simply fail to file a grievance or abandon the process before completion and claim that he has exhausted his remedies or that it is futile for him to do so because his grievance is now time-barred under the regulations.); **Wright v. Morris**, 111 F.3d 414, 417 (6th Cir. 1997)(It would be contrary to Congress' intent in enacting the PLRA to allow inmates to bypass the exhaustion requirement by declining to file administrative complaints and then claiming that administrative remedies are time-barred and thus not then available); **Marsh v. Jones**, 53 F.3d 707, 710

(5th Cir. 1995)(Without the prospect of a dismissal with prejudice, a prisoner could evade the exhaustion requirement by filing no administrative grievance or by intentionally filing an untimely one, thereby foreclosing administrative remedies and gaining access to a federal forum without exhausting administrative remedies). If a prisoner misses a grievance filing deadline, he or she should nevertheless press forward with the grievance and explain why it was untimely filed. Most corrections systems allow untimely-filed grievances to proceed upon the prisoner's showing of good cause. The courts require prisoners who have missed grievance filing deadlines to pursue such remedies. See **Harper v. Jenkin**, 179 F.3d 1311, 1312 (11th Cir. 1999)(since prisoner failed to seek leave to file out-of-time grievance as permitted by Georgia grievance regulations, he cannot be considered to have exhausted his administrative remedies).

The PLRA exhaustion requirement compels a prisoner to use his available prison grievance process. A number of courts have held that alternative forms of complaint will not satisfy '1997e(a). See **McCoy v. Gilbert**, 270 F.3d 503, 507 (7th Cir. 2001)(prisoner failed to exhaust administrative remedies where he spoke informally with guards in his unit rather than submit formal grievance); **Jackson v. District of Columbia**, 254 F.3d 262, 269 (D.C.Cir. 2001)(prisoner failed to exhaust administrative remedies where he merely engaged prison warden in conversation and was informed that he should file his case in court); **Curry v. Scott**, 249 F.3d 493, 504 (6th Cir. 2001)(An investigation by a prison Use of Force Committee will not substitute for exhaustion through the prison's administrative grievance procedure); **Freeman v. Francis**, 196 F.3d 641, 644 (6th Cir. 1999)(investigations by outside agencies are not substitutions for formal prison grievance submission). In **Camp v. Brennan**, 219 F.3d 179 (3rd Cir. 2000) the Third Circuit held that a decision by the Secretary of Corrections office in response to a prisoner's letter complaining of unlawful use of force constituted an exhaustion of administrative remedies. 219 F.3d at 281. Prisoners should think twice, however, before reliance on **Camp** since other Courts of Appeals have rejected such a broad interpretation of '1997e(a). The more prudent course for prisoners is to utilize and meticulously follow the

prisoners formal grievance process. Of course, if regulations mandate that a particular issue is excluded from the grievance process (for example, disciplinary decisions), then prisoners must follow those separate regulations to exhaust their administrative remedies.

Another statutory question which has divided the Courts of Appeals concerns who has the burden of proof as to whether a prisoner has exhausted his administrative remedies under '1997e(a). The Sixth and Eighth Circuits have held that the prisoner has the burden of alleging and proving that available administrative remedies were exhausted. See **Brown v. Toombs**, 139 F.3d 1102, 1104 (6th Cir. 1998)(prisoner must allege he has exhausted all available administrative remedies and should attach to his '1983 complaint the grievance decision); **McAlphin v. Morgan**, 216 F.3d 680, 682 (8th Cir. 2000)(where prisoner failed to allege full exhaustion in his complaint and attach such evidence to the complaint, dismissal for failure to exhaust was appropriate). The Second and Seventh Circuits, however, have concluded that '1997e(a)s exhaustion requirement is an affirmative defense which the defendants have the burden of pleading and proving. See **Massey v. Helman**, 196 F.3d 727,735 (7th Cir. 1999); **Jenkins v. Haubert**, 179 F.3d 19, 28-29 (2d Cir. 1999). In **Ray v. Kertes**, 285 F.3d 287 (3d Cir. 2002) the Third Circuit held that the failure to exhaust administrative remedies, as required by Section 1997e(a), is an affirmative defense that must be pleaded and proven by the defendants. 285 F.3d at 295. In **Ray**, the district judge dismissed the prisoners excessive force lawsuit because he had not demonstrated exhaustion of prison remedies in his complaint. 285 F.3d at 291. The Third Circuit reversed, holding that the failure to exhaust administrative remedies is an affirmative defense that the defendants must plead and prove. 285 F.3d at 295. The Court noted that it is considerably easier for a prison administrator to demonstrate exhaustion. 285 F.3d at 295. Notwithstanding the prisoner-friendly result reached in **Ray**, future plaintiffs should detail their exhaustion efforts in their complaint since the matter may be addressed in the future by the Supreme Court.

Since its inception in 1996, the PLRA's exhaustion requirement has generated literally hundreds of court decisions regarding its scope

and meaning. For example, what if prison officials refuse to furnish a prisoner with a grievance form? See **Miller v. Norris** 247 F.3d 736 (8th Cir. 2001)(finding that prisoner was prevented from utilizing available remedies by prison officials who failed to respond to requests for grievance forms). Under what circumstances can a prisoner file a lawsuit when prison officials have delayed their response to his grievance? See **Lyon v. Vande Krol**, 270 F.3d 563 (8th Cir. 2001)(if prisoner was prevented from exhausting his administrative remedies by prison officials who never responded to his complaints, there is no available administrative remedy); **Powe v. Ennis** 177 F.3d 393, 394 (5th Cir. 1999)(AA prisoners administrative remedies are deemed exhausted when a valid grievance has been filed and the States time for responding thereto has expired.®). Can a prisoner sue a defendant in a '1983 lawsuit if he doesn't identify him in the grievance process? See **Brown v. Sikes** 212 F.3d 1205, 1207 (11th Cir. 2000)(concluding that the exhaustion requirement does not always prohibit a prisoner from suing any defendant other than those named in the grievance); **Curry v. Scott**, 249 F.3d 493, 505 (6th Cir. 2001)(dismissing claim against prison official where he was not mentioned in the prisoners grievances). It is ironic that a statutory provision enacted by Congress to curb prisoner suits has in some cases increased rather than decreased judicial burdens.

In any event, prisoners will remain on solid ground in terms of '1997e(a) if they follow one commonsense rule: carefully read, fully understand, and precisely comply with prison grievance procedures. Bear in mind that '1997e(a) was enacted for one purpose only: curb the filing of prisoner lawsuits by placing an obstacle in the path of inmates trying to gain access to the courts. Prison grievance systems are notoriously one-sided and require bulldog-like firmness as the process drags on for weeks and months. This is all part of the process envisioned by Congress to discourage prisoners from filing suit. The minute a prisoner steps outside the grievance process (for example: failing to file a timely grievance; failing to file a timely appeal to the next level; attempting to skip an administrative review level; failing to appeal all claims later alleged in the lawsuit; failing to provide sufficient facts surrounding each complained incident, etc.), he or she has

basically committed legal suicide under '1997e(a). The very first item on the State Attorney's checklist is reviewing the complete grievance record to determine whether each claim presented in the '1983 lawsuit was subject to '1997e(a)'s exhaustion requirement. There are no exceptions to this statutory requirement. See **Porter v. Nussle**, 534 U.S. ____, ____, (February 26, 2002)(AFor the reasons stated, we hold that the PLRA's exhaustion requirement applies to all inmate suits about prison life, whether they involve general circumstances or particular episodes, and whether they allege excessive force or some other wrong.®).

2. PLRA filing fee and screening provisions

In addition to requiring prisoners exhaust all available administrative remedies, the PLRA also enacted several amendments to the federal *in forma pauperis* statute. See 28 U.S.C. '1915. We discuss two of these amendments in this section: the filing fee amendment and the new screening provisions to weed out meritless cases before the docketing stage.

(a) Filing fee amendment

Any person who files suit in federal court normally pays the filing fee and other costs regarding the service of process. Since most prisoners do not have the financial wherewithal to meet these costs, they were permitted to seek leave to proceed *in forma pauperis* (IFP®). See **Neitzke v. Williams**, 490 U.S. 319, 324 (1989)(noting that IFP statute codified as 28 U.S.C. '1915 was enacted in 1892 Ato ensure that indigent litigants have meaningful access to the federal courts®). Prior to the PLRA, the prisoner merely had to file with his complaint an affidavit listing his assets and declaring his inability to pay the costs of litigation. See **Neitzke**, 490 U.S. at 324. Even if the suit was legally frivolous or malicious, an IFP-approved prisoner was not obligated to pay the filing fee. Thus, prisoners faced little economic disincentives to filing merit less litigation.

The PLRA amended the federal IFP statute to discourage indigent prisoners from filing frivolous or malicious suits. First, any prisoner seeking leave to proceed IFP must file, in addition to the normal affidavit listing assets

and a statement of inability to pay court costs, a certified copy of his prison trust account for the six-month period immediately preceding the filing of the complaint. See 28 U.S.C. '1915(a)(2); **Garrett v. Clark**, 147 F.3d 745, 746 (8th Cir. 1998)(The PLRA Adoes not say that a prison account statement must be supplied when the complaint is filed. Instead, the prisoner should be allowed to file the complaint, and then supply a prison account statement within a reasonable time.®).

Requiring a prisoner to supply the court with his six-month account statement is necessary because **Aif a prisoner brings a civil action or files an appeal in forma pauperis, the prisoner shall be required to pay the full amount of a filing fee.®** 28 U.S.C. '1915(b)(1). Consequently, the old pre-PLRA days of prisoners using their IFP status to file suit scot-free are over. All prisoners must now pay the full filing fee B either they pay it immediately or proceeding IFP, they will be assessed an initial partial filing fee followed by incremental payments each month thereafter until the balance of the filing fee is paid off. See 28 U.S.C. '1915(b)(1),(2). This applies even if the district judge summarily dismisses the suit for failure to state a claim. See **Hains v. Washington**, 131 F.3d 1248, 1250 (7th Cir. 1997)(Alt would be absurd if the very weakest complaints B those summarily thrown out under 1915A B were cost-free from the prisoner's perspective, while more substantial claims must be paid for.®); **Leonard v. Lacy**, 88 F.3d 181, 185 (2d Cir. 1996)(Athere is abundant legislative history to indicate that Congress was endeavoring to reduce frivolous prisoner litigation by making all prisoners seeking to bring lawsuits or appeals feel the deterrent effect created by liability for filing fees®).

As to the amount of the initial payment, the statute states that the court shall assess as an initial partial filing fee, twenty percent of whichever is greater: (a) the average monthly deposits to the prisoner's account; or (b) the average monthly balance in the prisoner's account for the six-month period immediately preceding the filing of the complaint or appeal. See 28 U.S.C. '1915(b)(1)(A) and (B). However, if the prisoner Ahas no assets and no means by which to pay the initial partial filing fee,®he or she is still permitted to file the complaint or appeal. 28 U.S.C. '1915(b)(4).

After payment of the initial partial filing fee, the prisoner shall be required to make monthly payments of 20 percent of the preceding month's income credited to the prisoner's account. The agency having custody of the prisoner shall forward payments from the prisoner's account to the clerk of the court each time the amount in the account exceeds \$10 until the filing fees are paid. See 28 U.S.C. ' 1915(b)(2); Hatchet v. Nettles, 201 F.3d 651, 652-653 (5th Cir. 2000)(describing PLRA filing fee provisions and collection process).

The central objective of the filing fee amendment is to deter prisoners from filing frivolous or malicious suits. While the current \$150 filing fee, see 28 U.S.C. ' 1914, may seem insignificant to free citizens, it is a huge burden to prisoners making \$20 to \$40 a month prison wages. However, it is the law and has been upheld repeatedly despite constitutional challenges. See Taylor v. Delatoore, 281 F.3d 844, 848-849 (9th Cir., 2002)(upholding filing fee provisions despite access to courts and equal protection challenge); Murray v. Dosal, 150 F.3d 814, 818-819 (8th Cir. 1998)(rejecting access to courts, equal protection and due process challenges); Tucker v. Baanker, 142 F.3d 1294, 1297-1301 (D.C.Cir. 1998)(same); Shabazz v. Parsons, 127 F.3d 1246, 1249 (10th Cir. 1997); Norton v. Dimazana, 122 F.3d 286, 290 (5th Cir. 1997); Nicholas v. Tucker, 114 F.3d 17, 20 (2d Cir. 1997).

(b) Screening provisions

In addition to requiring prisoners pay the full filing fee, the PLRA-amended IFP statute also mandates new screening procedures for prisoner tort litigation. See 28 U.S.C. ' 1915A; Martin v. Short, 156 F.3d 578, 579 (5th Cir. 1998)(holding that screening provisions of ' 1915A applies to all prisoner suits regardless whether that prisoner is or is not proceeding IFP). Previously, the courts were permitted to dismiss a prisoner's suit *sua sponte* (meaning on its own motion) only if the allegations of poverty were untrue, or if the action was frivolous or malicious. See Neitzke v. Williams, 490 U.S. at 324.

Under the PLRA-amended IFP statute, *sua sponte* dismissal authority has been expanded. Now the courts at the docketing stage (prior to service upon the defendants) may

dismiss a prisoner's suit *sua sponte* if it is: (1) frivolous; (2) malicious; (3) fails to state a claim upon which relief may be granted; or (4) seeks monetary relief from a defendant who is immune from such relief. See 28 U.S.C. ' 1915A(b). Dismissal on these grounds does not require the court to await the filing of a motion to dismiss by the defendant. The courts now have *sua sponte* authority to immediately dismiss any action or claim upon filing which fails to state a claim upon which relief can be granted.

The courts have agreed that the new screening provisions meet constitutional standards. See Christiansen v. Clark, 147 F.3d 655, 657-658 (8th Cir. 1998)(upholding against equal protection challenge 28 U.S.C. ' 1915e(2)(B) which contains identical *sua sponte* dismissal grounds). There has been some division between the appellate courts, however, as to whether a prisoner must be afforded an opportunity to amend his or her complaint before it is dismissed *sua sponte* for ' 1915A(b) deficiencies. For example, in McGore v. Wrigglesworth, 114 F.3d 601 (6th Cir. 1997) the Sixth Circuit held that under the PLRA, courts have no discretion in permitting a plaintiff to amend a complaint to avoid a *sua sponte* dismissal. 114 F.3d at 612. Most courts, however, have held that a prisoner must generally be afforded the opportunity to amend unless the deficiency in the complaint cannot possibly be cured. See Gomez v. USAA Federal Savings Bank, 171 F.3d 794, 796 (2d Cir. 1999)(*pro se* IFP prisoners should be afforded opportunity to amend their complaints unless the court can rule out any possibility, however unlikely it might be, that an amended complaint would succeed in stating a claim); Cruz v. Gomez, 202 F.3d 593, 596 (2d Cir. 2000)(same); Lopez v. Smith, 203 F.3d 1122, 1131 (9th Cir. 2000)(*en banc*)(district court erred in not affording prisoner the opportunity to cure deficiencies by amendment).

The dispositive precedent in the Third Circuit is Shane v. Fauver, 213 F.3d 113 (3d Cir. 2000) which considered 42 U.S.C. ' 1997e(c)(1), containing identical screening provisions to 28 U.S.C. ' 1915A. In Shane, three prisoners brought suit under ' 1983 alleging violations of their First, Eighth and Fourteenth Amendments. 213 F.3d 115. The district court entered an order dismissing the complaint for failure to state a

claim upon which relief could be granted. 213 F.3d at 115. The Third Circuit held that dismissal of the complaint, without granting leave to file an amended complaint to cure the deficiencies, was error. 213 F.3d at 117. The Third Circuit rejected prison officials' argument that 42 U.S.C. '1997e(c)(1) required dismissal of a defective complaint without permitting a curative amendment. 213 F.3d at 117. Although acknowledging that the purpose of 42 U.S.C. '1997e(c)(1) was to curb the substantively meritless prisoner claims that have swamped the courts, the Third Circuit noted that it was not aware of any specific support in the legislative history for the proposition that Congress also wanted the courts to dismiss claims that may have substantial merit but were inartfully pled. 213 F.3d at 117.

3. Physical-injury requirement

No federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury.

See 42 U.S.C. '1997e(e).

Although prisoners may not like the PLRA's exhaustion and filing fee requirements, most understand the objectives underlying such provisions. Forcing prisoners to exhaust administrative remedies gives State officials the opportunity to resolve grievances before they become federal cases. Similarly, forcing prisoners to pay the complete filing fee will curb frivolous and malicious filings by compelling inmates to carefully weigh their prospects for success before seeking judicial intervention. Of course, until prison officials get serious about compensating prisoners for legitimate complaints (for example, reimbursing them for property destroyed or damaged by guards), the grievance system will never lessen the burdens of litigation and reduce one of the prime causes of inmate resentment and hostility.

The PLRA's physical injury requirement [codified as 42 U.S.C. '1997e(e)], however, engenders no similar rationalization. Under this

statute, prisoners may no longer seek compensation for mental or emotional injuries resulting from constitutional violations unless they also suffered physical injury. Given the fact that violations of many cherished constitutional protections (such as freedom of religion; freedom of speech; access to the courts; procedural due process; and equal protection) typically do not involve physical injury, this PLRA provision is viewed by many prisoners as nothing less than a blatant return to the hands-off era. Prisoners who suffer mental and emotional distress resulting from State-inflicted due process violations, First Amendment infringements, and racial discrimination are no different than free citizens in desiring just compensation for such injuries. Moreover, the Supreme Court has long held that one of the principal purposes of compensatory damages is to deter State authorities from further violations of constitutional rights. See **Memphis Community School District v. Stachura**, 477 U.S. 299, 307 (1986). Deterrence is also an important purpose of this system, but it operates through the mechanism of damages that are compensatory damages grounded in determinations of plaintiffs' actual losses. The elimination of compensatory damage awards under '1997e(e) obviously weakens this deterrent function by sending a message to prison staff that they will not be held financially accountable for the infliction of psychological harm in the absence of physical injury.

The key precedent in the Third Circuit regarding 42 U.S.C. '1997e(e) is **Allah v. Al-Hafeez**, 226 F.3d 247 (3d Cir. 2000). In **Allah**, a prisoner brought a '1983 suit seeking injunctive relief and an award of compensatory and punitive damages as the result of an alleged violation of his First Amendment rights to religious exercise. 226 F.3d at 248-249. Since he was transferred to another prison, the Third Circuit agreed that Allah's request for injunctive relief was moot. 226 F.3d at 249. The question presented on appeal was whether Allah's claim for money damages was barred under 42 U.S.C. '1997e(e)?

The Third Circuit agreed that '1997e(e) barred Allah's claims for compensatory damages since the only injury alleged in his complaint was mental and emotional injury. 226 F.3d at 250. Under '1997e(e), however, in order to bring a claim for mental or emotional injury suffered while

in custody, a prisoner must allege physical injury, an allegation that Allah undisputably does not make. Accordingly, Allah's claims for compensatory damages are barred by '1997e(e) and were appropriately dismissed. @ 226 F.3d at 250-251.

While an award of compensatory damages was not available under '1997e(e) absent proof of physical injury, the Third Circuit rejected the prison officials' argument that Congress intended '1997e(e) to bar all claims for damages brought under '1983 without a prior showing of physical injury. @ 226 F.3d at 252. According to the Third Circuit, prisoners may still seek an award of nominal damages and punitive damages for violations of constitutional rights even absent a showing of physical injury. 226 F.3d at 252. Neither claims seeking nominal damages to vindicate constitutional rights nor claims seeking punitive damages to deter or punish egregious violations of constitutional rights are claims for mental or emotional injury. @ 226 F.3d at 252.

Other courts preceding or following Allah have also rejected prison officials' erroneous assumption that '1997e(e) bars all suits not alleging a physical injury. See Thompson v. Carter, 284 F.3d 418-419 (2nd Cir. 2002) (Section 1997e(e) does not limit the availability of injunctive or declaratory relief; nor does it bar nominal and punitive damage awards); Searles v. Van Bebber, 251 F.3d 869, 877-881 (10th Cir. 2001) (while compensatory damages may not be awarded for violation of constitutional rights absent proof of physical injury, '1997e(e) does not bar recovery of nominal damages and punitive damages); Rowe v. Shackle, 196 F.3d 778, 781 (7th Cir. 1999) (A prisoner is entitled to judicial relief for a violation of his First Amendment rights aside from any physical, mental, or emotional injury he may have sustained. @); Canell v. Lightner, 143 F.3d 1210, 1213 (9th Cir. 1998) ('1997e(e) does not apply to First Amendment claims regardless of the form of relief sought @); Robinson v. Page, 170 F.3d 747, 748 (7th Cir. 1999) (The domain of the statute is limited to suits in which mental or emotional injury is claimed. @).

As for the current status of 42 U.S.C. '1997e(e), we would emphasize the following: First, '1997e(e) has been upheld despite

constitutional challenges. See Searles v. Van Bebber, 251 F.3d 869, 877 (10th Cir. 2001) (The restriction on damages of 42 U.S.C. '1997e(e) does not violate plaintiff's right of access to the courts or otherwise run afoul of constitutional restrictions @); Zehner v. Trigg, 133 F.3d 459, 463 (7th Cir. 1997) ('1997e(e) does not violate equal protection or separation of powers doctrine); Davis v. District of Columbia, 158 F.3d 1342, 1347 (D.C.Cir. 1998) (rejecting equal protection and access to courts challenge).

Second, the courts will dismiss any claim seeking compensatory damages for mental or emotional injuries without a prior showing of physical injury. See Herman v. Holiday, 238 F.3d 660, 666 (5th Cir. 2001) (His claims for monetary damages can only be described as for mental and emotional damages, which as discussed above, he is not entitled to recover in the absence of a prior showing of physical injury under '1997e(e). @); Davis v. District of Columbia, 158 F.3d at 1348 (claim to compensatory damages is directly barred by '1997e(e) as prisoner has alleged no compensable injury); Robinson v. Page, 170 F.3d 747, 749 (7th Cir. 1999) (If the suit contains separate claims, neither involving physical injury, and in one the prisoner claims damages for mental or emotional suffering and in the other damages for some other type of injury, the first claim is barred by the statute but the second is unaffected. @); Cassidy v. Indiana Department of Corrections, 199 F.3d 374, 376 (7th Cir. 2000) ('1997e(e) applies to all federal civil actions brought by prisoners, including '1983 constitutional tort litigation and ADA violations; The plain language of '1997e(e) provides for no exceptions. @).

As to what constitutes Aphysical injury, @ Congress failed to provide a definition in the PLRA, thus leaving the matter for the courts to resolve. In Siglar v. Hightow, 112 F.3d 191 (5th Cir. 1997) the Fifth Circuit held that a sore, bruised ear lasting for three days was de minimus and did not reach the requisite level of physical injury under the PLRA. 112 F.3d at 193. In Davis v. District of Columbia, 158 F.3d 1342 (D.C.Cir. 1998), the District of Columbia Circuit Court held that a prisoner's weight loss, appetite loss, and insomnia after disclosure of his HIV infection did not qualify as Aphysical injury @ under '1997e(e). 158 F.3d at 1349 (A somatic

manifestations of emotional distress are not prior physical injuries). And in Zehner v. Trigg, 133 F.3d 459 (7th Cir. 1997) the Seventh Circuit held that prisoners' alleged exposure to asbestos while working in a prison kitchen required dismissal because there was no claim of physical injury. 133 F.3d at 462. It would appear that the injury must be clearly physical in nature to qualify under ' 1997e(e).

Finally, if a prisoner's constitutional rights were violated but he or she sustained no physical injuries, he or she can still file suit seeking an award of nominal damages and punitive damages. See Allah v. Al-Hafeez, 226 F.3d 247 (3d Cir. 2000)(holding ' 1997e(e) does not bar nominal or punitive damages). Nominal damages [set at \$1.00] are the appropriate means of vindicating constitutional rights where the deprivation has not caused actual, provable injury. See Carey v. Piphus, 435 U.S. at 266 (ABy making the deprivation of such rights actionable for nominal damages without proof of actual injury, the law recognizes the importance to organized society that those rights be scrupulously observed.). Punitive damages, on the other hand, can only be awarded A in an action under ' 1983 when the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others.@ Smith v. Wade, 461 U.S. 30, 56 (1983).

4. Three-strikes provision

In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under this section if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury.

See 28 U.S.C. ' 1915(g).

Under 28 U.S.C. ' 1915(a)(1) the federal courts may authorize the commencement of a civil action *in forma pauperis* (IFP) if the person submits an affidavit listing all assets and stating that he or she is unable to pay the filing fee. As previously noted, IFP status does not excuse payment of the filing fee; it merely permits an indigent prisoner to file his suit and commence his case while making incremental monthly payments to satisfy the filing fee. IFP status, however, is denied under the PLRA if the prisoner has previously filed three or more actions that have been dismissed as frivolous, malicious, or for failing to state a claim. See 28 U.S.C. ' 1915(g). The only exception for three-strikes prisoners is when A the prisoner is under imminent danger of serious injury.@ 28 U.S.C. ' 1915(g).

Under this statute, an indigent prisoner accrues a A strike @ when he or she files a frivolous or meritless action. Once the prisoner has received A three strikes,@ he or she is A out @ in terms of bringing a future case IFP absent proof of A imminent danger of serious injury.@ 28 U.S.C. ' 1915(g). This PLRA provision was specifically aimed at abusive indigent prisoners B sometimes called A frequent filers @ B who continuously pursue frivolous or meritless litigation in federal court. Of course, the courthouse door still remains open to even three-strikes prisoners; they merely must pay the court filing fee up front. See Abdul-Akbar v. McKelvie, 239 F.3d 307, 317 (3d Cir. 2001)(Section 1915(g) does not prevent a prisoner with A three strikes @ from filing a civil action; he or she is simply unable to enjoy the benefits of proceeding IFP and must pay the fees at the time of filing instead of under the installment plan).

Prisoners have had no success in mounting constitutional challenges to the PLRA A three-strikes @ provision. See Lewis v. Sullivan, 279 F.3d 526 (7th Cir. 2002)(rejecting equal protection challenge to three-strikes provision); Higgins v. Carpenter, 258 F.3d 797 (8th Cir. 2001)(rejecting equal protection challenge); Abdul-Akbar v. McKelvie, 239 F.3d 307 (3d Cir. 2001)(rejecting equal protection challenge); Medberry v. Butler, 185 F.3d 1189 (11th Cir. 1999)(rejecting ex post facto challenge); White v. State of Colorado, 157 F.3d 1226 (10th Cir. 1998)(rejecting access to courts, due process, and equal protection challenge); Wilson v.

Yaklich, 148 F.3d 596 (6th Cir. 1998)(rejecting equal protection, right of access, bill of attainder, and ex post challenges); Rivera v. Allin, 144 F.3d 719 (11th Cir. 1998)(rejecting right of access, separation of powers, due process, and equal protection challenges). One district court did declare that the Athree-strikes@ provision was unconstitutional under Astrict scrutiny@ equal protection grounds. See Ayers v. Norris 43 F.Supp.2d 1039 (E.D.Ark. 1999). However, the Ayers rationale was subsequently rejected by the Eighth Circuit. See Higgins v. Carpenter, 258 F.3d at 798 (Awe conclude that the court-s analysis in Ayers was incorrect because ' 1915(g) need survive only a rational basis, not a strict scrutiny test@).

Typical of this line of cases is the Third Circuit-s rejection of an equal protection challenge to 28 U.S.C. ' 1915(g) in Abdul-Akbar v. McKelvie, 239 F.3d 307 (3d Cir. 2001). First, the Third Circuit concluded that the Athree-strikes@ provision was subject only to Arational basis@ equal protection review rather than the more demanding Astrict scrutiny.@ 239 F.3d at 318. ANeither prisoners nor indigents are suspect cases.@ 239 F.3d at 317. Furthermore, a prisoners-s constitutional right of access to the courts is not a fundamental right entitled to strict scrutiny review. 239 F.3d at 317 (AAn unconditional right of access exists for civil cases only when denial of a judicial forum would implicate a fundamental human interest B such as the termination of parental rights or the ability to obtain a divorce.@). The Third Circuit further noted that ' 1915(g) Adoes not prevent a prisoner with xthree strikes= from filing a civil action; he or she is simply unable to enjoy the benefits of proceeding IFP and must pay the fees at the time of filing instead of under the installment plan.@ 239 F.3d at 317. Additionally, prisoners are not precluded from filing their ' 1983 complaints in state court systems that may not have a Athree strikes@ provision. 239 F.3d at 317. Having concluded that prisoners are not a suspect class and the Athree strikes@ provision does not implicate a fundamental right, the Akbar Court held that rational basis equal protection review was appropriate. 239 F.3d at 318. Since preventing Afrequent filers from obtaining fee waivers is rationally related to the legitimate government interest of deterring frivolous lawsuits,@ the Third Circuit concluded that ' 1915(g) does not violate equal protection

concepts. 239 F.3d at 319.

In light of Akbar and other appellate court decisions rejecting constitutional challenges to 28 U.S.C. ' 1915(g), we now turn to the operation of the Athree strikes@ provision. According to the statute, any prisoner-initiated civil action or appeal dismissed on grounds that it is Afrivolous, malicious, or fails to state a claim upon which relief may be granted@ counts as a strike. For example, the dismissal of a prisoners prior case because it Aacked an arguable basis in law@ is equivalent to a dismissal for frivolousness and counts as a strike. See Day v. Maynard, 200 F.3d 665, 667 (10th Cir. 1999). A dismissal of a prior case without prejudice also counts as a strike, so long as the dismissal is made because the case is frivolous, malicious or fails to state a claim. 200 F.3d at 667. Similarly, dismissal of a prior lawsuit without prejudice is strike-worthy where it was based upon the prisoners abuse of the judicial process by filing a false affidavit. See Rivera v. Allin, 144 F.3d 719, 731 (11th Cir. 1998). In short, prisoners obtain a Astrike@ against them for purposes of future IFP eligibility under ' 1915(g) when any prior action or appeal was dismissed on grounds it was frivolous, malicious, or fails to state a claim upon which relief may be granted.

In considering the number of Astrikes@a a prisoner has accumulated under ' 1915(g), the courts will tally lawsuits dismissed prior to enactment of the PLRA Athree strikes@ provision. See Welch v. Galie, 207 F.3d 130, 132 (2d Cir. 2000)(lawsuits dismissed prior to PLRA may nevertheless be counted); Tierney v. Kupers, 128 F.3d 1310, 1312 (9th Cir. 1997)(' 1915(g)-s cap on prior dismissed claims applies to cases dismissed both before and after the statutes effective date. ATherefore, regardless of the dates of the dismissals, the analysis is the same: three prior dismissals on the stated grounds equals no IFP status in new filing, unless the prisoner is in imminent danger of serious physical injury.@); Keener v. Pennsylvania Board of Probation and Parole, 128 F.3d 143, 144-145 (3d Cir. 1997)(per curiam)(same).

Those prisoners who have accumulated Athree strikes@ under 28 U.S.C. ' 1915(g) are not permitted IFP status to file a new claim unless they pay the complete filing fee up front. See Abdul-Akbar, 239 F.3d at 317. The only

exception is when the prisoner can prove that he or she is under imminent danger of serious physical injury. 28 U.S.C. § 1915(g).

In **Abdul-Akbar v. McKelvie**, 239 F.3d 307 (3d Cir. 2001) (en banc) a prisoner who had filed at least 180 civil rights or habeas corpus claims was denied IFP status to file a new § 1983 complaint. 239 F.3d at 311. Citing 28 U.S.C. § 1915(g), the district judge concluded that Akbar was not entitled leave to proceed IFP because three or more of his prior suits were dismissed as frivolous and there was no claim by Akbar of imminent danger of serious physical injury. 239 F.3d at 311. At issue on appeal was whether the imminent danger exception of 28 U.S.C. § 1915(g) was to be assessed at the time of the alleged incident [as decided previously in **Gibbs v. Roman**, 116 F.3d 83, 86 (3d Cir. 1997)], or at the time the complaint is actually filed with the court. 239 F.3d at 312. The en banc Third Circuit concluded that **Gibbs** was wrongly decided because Congress intended that the imminent danger exception must be assessed contemporaneously with the bringing of the action. 239 F.3d at 313. Someone whose danger has passed cannot reasonably be described as someone who is in danger, nor can that past danger reasonably be described as imminent. 239 F.3d at 313. See also: **Day v. Maynard**, 200 F.3d 665, 667 (210th Cir. 1999) (three-strikes prisoner not entitled to IFP status under imminent danger exception since his complaint targeted Oklahoma defendants who had no control over his present confinement in Connecticut prison); **Medberry v. Butler**, 185 F.3d 1189, 1193 (11th Cir. 1999) (three-strikes prisoner not entitled to IFP status under imminent danger exception where the threat had ceased prior to the filing of complaint); **White v. State of Colorado**, 157 F.3d 1226, 1228 (10th Cir. 1998) (three-strikes prisoner not entitled to IFP status under imminent danger exception where amended petition failed to specify the nature of the threat).

In **Ashley v. Dilworth**, 147 F.3d 715 (8th Cir. 1998) the Eighth Circuit concluded that the prisoner sufficiently alleged imminent danger of serious physical injury to permit IFP status despite three prior strikes. 147 F.3d at 717. In this case, the prisoner alleged that prison officials repeatedly confined him near inmates on his enemy list, resulting in two physical attacks,

including one prisoner armed with a screwdriver and another armed with a butcher knife. 147 F.3d at 717. In short, because Ashley has properly alleged an ongoing danger, and because his complaint was filed very shortly after the last attack, we conclude that Ashley meets the imminent danger exception in § 1915(g). 147 F.3d at 717.

Likewise, in **McAlphin v. Toney**, 281 F.3d 709 (8th Cir. 2002) the Eighth Circuit concluded that a three strikes plaintiff had sufficiently alleged imminent danger of serious physical injury to permit him to proceed *in forma pauperis*. 281 F.3d at 711. In this case, the prisoner alleged he was subject to extreme pain and a spreading mouth infection due to prison officials' delay in making dental extractions. 281 F.3d at 711. The Eighth Circuit concluded that such allegations were sufficient to satisfy the imminent danger exception of 28 U.S.C. § 1915(g). 281 F.3d at 711.

B. PLRA Restrictions on Remedial Relief

In addition to curbing the purported flood of prisoner-initiated lawsuits overwhelming the court system, the PLRA also contains statutory provisions designed to end, or at least significantly curtail, what PLRA advocates characterize as judicial micromanagement of the prison system. These guidelines will work to restrain liberal Federal judges who see violations of constitutional rights in every prisoner complaint and who have used these complaints to micromanage State and local prison systems. See 141 Cong. Rec. S14414 (September 27, 1995) (remarks of former Senator Dole).

The PLRA amends 18 U.S.C. § 3626 in three significant respects: (1) it places new requirements for prospective relief in all civil actions concerning prison conditions; (2) it places limitations on the issuance of prisoner release orders or so-called population caps to reduce prison overcrowding; and (3) it provides for the automatic stay and termination of previously granted prospective relief.

The PLRA places limitations on when district judges can award remedial or prospective relief which is defined as all relief other than compensatory monetary damages. See 18 U.S.C. § 3626(g)(7). According to the

statute, a court shall not grant or approve any prospective relief unless the court finds that such relief is narrowly drawn, extends no further than necessary to correct the violation of a Federal right, and is the least intrusive means necessary to correct the violation of the Federal right. See 18 U.S.C. § 3626(a)(1)(A).

Basically, what § 3626(a) does is require that prison conditions remedies extend no further than absolutely necessary to remedy federal constitutional violations. Consequently, if a federal judge concludes that prison overcrowding has resulted in unsanitary conditions and increased prisoner violence, that judge can only order State authorities to implement those measures necessary to correct the Eighth Amendment violations. The PLRA prohibits district courts from issuing orders that effect an overall modernization of the prison or to comply with State law. See Gilmore v. People of the State of California, 220 F.3d 987, 999 (9th Cir. 2000) (Section 3626(a) therefore operates simultaneously to restrict the equity jurisdiction of federal courts and to protect the bargaining power of prison administrators. B no longer may courts grant or approve relief that binds prison administrators to do more than the constitutional minimum.).

With respect to prisoner release orders, the PLRA provisions mandate that no such order may be entered unless a less intrusive order has failed to remedy the federal-right violation and the defendant was afforded a reasonable amount of time to comply with the previous court orders. 18 U.S.C. § 3626(a)(3)(A). Additionally, only a three-judge court can issue a prisoner-release order, see 18 U.S.C. § 3626(a)(3)(B), and this court must find, by clear and convincing evidence, that crowding is the primary cause of the illegal conditions of confinement and that no other remedy can alleviate those conditions. See 18 U.S.C. § 3626(a)(3)(E).

If prospective relief has already been granted by a district court, the PLRA contains provisions permitting termination of all prospective relief unless the court makes written findings that the relief is needed to rectify a current and ongoing violation of the Federal right, extends no further than necessary to correct the violation of the Federal right, and that the prospective relief is narrowly drawn and the

least intrusive means to correct the violation. See 18 U.S.C. § 3626(b)(3); Imprisoned Citizens Union v. Ridge, 169 F.3d 178, 190 (3d Cir. 1999) (Congress chose to allow the courts to maintain jurisdiction only where defendants are guilty of current and ongoing violations of a federal right). Even if a court made these findings at the time the remedial order was entered, the order is subject to termination, upon motion, two years after the order's entry unless the court, once again, makes the prescribed findings. See 18 U.S.C. § 3626(b)(1).

Finally, all prospective relief ordered by a court to remedy unconstitutional conditions is automatically stayed thirty days after a motion is filed to modify or terminate remedial relief and lasting until the district court enters a final order ruling on the motion. See 18 U.S.C. § 3626(e)(2). The automatic stay provision may be postponed for up to sixty additional days by the court for a good cause. See 18 U.S.C. § 3626(e)(3). A crowded or congested court docket, however, does not qualify as a good cause for postponement of the stay. 18 U.S.C. § 3626(e)(3); see also Miller v. French, 530 U.S. 327 (2000) (rejecting argument that automatic stay provision violates the separation of powers doctrine by usurping the power of the judicial branch to enter final judgments).

IX. Conclusion

The Pennsylvania Law Project would like to thank Gary Rock for the tremendous effort in compiling this manual and wish you the best in its use. Despite the some public perceptions of inmate litigation, we remain committed to the old adage that the pen is mightier than the sword and commend your efforts to utilize our Judicial system to bring about a just result to your concerns.