

# Prison Legal News

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*Dedicated to Protecting Human Rights*

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## Wrongfully Convicted Man Freed for Murder of Oregon DOC Director, But State Wants Him Back In Prison

by Mark Wilson

**"T**HE STATE CAN NO LONGER AFFORD to manufacture a case built on lies and half-truths," wrote Patrick and Kevin Francke in their letter to a federal judge in support of the man wrongfully convicted of killing their brother.

After serving 28 years in prison, Frank E. Gable, then 59 years old, walked out of prison on June 27, 2019. He was a free man but he had a cloud hanging over his head that remains there still. The state of Oregon had filed an appeal to the court order that released him, which remains pending.

On April 18, 2019, U.S. District Court Magistrate Judge John V. Acosta released

the stunning decision that Gable was "probably" innocent of murder. In a 94-page opinion, he ordered the state to retry or free Gable within 90 days.

Gable was convicted for the 1989 murder of Michael Francke, Director of the Oregon Department of Corrections (ODOC).

Francke's brothers wrote in their letter to the judge that the state should "abandon this fruitless endeavor" of trying Gable again. They hoped officials would "concede that they convicted an innocent man." The sooner they do so, "the better and justice will be served!"

The murder of Francke occurred amidst his efforts to reform a corrupt prison system in Oregon. Francke had already turned around New Mexico's troubled prisons in just four years when he was recruited. At age 40, Michael Francke was appointed Director of ODOC on May 1, 1987. At the time, the agency was struggling with prison overcrowding. A ten-month drug smuggling investigation of Oregon State Penitentiary (OSP) employees had also forced the 1986 resignation of the superintendent and the firing of several guards.

Francke immediately started cleaning house. By February 1988, he had commissioned a prison population study, developed a \$28.5 million prison construction plan, made changes in prison management and implemented tougher disciplinary rules. He also discovered an "organized criminal element" within ODOC, according to his brother Kevin. Whatever Francke found spooked him enough that he started sleeping with a shotgun next to his bed. But that

did not save him.

Just after midnight on January 17, 1989, a security guard patrolling the grounds of the ODOC administration in Salem found Francke dead outside his office. His automobile sat nearby, its driver's door ajar, the dome light on inside.

An autopsy revealed that Francke's assailant had attempted to stab him at least three times. One knife thrust slashed his overcoat but did not cut him. A second thrust passed through Francke's left bicep, slightly penetrating his chest after passing through business cards in his front shirt pocket. The fatal blow passed through Francke's chest from left to right at a downward angle, piercing his heart. He died from blood and oxygen loss.

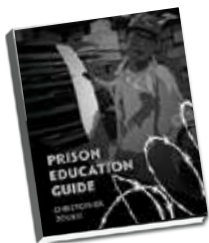
Investigators decided that Francke was stabbed as he interrupted a car burglar at about 7 p.m. He then staggered back toward his office and unsuccessfully attempted to punch out a windowpane of the locked door before dying on the porch, where he was found. No murder weapon was ever recovered, and no DNA or other evidence of the assailant's identity was discovered at the crime scene.

As reported in the inaugural issue of *PLN*, rumors and reports quickly surfaced linking Francke's murder to corruption within the prison system that he was about to expose.

"You want to know what I think?" asked his brother Patrick then. "I think he discovered something within the [Oregon] system ... something that he was getting ready to turn over." [See: *PLN*, May 1990, p.3]. On July 14, 1989, the Salem *Statesman*

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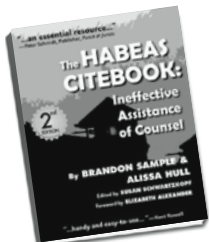
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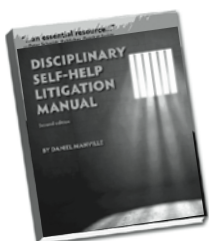
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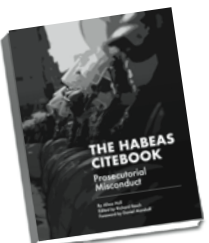
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## **Murder of ODOC Director (cont.)**

*Journal* reported that the FBI was “investigating a possible connection between official corruption and drug smuggling at the state penitentiary and the murder.” Yet, local officials had little interest in the corruption allegations.

By September 1989, however, those questions could no longer be ignored, and Oregon’s then-Governor, Neil Goldschmidt (D), appointed retired Judge John C. Warden to conduct an independent investigation of ODOC.

On December 14, 1989, following a three-month inquiry, Warden issued a report finding “significant illegal activities or other wrongdoings” within the prison system, though he did not find a “reasonable” link between that and Francke’s murder. Little detail has been given on what these “significant illegal activities” were, much less prosecuting them.

Meanwhile, during what the *Statesman Journal* called “the most expensive homicide investigation in Oregon history,” detectives focused their attention on a motley crew of low-level drug dealers and excons.

First in line was Johnny Lee Crouse, a parolee first interviewed by detectives on February 15, 1989, after telling his parole officer that he had information about the Francke murder. He said he had been walking by the crime scene when he witnessed five men “drop some guy” and run off. Crouse even claimed to have chased one of the men for about three and a half miles but was unable to catch him. He denied any involvement in the crime, though he knew from news reports that Francke had been killed with a knife.

Detectives interviewed Crouse a second time on April 4, 1989, after he was arrested on an unrelated assault charge. For the first hour of the interview, Crouse repeated his story about the five assailants. When detectives said they did not believe him, Crouse changed his story, this time implicating himself as the killer. He said a man named “Juan” agreed to pay him \$300,000 to “take care of Francke.” Crouse said he was paid a \$1,500 down payment.

Crouse claimed that as Francke was getting into his car, he approached and stabbed the prison director once or twice. He later decided on twice, but he provided other details consistent with the physical

evidence at the crime scene, the autopsy findings and Francke’s physical characteristics.

Later that same day, when detectives interviewed him again, Crouse changed his story once more. However, he continued to implicate himself as the killer. When he was interviewed again the next day, April 5, 1989, he asked all but one detective to leave the room before describing how he had stabbed Francke. Crouse again offered details—that he stabbed Francke “at least once in the heart, in a downward motion”—which were consistent with the autopsy results.

Detectives allowed Crouse to call his brother, and they recorded the call, during which he asked if the brother remembered a previous telephone conversation in which Crouse had admitted to killing Francke. Later that day, Crouse accompanied detectives to the crime scene, taking umbrage and becoming hostile when one touched him.

Returning to an interrogation room, one of the detectives suggested to Crouse that his violent reaction to being touched might have played a part in what happened between him and Francke. Sure enough, Crouse changed his story one more time, saying that he had targeted a car for burglary and been surprised by a man—presumably its owner—whom Crouse stabbed when the man started a fist fight. He claimed that he did not know the victim was Francke until hearing news reports the following day.

Detectives noted that this was the most convincing of all of the versions of the story Crouse had offered. But when a new detective attempted to interview Crouse on April 9, 1989, he recanted his prior confessions and denied killing Francke.

Crouse then asked to speak with the original detectives again on April 13, 1989, and recanted his recantation, saying that he “thought he would have a ray of hope to get away with” the murder when he saw the new detective. But he insisted to the others that he “could not live with getting away with the Francke murder.” During this interview, he also admitted to punching Francke on the left side of his face, consistent with a wound that Francke sustained.

On April 19, 1989, an FBI polygrapher gave Crouse two polygraph examinations. He found that Crouse was not deceptive in telling detectives that he stabbed Francke.

On June 15, 1989, Crouse was interrogated again. This time he denied

## Murder of ODOC Director (cont.)

killing Francke but claimed he was part of a conspiracy to cover up the murder. Also involved in the conspiracy, he said, were ODOC officials who wanted to kill Francke. Crouse even claimed that he knew who had actually committed the murder.

For reasons that were not clear to Judge Acosta, the state decided on November 29, 1989 to grant Crouse immunity from prosecution for previous false statements he had made concerning the Francke homicide. In what would be his final law enforcement interview, Crouse told detectives on November 30, 1989, that he did not kill Francke and had no involvement in the murder.

By then, investigators had lost interest in Crouse as the suspected killer. Ignoring the way his multiple confessions were corroborated by the physical evidence, they turned their attention to another low-level drug dealer and police informant named Frank E. Gable.

"I don't know how I first got implicated," said Gable, "but I'm real scared it's

going to end in me getting [convicted] for something I ain't did." [See: *PLN*, May 1990, p. 4].

In fact, what implicated him was a tip from another low-level drug dealer, Michael Keerins, whose brother, Kris, had been identified as a "person of interest" to the investigation in January and February 1989. That tip led investigators to interrogate Michael Keerins in May 1989, when he did not mention Gable.

By the time they returned to interview him a second time in September 1989, though, Keerins was ready to pass along a "jailhouse confession" he allegedly overheard from Gable when the two were incarcerated together at the Marion County Jail in May—the same month that he gave his first interview and failed to bring it up. Indeed, this story seems to be a tale of a group of police snitches eager to pin the blame for Francke's murder on their fellow snitches in what would become a macabre game of pin the murder on the snitch. Gable would ultimately win.

Keerins would later admit that he lied, making up the confession he said he overheard so as to deflect suspicion from his family, as well as for personal gain and because he learned that Gable was a "snitch for Keizer PD" (the police department in Keizer, Oregon).

Like Crouse, Gable was interviewed by detectives many times, starting in May 1989, the same month Keerins later said he

overheard Gable's confession.

He was interviewed again in June 1989, after he started working as an informant for Keizer PD and an officer there noticed a resemblance between Gable and the composite sketch of Francke's killer.

At a third interview on September 13, 1989, he continued to maintain that he did not kill Francke and had never said so. But he told the interviewer he had started to fear that "you sons of bitches were going to try to hang this on me."

After a fourth interview on September 15, 1989, Gable was booked into jail for assaulting his then-wife. At about 12:30 a.m. on September 16, 1989, after he mentioned thinking of killing himself in the jail, a detective seized the opportunity to get him talking about the Francke murder. Gable continued to talk extensively with investigators later that day, as well as November 3, 1989, December 22, 1989, December 23, 1989 and January 21, 1990.

Like Crouse, Gable presented a version of events that shifted over the course of different interviews. Unlike Crouse, however, Gable always maintained his innocence. Furthermore, no physical evidence placed him at the crime scene nor identified him as the killer.

But after hearing testimony from Keerins and several other drug dealer and ex-con snitches, all claiming that they either witnessed Gable commit the Francke homicide or that he confessed to them that he had done so, a grand jury indicted him for murder, and he was arrested on April 8, 1990.

Gable's four-month trial began one year later. The defense intended to introduce evidence of Crouse's confession and called him as a witness. However, Crouse invoked

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his Fifth Amendment privilege against self-incrimination. The trial court then agreed with prosecutors that no other evidence about his confession could be considered by the jury. Gable's attorneys objected that this would violate the Oregon Evidence Code. But they did not argue that it would deprive him of his due process right to present a defense, which would have been a much stronger point to make with the judge.

At trial, the state offered testimony from the drug dealers and felons who claimed that they had witnessed Gable commit the murder or that he had confessed to them afterwards. The jury did not see any physical evidence linking Gable to the homicide.

But once they were prohibited from introducing evidence of Crouse's confession, Gable's attorneys had no line of defense except to challenge the credibility of the state's witnesses and to question the reliability and adequacy of the investigation. Gable did not testify.

On June 27, 1991, after deliberating less than 24 hours, the jury voted unanimously to find Gable guilty on all six counts against him of aggravated murder and one

count of murder. The surviving Francke brothers were in the courtroom.

"If I had been on the jury, I wouldn't have voted for a guilty verdict," scoffed Kevin Francke, whose brother agreed.

"I watched them re-enact the crime and thought it was the stupidest thing I'd ever seen," Patrick Francke said. "None of it made any sense."

The prosecution pursued the death penalty on the aggravated murder convictions. At the conclusion of the penalty phase, however, the jury voted 10-to-2 against death. On July 11, 1991, Gable was sentenced to life imprisonment without the possibility of parole, even though that was not an available penalty at the time of the offense.

"I'm glad I didn't get the death penalty," Gable told the *Statesman Journal*. "But I'm not happy that I'm in prison without parole for a crime I didn't do."

Given the high-profile nature of the offense, prison officials transferred Gable out of state. He served his sentence at prisons in California, Idaho, Florida, Ohio and Nevada before he ended up in a cell in Kansas, where prison officials at Lansing

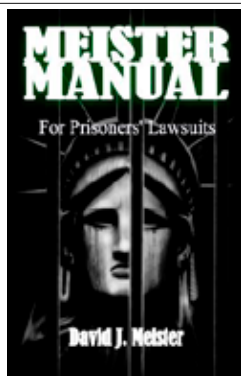
Correctional Facility described him as a "model inmate."

After Gable's trial, the Francke brothers met with Crouse at OSP, where he was incarcerated on an unrelated conviction. Crouse told them that he did not kill Michael Francke, but he wouldn't say who did.

Neither Kevin nor Patrick Francke believes that Crouse was the killer, but they are both certain that he knew who killed their brother. Unfortunately, that is a secret that Crouse took to his grave when he died in 2013, shortly after his release from the Nebraska State Penitentiary.

Both Kevin and Patrick still also believe that prison officials were involved in Michael's murder.

"Francke's family, his brothers Kevin and Pat, have been saying for years that their brother was killed because he discovered corruption within his department and was going to clean house," noted journalist Phil Stanford, who has written extensively on the case since 1989. "Almost immediately after Francke's murder, the authorities in charge of the investigation denied this was so—but as is now clear, that was part of the cover-up. But they needed a patsy, someone



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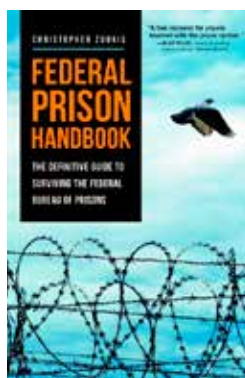
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## Murder of ODOC Director (cont.)

to take the fall, and Gable was it.”

After several years of unsuccessful state court litigation, Gable finally filed a federal habeas corpus action under 28 U.S.C. § 2254. He was represented in that action by Assistant Federal Public Defender Nell Brown, with assistance from the Oregon Innocence Project, to challenge his conviction.

Their efforts finally paid off when Acosta issued his April 2019 ruling vacating the conviction. In it, the judge extensively discussed the strong evidence that Gable offered in the recantations of eight grand jury and/or trial witnesses. Each admitted that they had previously lied, some because Gable was a police informant, others to divert attention from themselves and their family members, still others who received inducements and incentives from prosecutors.

Virtually every prosecution witness described threats and other coercive police interrogation tactics. Gable also offered the testimony of a polygraph expert, David C. Raskin, Ph.D., who concluded that “it is abundantly clear that polygraph testing procedures conducted in this investigation were fundamentally and seriously flawed.”

“The unethical and flawed polygraph testing procedures combined with improper and coercive interrogations appear to have provided the means to shape their statements in order to obtain false testimony from the examinees,” Dr. Raskin concluded.

By way of example, he highlighted witness Jodie Swearingen’s experience. One of those who testified against Gable at his trial was another small-time methamphetamine dealer named Cappie Harden, who said he was giving Swearingen a ride in the vicinity

of the crime scene when he saw and recognized Gable and then watched him stab Francke. Swearingen stuck to the same script when she testified before the grand jury. But at Gable’s trial she recanted that testimony.

Acosta recorded what happened next: “Specifically, as to Swearingen, Dr. Raskin noted that investigators gave her 23 polygraphs in 12 separate sessions, and that she was ‘administered multiple polygraphs on at least 7 different days.’ On numerous occasions, investigators ‘confronted’ her with supposed defective responses.... Raskin states, ‘I have never seen this many tests administered to one person in the 43 years I have been working in this field...’ and (he) opined that the pattern of interrogation and confrontation combined with the sheer number of tests would have produced flawed polygraph results for Swearingen.”

“Dr. Raskin described similar flaws in the polygraph examinations of the other witnesses,” Acosta added, before finally turning his attention to Crouse.

“There is no evidence in the record that Crouse had any connection whatsoever with Gable, Swearingen, Harden, or any other member of the group of Gable’s acquaintances,” the judge noted. “Yet, less than three months after Francke’s murder, before any witness accounts emerged which described the altercation, Crouse knew a plethora of physical details about events immediately before, during, and immediately following the altercation that he could not have known unless he killed Francke.”

The judge concluded that “the trial court’s mechanistic application of the Oregon Rules of Evidence denied Gable his federal constitutional right to present a defense.”

Finding that the error was not harmless, Acosta ruled that, “Gable has demonstrated that the exclusion of Crouse’s statements had a substantial and injurious effect or influence in determining the jury’s verdict: evidence of Crouse’s confession ‘would have filled a major gap in the defense case and would have greatly increased the likelihood of the jury’s entertaining a reasonable doubt of (Gable’s) guilt.’”

Granting Gable’s petition for habeas corpus relief, the judge ordered the state to retry him or release him from custody within 90 days. In doing so, the court made its view of the proper outcome clear.

“In light of the totality of the evidence, including the newly presented evidence, the court concludes it is more likely than not that no reasonable juror would find Gable guilty beyond a reasonable doubt of the crimes charged.”

Gable’s attorneys agree with Acosta’s assessment.

“There’s no physical evidence to convict our client; there were just inconsistent statements by supposed eyewitnesses,” said Oregon Federal Public Defender Lisa Hay. “At the end, most of the trial witnesses later admitted they lied at the trial and there are concerns about the coercive and improper interrogation techniques that were used. No one should have confidence in the 1991 verdict.”

The ruling also brought the Francke family a measure of joy and relief.

“My brother and I have been working toward this day for almost 30 years,” Patrick Francke wrote on Facebook, adding that he and Kevin “are happy in the extreme that the very real probability that Frank Gable will be released and his freedom is within sight.”

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"If nothing ever comes of this, Michael's legacy is 'an innocent man was set free,'" said Patrick Francke.

For his brother, though, it will not be enough until the real killer is found. Still, Kevin Francke said, "There is no doubt in my mind that Frank Gable is innocent."

Neither man was consulted about the state's decision to appeal Judge Acosta's ruling, despite the requirements of Oregon victim's rights law. The state has also taken steps to revive its original prosecution, with detectives contacting (though hopefully not threatening) several of the witnesses who recanted their statements, according to Brown, Gable's lead attorney.

"Mr. Gable has served nearly thirty years in prison for a conviction that is, at worst, the wrongful conviction of an innocent man, and at best, the product of a trial rife with highly suspect evidence and marred by errors of a constitutional magnitude," she said.

In a recent letter to Oregon Department of Justice officials that called their decision to appeal "galling and baffling," Kevin Francke also noted his family's frustration that they were ignored in the decision-making process.

"Hasn't an innocent man's life been sacrificed enough?" he asked. "And the millions upon millions of taxpayer dollars fabricating this sham investigation?"

Now out of prison, Gable—who changed his name several years earlier to Franke J. Different Cloud, to honor his Native American heritage—can finally spend time with his wife, Rainy Storm, a prison pen-pal he married about four years before his release.

The state's appeal hanging overhead still has Kevin Francke incensed. "There is

absolutely no more inhumane thing they can do, because Frank Gable is an innocent man," he declared. "They have no physical evidence. They have no witnesses. They don't even have circumstantial evidence. They have no case left."

Patrick Francke agrees, "There's never going to be any pursuit of this case by the State of Oregon or Marion County district attorney. The witnesses, their evidence, has gone to the winds. People are dead. So that's the end of it, as far as I'm concerned"

The brothers urged "the district attorney's office and the state attorney general to drop this farce." But they also recognized that release would represent a frightening new beginning for Gable, who "has been out of the real world for almost 30 years and will need a job and money to get started in his new life with his wife," they wrote on a GoFundMe page they established "to help Frank get started anew."

Kevin Francke also wrote on the GoFundMe page that "Mike Francke's legacy should not be that an innocent man's life was tossed onto the trash pile of incarceration, then left to rot outside the walls, forgotten and abandoned."

The only burning question that remains is whether Oregon officials will continue their efforts to taint that legacy by trying to reinstate a clearly wrongful conviction of an innocent man, or if they will now fully investigate whether there was a cover-up and work to bring Michael Francke's real killer

to justice. If Gable did not kill Francke, who did and why? The state of Oregon seems to show little interest in learning the answers to these questions.

As of October 11, 2021, the state's appeal of Judge Acosta's order was still pending before the U.S. Court of Appeals for the 9<sup>th</sup> Circuit. See: *Gable v. Williams*, USDC OR, Case No. 3:07-cv-00413-AC. 📰

Sources: *The Oregonian/OregonLive*, *The Statesman Journal*, *The Portland Tribune*, *KOIN*, *KGW*, *Pamplinmedia.com*, *gofundme.com*

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### **Are Phone Companies Taking Money from You and Your Loved Ones?**

HRDC and PLN are gathering information about the business practices of telephone companies that connect prisoners with their friends and family members on the outside.

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#### **Prison Legal News**

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# From the Editor

by Paul Wright

**A**FTER EDITING *PLN* FOR OVER 31 YEARS now, it seems like all 370-plus issues of the magazine kind of blend together in my mind like one big, long magazine. A lot of stories don't have a beginning, middle or an end but rather are like a very, very long play with many scenes in them.

This month's cover article is one of them. In the very first issue of *PLN*, May 1990, which myself and *PLN*'s co-editor at the time, Ed Mead, hand-typed in our respective maximum security prison cells, we reported on the murder of then Oregon DOC director Michael Francke and Gable's arrest for the murder. Today, 31 years later, we are still reporting on Francke's murder and the rather startling developments behind Gable's habeas release.

The story is far from over, with prosecutors now appealing the habeas decision. The state's appeal has been pending for several years now before the 9<sup>th</sup> circuit federal appeals court. We will report the court's decision when it is issued. The bigger question of who killed Francke, and why, may never be known. It may turn out to be the story without a conclusive ending, just an enduring mystery.

Speaking of wrongful convictions, this issue reports the filing of a lawsuit by Robert DuBoise against Tampa police and "expert witnesses" who wrongfully convicted him of a rape and murder he did not commit, for which he spent 37 years in prison, several on death row, before eventually establishing his innocence and getting released. He is represented by attorneys from the Human Rights Defense Center, the publisher of *PLN*, and the Chicago law firm of Loevy & Loevy. Details of his ordeal and now his quest for compensation for those many years he was deprived of his liberty are on page 10.

The COVID pandemic continues its course and will likely get worse during the winter months. We continue reporting developments around it—legal, medical and news wise. Unvaccinated staff entering prisons and jails seem to be the primary vectors for the disease and they are also showing resistance to getting vaccinated. Around the country, various state governments and the federal government are imposing vaccine requirements on police and prison and jail

guards. We will report on those developments as well.

If you have not donated to our annual fundraiser yet, please do so. HRDC undertakes a massive amount of advocacy for prisoners and their families, and the victims of police state injustice. We need your support to continue doing so. HRDC does not have a lot of foundations or wealthy people writing huge checks to support our work (and not for lack of trying on our part). Rather it is individuals like you whose donations and support allow us to keep advocating for lower phone rates for prisoners and their families, to end the financial exploitation and abuse of prisoners and to keep plugging away on these issues and many others year after year. We have always operated a very lean organization where money goes to very direct advocacy, litigation and publishing. Even if you cannot afford to donate now, please encourage friends and family members and those in your social network to do so.

We have several book projects in the works. Hopefully by the end of the year we will have John Boston's new book, *The PLRA handbook: Law and Practice Under the Prison Litigation Reform Act* available for shipping. We also have a new edition of *Protecting Your Health and Safety* in the process of being updated and several other books as well. And we have the paperback edition of Vic-

toria Law's new book, *Prison By Any Other Name: The Consequences of Popular Reforms*, available and ready to ship. See the interview with Vikki in this issue of *PLN*, on page 38.

Lastly, readers have probably noticed that they are getting *PLN* later in the month than they normally have in the past. This has been caused by slowdowns with the post office which seems to be operating slower and slower with each passing day and there have also been delays by our printer due to both staffing and paper shortages. If your issues of *PLN* or *CLN* are later than usual please give them extra time to arrive.

A number of prisoners have taken advantage of our introductory specials to subscribe to *PLN* and its companion publication *Criminal Legal News*. We are offering bundle deals for readers who wish to subscribe to both publications, which allow for greater savings. Please subscribe now as the fewer renewal notices we have to send out the more staff time and postage we can save and focus on putting out the magazines themselves!

In addition to our print magazines, we also have a free daily electronic newsletter and we also publish news on a daily basis on our Facebook and Twitter accounts under the handles of the Human Rights Defense Center.

Enjoy this issue of *PLN* and please encourage others to subscribe. 🐾

## Indiana DOC Settles HRDC Mail Censorship Suit

by Chuck Sharman

**O**N SEPTEMBER 21, 2021, THE INDIANA Department of Corrections (INDOC) agreed to a slate of policy reforms embodied in a consent decree to settle a censorship lawsuit filed by the Human Rights Defense Center (HRDC), publisher of *Prison Legal News* (*PLN*) and *Criminal Legal News* (*CLN*). In addition, INDOC also agreed to pay HRDC a total of \$265,000 in damages and attorney's fees.

HRDC's complaint was filed in November 2020 after what it termed "haphazard" censorship of its publications at INDOC prisons, including:

- Twenty-two consecutive monthly issues of *PLN* published from July 2018 to April 2020, which were confiscated at the state penitentiary;

- A dozen issues of *PLN* and *CLN* published from May 2018 to July 2020, along with copies of *Prison Education Guide*, *The Criminal Law Handbook*, *How to Win Your Personal Injury Claim 9th Edition*, the *Merriam-Webster Dictionary*, *Merriam-Webster's Dictionary of Law*, *The Best 500 Non-Profit Organizations for Prisoners & Their Families*, and *Beyond Bars: Rejoining Society After Prison*, all of which were seized



at Pendleton Correctional Facility;

- Ten monthly issues of *PLN* and *CLN* published between August 2018 and March 2020, which were seized at New Castle Correctional Center; and

- Four monthly issues of *PLN* and *CLN* published between October 2018 and April 2020, along with copies of the *Disciplinary Self-Help Litigation Manual*, all of which were confiscated at Miami Correctional Facility.

The problem, the complaint noted, was both an abrogation of HRDC's free speech rights under the U.S. Constitution and a disruption of its business with dozens *PLN* and *CLN* subscribers incarcerated by INDOC.

Worse, those prisoner subscribers were the ones who informed HRDC that its publications had been seized, since INDOC failed to do so, violating the publisher's 14<sup>th</sup> Amendment due process rights.

INDOC staff employed a number of excuses for censoring the items they did, marking some "Not approved" and others "duplicate," while others were stamped "refused" by prisoners who didn't do so. Still other prisoner recipients were erroneously

said to be "no longer here" or "unable to identify," creating a maddening labyrinth of excuses that was impossible to navigate.

Recognizing the important constitutional issues at stake, the U.S. Court for the Southern District of Indiana granted HRDC a preliminary injunction on January 22, 2021, to keep INDOC from continuing its censorship while the case proceeded. The injunction was later incorporated into the settlement agreement.

INDOC will still be allowed to censor any incoming publications for "a legitimate penological interest." But it must provide timely notice—within ten days—to the sender, who then has a right to file appeal that will also be heard in a timely manner.

In the settlement agreement reached between the parties, INDOC agreed to pay HRDC \$35,000 in damages, plus another \$230,000 in attorney fees and costs. Prison officials have 60 days from the date of the settlement agreement to draft new policies to accommodate HRDC and similar publishers, with a one-hour training program to be developed and administered to staff by the end of January 2022.

HRDC, a Florida non-profit, has published *PLN* since 1990 and *CLN* since 2017. It was represented in this matter by Richard A. Waples of the Indianapolis firm of Waples & Hangar, along with Kenneth G. Schuler, Marc N. Zubick, Sarah W. Wang, Kirsten C. Lee and Greer M. Gaddie of the Chicago firm of Latham & Watkins, LLP, as well as in-house counsel Daniel Marshall and Jesse Isom. See: *Human Rights Defense Center v. Robert E. Carter, Jr.*, USDC, SD IN, Case No. 1:20-cv-02979-JRS-MJD. 📖



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# HRDC Represents Wrongfully Convicted Florida Man Who Spent 37 Years in Prison for a Rape Murder He Did Not Commit

by Chuck Sharman

**A** FLORIDA MAN WHO SPENT 37 YEARS in prison on a wrongful rape murder conviction filed a federal lawsuit on October 4, 2021, against the Tampa Police Department (TPD) officers who mishandled his prosecution, along with the city and a forensic odontologist who provided “expert” bite mark testimony—which was later debunked—at his trial.

The Human Rights Defense Center (HRDC)—a Florida nonprofit that has published *Prison Legal News* since 1990 and *Criminal Legal News* since 2017—is providing representation in the suit filed by 56-year-old Robert DuBoise. He was convicted of the brutal August 1983 rape and murder of Barbara Grams while the nineteen-year-old was walking home from work at a store in a Tampa shopping mall.

TPD detectives zeroed in on DuBoise, then just 18, because he had allegedly been a problem employee at the same store—although he left six months before Grams started her tenure there. Fingerprint and hair analysis excluded him as a suspect, but police still pinned the case on DuBoise.

Worse, TPD Detectives Phillip Saladino, K.E. Burke and John Counsman—who are named in the suit—abandoned the search for Grams’s murderer as soon as a supposed “bitemark” was found on her cheek by then-Hillsborough County Medical Examiner, Dr. Lee Miller.

Miller cut it out of the victim’s face and placed it in formaldehyde, rendering it forensically useless. Yet Dr. Richard A. Souviron, a forensic odontologist also named in the lawsuit, was called in to examine the bitemark as “evidence.” Souviron asked for dental impressions to be taken of the suspect, instructing the detectives that they were looking for a gap between his front teeth.

DuBoise has no such gap. Convinced of his own innocence, he cooperated in the making of beeswax molds of his teeth—by Detective Burke and his wife, who had no training, the suit notes. Beeswax is also an unreliably soft medium for making dental impressions, the suit further claims. Nevertheless, Dr. Souviron told the detectives that they had found their man, and DuBoise was arrested and charged.

At trial, Dr. Souviron testified that this “evidence” proved DuBoise had made the alleged bitemark. In fact, the suit notes, the bitemark was not made by a human at all. The three detectives also suborned false testimony from a pair of “jailhouse snitches” held with DuBoise at the Hillsborough County Jail, the suit claims. In exchange for promises of leniency, Claude Butler and Jack Andruskiewicz claimed that DuBoise confessed to them that he murdered Grams.

Based on this, a jury convicted DuBoise and the court sentenced him to death. He was originally placed on death row, but his sentence was converted to a life term in 1988. After a long legal struggle led by the Innocence Project, he was exonerated and released in 2020, when a slide with a vaginal sample with semen from Grams’s body was found, and a DNA test excluded him as her rapist.

Florida has a compensation fund for victims of wrongful convictions, which would pay DuBoise \$2 million for the 37 years of his life he spent locked up for a crime he didn’t commit. But the 2008 law contains a “clean hands” provision that bars collection from the fund by anyone with a prior violent felony conviction or multiple nonviolent felony convictions.

DuBoise ran afoul of the clean hands provision thanks to a four-year probation sentence he got at age 17 for burglary and grand theft, after cops found him in a car that he didn’t own and charged him as an adult for stealing gasoline, hubcaps, an extension cord and a claw hammer.

He could possibly appeal directly to the state legislature, which has approved some compensation for a few other victims of wrongful imprisonment denied for lack of “clean hands.” Of the 31 people exonerated since the law was passed in 2008, only five collected the money they are owed. The rest have been barred by the “clean hands” provision or another that places a 90-day-limit on filing a claim—even if the exoneree is still in prison awaiting release.

“It’s really cruel,” notes the Innocence Project’s Florida Campaign Director, Michelle Feldman, who says a person’s prior conviction “is often what puts them on law enforcement’s radar in the first place.”

So DuBoise’s suit asks the U.S. District Court for the Middle District of Florida to hold Dr. Souviron to account, along with the three TPD detectives or their estates—Counsman has since died—for their alleged conspiracy to convict him based on the bogus “bitemark” evidence and reported confessions. In addition, the suit names the detectives’ supervisor, TPD Sgt. R.H. Price, as well as the city.

Providing counsel, along with HRDC litigation director Dan Marshall and HRDC staff attorney Jesse Isom, are four attorneys from the Chicago firm of Loevy & Loevy: Jon Loevy, Gayle Horn, Heather Lewis Donnell and John Hazinski. See: *Robert DuBoise v. City of Tampa et al*, USDC C. Dist. FL, Case No. 8-21-cv-02328.

HRDC has limited resources and can only provide representation to prisoners who have been wrongly convicted of a crime, and have had their criminal convictions reversed and are seeking money damages for the time spent in prison or jail as a result of the wrongful conviction. HRDC litigates cases nationally. 🐼

Additional source: [tampabay.com](http://tampabay.com)

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# Fifth Circuit Overturns Permanent Injunction Requiring Texas Prison to Observe COVID-19 Precautions

by Matt Clarke

ON MARCH 26, 2021, THE FIFTH Circuit court of appeals overturned a permanent injunction that required a Texas Department of Criminal Justice (TDCJ) prison to observe certain precautions against the spread of COVID-19.

Laddie Valentine and Richard King are state prisoners incarcerated at a TDCJ geriatric prison, the Wallace Pack Unit. The 1,132 prisoners incarcerated there include 800 who are over the age of 65, 49 who are wheelchair-bound, and 87 who use walkers. Many of them have serious medical conditions. All live in tiny cubicles which have a small personal sleeping and living space and are separated from one another by waist-high steel walls. An average of 54 cubicles are jammed into each of the prison's dormitories.

On March 30, 2020, Valentine and King filed a federal civil rights lawsuit alleging the prison had failed to implement adequate precautions against the spread of COVID-19 in violation of the Eighth Amendment, the Americans with Disabilities Act (ADA) and the Rehabilitation Act (RA). On April 11, 2020, the first prisoner assigned to Pack Unit died of COVID-19. By the time the case went to trial, about 500 had tested positive for the virus, 74 had been hospitalized with COVID-19 and 19 had died.

The district court entered a preliminary injunction in favor of the prisoners on various COVID related issues. TDCJ appealed.

The Fifth Circuit stayed the injunction and then reversed it on June 5, 2020. Which was affirmed by the US Supreme Court. [See: *PLN*, Jul. 2020, p. 34].

Undeterred, following an 18-day bench trial, the district court issued a permanent injunction requiring the prison to take 17 steps to prevent the spread of COVID-19. This included providing adequate soap and clean towels, providing hand sanitizer to wheelchair-bound prisoners, providing PPE to prisoners assigned work tasks, testing prisoners for the virus and quarantining COVID-19-positive prisoners. The prison was also required to create plans for contact tracing and sanitization of common surfaces and cubicles. Social distancing rules were to be created and enforced and all of this was to be documented in TDCJ policies and audited for compliance. See: *Valentine v. Collier*, 490 F.Supp.3d 1121 (SD TX 2020).

TDCJ again appealed and the Fifth Circuit again reversed. The Fifth Circuit noted that TDCJ had implemented many new rules, practices and policies in the weeks before trial, during trial, and after trial. These included creating of an extensive written COVID-19 policy, revising the policy to reflect CDC guidelines, applying some CDC guidelines for nursing homes to the Pack Unit, implementing weekly COVID-19 testing, installing temporary hand washing stations, and installing an electrostatic

sprayer which sprays a mist to disinfect the entire prison.

The court noted that TDCJ's response was not perfect, but perfection was not required—adding new meaning to the term “good enough for government work.” It arguably took too long to get test results back and act on them, guards did not wear their masks all of the time and the social distancing policy could have been better. However, none of this rose to the level of deliberate indifference that would justify a permanent injunction.

With respect the ADA and RA claims, the court held that plaintiffs had neither shown that the prison official defendants had personal knowledge of the difficulties prisoners in wheelchairs had practicing proper hand sanitation nor was it obvious. Therefore, the court vacated the injunction, reversed the judgment of the district court and rendered judgment for the defendant prison officials. See: *Valentine v. Collier*, 993 F.3d 270 (5th Cir. 2021).

This case fits into an ongoing pattern. Prisoners who seek relief from COVID related conditions can win at the trial court level. But prison officials who have appealed have seen the appellate courts uniformly rule in favor of the government. It remains to be seen what happens when the cases seeking money damages for the thousands of prisoners killed by COVID start going to trial and then hitting the appellate courts. 🏛️

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# \$750,000 Settlement in South Carolina Pretrial Detainee's Suicide by Southern Health Partners

by David M. Reutter

ON JUNE 17, 2021, SOUTHERN HEALTH Partners paid \$750,000 to resolve a lawsuit alleging it failed to take proper steps in caring for a pretrial detainee who entered South Carolina's Marlboro County Jail with a prescription drug addiction.

Roy Locklear, 30, had a history of drug abuse and addiction, specifically pain medications and cocaine. A bench warrant was issued for Locklear on January 15, 2013, after he tested positive on five straight drug screens in the prior month. South Carolina Department of Law Enforcement Agent Brian Truex began working to take Locklear into custody on October 23, 2014. He made contact with Locklear's father on about October 30 and learned of Locklear's severe drug addiction.

Later that evening, Locklear contacted Agent Truex. After some discussion, Locklear agreed to turn himself in only to Agent Truex because "he didn't trust the local officers as they had lied to him before and he was scared of them." He was taken into custody on November 5, 2014. Truex told Locklear's mother at that time that the situation was an "opportunity for [Locklear] to get his life straight."

On the way to Marlboro County Jail, Locklear said he was tired of running from the warrants and asked if he could get some help with his addiction. He advised Truex that "he was heavily addicted to pills, rubs cocaine on his teeth which were half gone, and has been addicted all of his life."

It was alleged that Truex was present when Locklear was booked. During that process, Locklear "did deny any medical conditions and necessary medications." The booking report indicated that Locklear was arrested for "Violation of Drug Court." Despite his admissions of drug addictions, it was recorded that Locklear was in good health. The sections for "Drug Dependency Problems" and "Suicidal Tendencies" were left blank.

The complaint alleged that Locklear's physical appearance made evident that he was either under the influence of drugs or suffering from withdrawal. The Drug Court warrant and information Locklear's father gave to Truex gave notice that he had a current drug addiction. Locklear's

own statements made that point clear.

Yet, he was placed in a regular cell without supervision or treatment. Locklear was found by his cellmate on November 6, 2014, which was the day after his arrest, hanging from a noose fashioned from a bedsheet. Guards cut Locklear down from the door post, but traumatic damage was done. Locklear was initially placed on a ventilator, but his parents decided to have it removed and Locklear died November 13, 2014.

Represented by Florence based attor-

ney Patrick J. McLaughlin, Locklear's estate sued. The major claim was gross negligence on the part of the jail's private medical provider, Southern Health Partners. It agreed to resolve the matter via a \$750,000 settlement. The Court approved the settlement on June 17, 2021. It assigned \$10,000 to the survivor cause of action and \$740,000 to the wrongful death cause of action. See: *Locklear v. Marlboro County*, Marlboro County, South Carolina, Court of Common Pleas, Case No. 2017-CP-34-00064. ■

## Arizona Auditor's Report Finds Underfunding of DOC's Capital Funding Requests and Unreconciled Prisoner Trust Fund Accounts

by Matt Clarke

IN OCTOBER 2020, THE ARIZONA Auditor General's Office published a report on a performance audit of the Department of Corrections, Rehabilitation and Reentry (DOC). The audit reviewed the DOC's revenues, expenditures, capital funding, and management of prisoners' monies. Although the auditors found DOC spending was largely compliant with applicable statutory and other requirements, it did note that the DOC was allocated less than 5% of its requested capital funding. It also had 480 unreconciled transactions involving prisoners' monies between January 2015 and January 2019, and had not reconciled any prisoner account statements since November 2019.

The DOC operates ten state prison complexes and contracts for six privately-owned or -managed prisons. As of August 31, 2020, it was responsible for supervising 39,153 prisoners in state and private prisons and 5,189 persons under community supervision.

DOC finances are handled in 19 separate funds from a variety of sources, including legislative appropriations, portions of the luxury tax allocated by statute, transfers from other funds and government agencies, income from DOC-owned property, sales of DOC-made goods, and donations. The largest is the General Fund which receives an almost \$1.1 billion annual appropriation. About 60% of the fund's expenditures are for

payroll and related benefits. Medical services and payments to private prisons account for about another 30%.

The Corrections Fund is funded by a portion of the luxury tax on alcohol and tobacco products and transfers from other funds. The fund is required by statute to transfer \$2.5 million annually to the Building Renewal Fund.

Although this fund is supposed to be earmarked for major and minor maintenance expenditures, about 80% of its expenditures consist of payments to private prison companies. Another 9% pays for prisoners' food.

The Building Renewal Fund is primarily funded by transfers from other funds which amounted to \$4.5 million in Fiscal Year (FY) 2019. It also received about \$1.2 million from a 1% fee on deposits made into prisoners' accounts and a \$25 visitor background check fee.

The auditor's report noted that the DOC's largest expenditures in the audited period—FY 2016 - FY 2019—were for payroll and related benefits (56%), contracted services, including prisoners' food and privately-owned or -managed prisons (31%), and other operating expenses such as rent, utilities, supplies, uniforms, and prisoners' wages (11%).

Capital funding includes appropriations for new construction and major repairs of pre-existing buildings. This can include, for instance, replacing nonfunctioning door

locks or fire alarms or upgrading security lighting and perimeter alarm systems (all of which were requested funding items).

To receive capital funding, the DOC submits a funding request each FY to the Arizona Department of Administration (ADOA). The ADOA reviews the request and submits its own funding request to the Governor. The Governor, in turn, makes capital funding recommendations to the Legislature in the executive budget. During FY 2016 through FY 2020, the ADOA's recommended capital funding was 13.4% of that requested by the DOC. The Governor's recommended funding averaged 20.8% of the ADOA's recommendation (2.7% of the DOC's request) and the Legislature appropriated 2.38% of the amount requested by the DOC (87.6% of the amount in the executive budget). Most years, the DOC received a mere \$5.5 million in capital funding.

The auditors found that capital funding was woefully underfunded, increasing security risks and resulting in a minimum of \$125 million in deferred maintenance costs. They reported that the required maintenance costs far outstripped the amount the Building Renewal Fund receives each year.

The auditors compared the DOC's \$0.85 average annual per capita capital funding from FY 2016 through FY 2020 with that of four other states and found that Arizona received the lowest capital funding in the group. The other states were Ohio (\$7.47), Texas (\$1.85), Virginia (\$3.28) and Washington (\$3.16).

The auditors examined the critical issue of repairing nonfunctional locks at the Lewis prison complex and found that the DOC had received approval to use \$17.7 million in non-appropriated funds to begin a 3-phase project to replace the locking, fire detection, and evaporative cooling systems at the Lewis and Yuma prison complexes.

A redesign of that project from using sliding doors to swinging doors saved about \$20 million, but that savings was more than expended when the decision was made to replace evaporative coolers with air conditioning to prevent humidity damage to the buildings. The total project costs are estimated at just over \$60 million with completion expected in August 2022.

In auditing the prisoners' trust fund accounts, which have a combined balance of over \$19.7 million, the auditors found

that, although most of the deductions they reviewed were accurate and supported by documentation, the DOC had not reconciled prisoners' accounts since November 2019. This goes against state policy which requires anomalies, deficiencies, imbalances, and errors to be detected through reconciliation and resolved within 30 days.

Further, some of the 480 unreconciled items, dating from January 2015 through January 2019, no longer had validating documentation.

The DOC explained the lack of monthly reconciliation as difficulties it was having with a new computer program called Keep Track designed to track the trust fund. It explained that, during the data migration from the old system to the new system, many records were loaded into the new system that should not have been. Further, staff lack of familiarity with the new system was causing delays which would soon be overcome and the reconciliations brought up to date. The DOC also agreed with the auditors' recommendation to develop a method to maintain historic records under the Keep Track system. ■

Source: *azauditor.gov*

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# Washington State Prison Chief Secretly Forced to Retire, But Why?

IT ALL SEEMED ABOVE BOARD WHEN, ON January 26, 2021, Washington Department of Corrections (DOC) Secretary Stephen Sinclair sent an email to DOC employees announcing his retirement effective May 1, 2021, but, according to the *Seattle Times*, a Public Records Request led to documentation that revealed he had been asked to step down by Washington Governor Jay Inslee.

After Sinclair announced his pending retirement, Inslee praised his over three decades of service at the DOC, including being its secretary since 2017. He did not mention that he had requested Sinclair's resignation and, when asked directly about it, he deflected, calling it "irrelevant at this point."

The changing of the guard of top state officials is usually a highly choreographed performance. Staffers at the DOC and the governor's office know their emails are public records and were careful not to reveal whether Sinclair was being forced out of office or not. But Sinclair was not so careful. His response to a draft of a schedule detailing the revelation of his retirement to the media included a notation for January 22: "Steve notifies Governor." Sinclair put a comment on the draft asking, "Why do I need to notify the Gov he is the one who asked me to leave?"

That comment, which was among the thousands of pages of emails and other documentation the DOC released pursuant to a Public Records Act request, tore down the facade of unity Inslee had been projecting to the public.

Sinclair's resignation took place in the wake of continuing media criticism of health care in state prisons. An Office of Corrections Ombuds report published shortly before Sinclair's retirement was highly critical of medical treatment in the DOC, detailing fatal failures in cancer diagnosis and treatment. Sinclair had also been criticized for the DOC's lackluster response to the COVID-19 pandemic, which left 14 prisoners and two employees dead. His response that the department did better than some other prison systems ignored the fact that the pandemic response of almost every prison system was abysmally inadequate.

Sinclair ran a system with close to

15,000 prisoners in a dozen state prisons and about 20,000 people under community supervision. His annual salary was \$186,888.

The governor's office declined to comment on Sinclair's resignation, but spokesperson Tara Lee did say that "the

state needed to move in a new direction at the Department of Corrections" and the governor had full confidence in the new secretary, Cheryl Strange. ■

Source: *seattletimes.com*

## Preliminary Injunction Bars Arkansas from Confiscating Prisoners' COVID Stimulus Money

by David M. Reutter

AN ARKANSAS FEDERAL DISTRICT Court issued a preliminary injunction that bars the Arkansas Department of Corrections (ADC) from carrying out a state law that confiscates prisoners' stimulus money and distributes it to the state.

The Court's September 3, 2021, order was issued in a lawsuit brought by ADC prisoner Anthony Lamar. As the COVID-19 virus hit the United States, Congress responded to the halting of the economy by passing the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) on March 27, 2020. For purposes of Lamar's lawsuit, the most noticeable part of the CARES Act was a \$1,200 payment to every American adult with an income below \$75,000. Those payments were commonly known as stimulus checks.

Congress passed two more stimulus bills in the next year. The December 27, 2020, Consolidated Appropriations Act (CAA) included a \$600 stimulus payment or tax credit. Then, on March 11, 2021, Congress approved a \$1,400 stimulus payment or tax credit with the American Rescue Plan Act.

Prisoners fell under the definition of persons eligible to receive stimulus checks. The Internal Revenue Service originally declined to send stimulus payments to prisoners, but a California federal district court entered a permanent injunction in a nationwide class action requiring distribution of stimulus payments to prisoners. [See: *PLN*, Nov. 2020, p. 24; *Scholl v. Mnuchin*, 494 F.Supp.3d 661 (N.D. Cal. 2020)].

The Arkansas General Assembly believed that money could be put to better use by the state. It passed Arkansas Act

1110. It instructs ADC officials to withhold stimulus checks received by prisoners and use the funds in one of two ways. First, the funds must be used to pay off a prisoner's court fines, fees, costs, or restitution if the ADC is aware of such debts. If a prisoner did not owe such debts or if there was any stimulus funds left over after those debts were paid, the excess funds must be distributed equally to the "inmate welfare fund" and the Division of Correction Inmate Care and Custody Fund Account.

Under that law, ADC had collected, as of the Court's order, \$3,503,095.56 with more on the way. Of that, it has paid \$461,630.32 towards court fines, fees, costs, or restitution. ADC confiscated \$1,395 of Lamar's \$1,400 to pay off liens against his prisoner account under ADC Administrative Directive 16-44. While he challenged the constitutionality of that Directive, it was not an issue in the preliminary injunction. What was at issue is Lamar's request to prevent ADC from confiscating his \$600 and \$1,200 stimulus checks once they arrive.

After holding a hearing on Lamar's request for a preliminary injunction, the Court granted him relief. It began its analysis by noting that none of the federal acts that authorized the stimulus payments created a private right of action.

Thus, Lamar's lawsuit had to rest on the doctrine of obstacle preemption. Under that doctrine, a state law will be invalidated if it poses an "obstacle to the accomplishment and execution of the full purposes and objectives of Congress." See: *Wyeth v. Levine*, 555 U.S. 555 (2009).

"Whether one defines Congress's

purposes and objectives in the CARES Act and the CAA in broad terms of economic stimulation or narrow terms of simply giving people 'free' money, Act 1110 plainly frustrates the method which Congress chose to achieve its purpose," the Court wrote.

ADC argued that its use of the monies, as opposed to prisoners, would advance economic stimulation. "The ADC's argument misses the mark. Confiscation of the money is an obstacle to Congress's choice," the Court wrote. "Even if one genuinely believes Act 1110 is the better way to serve Congress's purpose, neither the State of Arkansas nor this Court is in any position to second guess Congress's chosen method. Congress gave money to everyone."

The Court then turned to decide whether confiscation of the money was a violation of procedural due process. It found no violation when it came to confiscation for the purpose of paying off court fines, fees, costs, or restitution.

It did, however, find a violation when it comes to diverting the excess funds to the inmate welfare fund and the Inmate Care and Custody Account. The Court

noted there were no post deprivation remedies available, for the ADC's grievance procedure provides a challenge to "issues controlled by State or Federal law or regulation" a "non-grievable issue." The Court concluded the confiscation of the monies did not violate substantive due process or the Takings Clause.

The Court's order granting Lamar a preliminary injunction noted that Lamar was just one of many cases making similar challenges to Act 1110. Lamar's case was one of three the Court chose for motions practice. Many of those cases sought class action status. Because the Court envisioned appointing counsel for the pro se plaintiffs and probably certifying a class, it said it was "appropriate for the injunctive relief to cover all prisoners to whom Act 1110 applies."

The Court ordered ADC to place any federal relief and stimulus funds in a sequestered account if it continues to confiscate those funds. It must maintain records of how much money it confiscates from each prisoner and what amount is paid for court fines, fees, costs, and restitution. While ADC may return the

confiscated excess funds to prisoners, it may not otherwise disburse those funds until the end of the lawsuit. See: *Lamar v. Hutchinson*, USDC, ED AR, Case No. 4-21-cv-00529 (2021).

The court has consolidated all pro se cases into *Hayes v. Rutledge*, USDC ED AR, Case No. 4:21-cv-347-LPR. John Tull and Thomas Keller of Quattlebaum, Grooms and Tull have appeared to represent the plaintiff class, who have filed a motion for class certification as this issue of *PLN* goes to press. 🐢

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# Georgia Sheriff Suspended After Indictment on Federal Civil Rights Charges

by David M. Reutter

CLAYTON COUNTY SHERIFF VICTOR HILL was suspended by Georgia Gov. Brian Kemp following the review of a federal civil rights indictment that charged Hill with ordering excessive use of force against detainees.

Kemp's June 2, 2021 administrative order was issued after a commission he ordered in May released its report. The commission's members were charged with determining whether the indictment "relates to and adversely affects the administration of the office of Clayton County Sheriff such that the rights and interests of the public are adversely affected."

According to a press release from the U.S. Attorney's Office for the Northern District of Georgia, Hill ordered staff at the Clayton County Jail on four separate occasions in 2020 to strap pretrial detainees into a restraint chair "for a period exceeding that justified by any legitimate nonpunitive government purpose."

A superseding indictment was filed in July for a fifth incident in which a man was allegedly placed in a restraint chair with a spit hood, punched in the face, and left for several hours.

The latest indictment describes Hill ordering the prisoner to be placed in the chair, and being present when the hood was placed on the prisoner's head.

The commission's June 1, 2021 report recommended Hill be suspended from office. Kemp's order suspended Hill "without further action pending the final disposition of the case or until expiration of his term in office."

Hill was first elected Sheriff in 2004. His tenure started with controversy when he fired 27 deputies on his first day in office in 2005. He had them escorted out of the building as snipers were positioned outside. The deputies were later reinstated after a lawsuit that resulted in a court order.

Four years later, Hill lost reelection, but he was again elected Sheriff in 2012. He was acquitted in 2013 on more than two dozen charges alleging he used his office for personal gain. Then in 2015, he fired a pistol and struck and wounded a friend at her workplace in Gwinnett County. The friend said the shooting was accidental.

More recently, in August 2021, a lawsuit was filed by Gabriel Arries against Sheriff Hill. It claims Clayton County deputies beat him in the shower area of the jail and placed him in a restraint chair. Arries was sent to the hospital and diagnosed with a severe brain injury, according to the lawsuit [See: *Arries v. Hill et al*, USDC N. Dist. GA, 1:21-cv-03588-SDG]. Another two lawsuits were filed against Hill and the county on October 11, 2021 by former prisoners Melvin McDay and Timothy O'Neil claiming they too were abused with restraint chair placements and inhumane conditions of confinement.

Hill has pleaded not guilty to the federal charges alleging violations of the detainee's civil rights. He was released on a signature bond.

Despite his growing track record of abuses, Hill remains sheriff according to the county website. He is the first Black sheriff of Clayton County, located in the Atlanta metropolitan area. See: *USA v. Hill*, USDC N. Dist. GA, Case No.1:21-cr-00143-ELR-CCB. ■

Additional source: *CNN.com, Atlanta Journal Constitution*

## Benevolent or Predatory?

### Lake Ozark Politician Gives Women Prisoners Help, Gets Sex

by Casey J. Bastian

IN 2015, GERRY MURAWSKI WAS AN elected city alderman for Lake Ozark, Missouri. Murawski was also engaging in questionable relationships with several young women. During the period of 2015-2016, Murawski would provide money and favors for at least four women who had been held in the local Laclede County Jail. The young women would give massages, companionship, and sex after they were released; one stated that she felt "obligated" to engage in sex acts with Murawski for the financial help he had provided.

This conduct would eventually lead to three separate investigations by local, state, and federal authorities. At one point, Murawski admitted to the FBI that a prostitute he solicited through Craigslist in 2015 had been only 16 at the time. Meeting an underage girl online and having sex with her at a Columbia, Missouri hotel did not lead to any criminal charges. In fact, not one of the three investigations resulted in any criminal charges against Murawski. It didn't even hurt his political career. Murawski would be elected mayor of Lake Ozark in 2019.

Murawski was recently asked by local reporters with the *LakeExpo.com* news website about his soliciting a teen prostitute and the subsequent 2016 investigation.

After initially denying the allegations, Murawski admitted that "it happened." He defended himself, "I thought she was 20...I made a mistake." FBI documents reveal that Murawski initially claimed he thought she was "around 19." Whichever age Murawski claims he believed her to be, authorities determined that she was merely 16. Murawski attempted to mitigate his conduct to the reporters: "I admit to you that after my wife died, I went through about two years... I was lost. And I kind of came back to my senses. I didn't ever have another prostitute, so I learned a lesson from that."

While there is no evidence that Murawski had other prostitutes, further investigations revealed his continuing contact with other vulnerable, young women.

FBI documents reveal that, in addition to using Craigslist to secure the underage prostitute, Murawski frequented *Backpage.com* and had an account on *SeekingNaughty.com*. Murawski claims that he was just viewing the *Backpage* site because one young woman was a friend with a crack cocaine habit; but Murawski did have a sexual relationship with the woman. The 16-year-old prostitute used the cell phone Murawski provided her after their 2015 liaison to advertise on other sites. The use of the cell phone number linked to Murawski on sites

known for prostitution, as well as the *SeekingNaughty.com* account, is what primarily triggered the other two investigations. There was also a tip from the wife of another alderman to the Missouri Attorney General's Office (MAGO) that included salacious screen shots in 2019. Law enforcement agencies would declare that it was Murawski's continuing connection to the teen prostitute and his political position that placed him at the center of a joint human trafficking investigation. MAGO investigator Matt Rodriguez and Missouri Highway Patrol investigator Darrin Haslag looked into whether Murawski was trafficking young women through the local jail.

The investigation focused mainly on three young women. Crystal, Stephanie, and Kelly (whose names have been changed to protect their identity). All three spent time in the local jail. Stephanie told reporters, "I think he's... interested in girls in jail. You're about at the lowest point in your life... for him to use that... use it against you... I thought it was crooked... I was already at some point in my life where I needed help."

Crystal was Murawski's initial humanitarian project. Murawski had found Crystal, drug-addicted, walking down the street and picked her up and moved her into his condo. When Crystal went to jail, she would pass around Murawski's cell number to the other girls and describe the relationship as "pretty much like a trick." Murawski would provide the women with money for commissary, bail, attorney fees, and when they got out of jail, cell phones, housing (with him) and even vehicles. Murawski has even helped "fix" tickets. Murawski would get phone sex, massages, companionship, and physical sex.

Stephanie was 22 when the sexual relationship with Murawski occurred. She felt obligated to return the favors for the \$1,050 he had given her. When Stephanie tried to move on with her life, Murawski tried to get her bond revoked. The bail bondsman said, "He tried... he really wanted her to go back to jail." Stephanie says that Murawski would repeatedly ask her if she had any friends that needed similar help. Murawski seemed to want to do the same things with any of those women as he had done with Stephanie: provide money and help for sexual favors.

Kelly also reported feeling pressured to have sex with Murawski. Multiple times Murawski attempted oral sex and Kelly would refuse. Kelly calls Murawski a "predator." "Crystal was down and out and needed help. [She was] vulnerable," stated Kelly, and she believes that is what attracted Murawski to Crystal. Local bar owner Terry Huston says Murawski would bring by a variety of young girls trying to get them jobs. "Something wasn't right," said Huston, who refused to hire any of the young women. Huston told Rodriguez that it was "common knowledge among the locals that Murawski was involved with prostitutes." This belief was held by Stephanie.

Murawski disputes these assertions, insisting that he was just wishing to help people in their time of need. Sex was not expected. "I never said, 'Hey you gotta have sex with me. I'll help you.' That never... I just don't do that," Murawski said. Investigator Haslag wrote in his report, "[Murawski] is not overheard telling [Stephanie] that it is being done in exchange for sex[...] although the conversations often center on plans for sexual contact between the two, upon her release." None of the women claim

Murawski forced them to have sex.

Murawski also claims that it was Crystal who was responsible for trading his number amongst the other prisoners to curry favor in the jail. In addition, Kelly has described her interactions with Murawski as a "hustle."

The FBI report calls Murawski a widower who was attracted to young women and helped them financially. "Murawski realized these women sometimes took advantage of his generosity, but this did not bother him because he enjoyed their companionship," reads the report. "I had no expectation of [sex in return for helping]. In some cases, they did have sex with me, but it was their choice. It was never pushed. It's just not what I do," Murawski claims. ■

Source: *lakeexpo.com*

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# Language Matters: Why We Use the Words We Do

by Paul Wright

**R**ECENT YEARS HAVE SEEN EFFORTS BY a lot of well-meaning people referring to prisoners as “people in prison” or “incarcerated people,” former prisoners as “returning citizens,” “formerly incarcerated people” and more. Pretty much since we started publishing *PLN* in 1990 we have used the terms prisoners, guards, prisons, jails, ex or former prisoner, etc. In the October 1993 issue of *PLN* we published an article by Ojore Lutalo, titled *Some Food for Thought: Prisoners Are Not Inmates* that pretty much set forth our reasoning. Almost 30 years later it is probably time to address the matter again.

This year marks the 50<sup>th</sup> anniversary of the Attica massacre which was second largest massacre of people on American soil in the 20<sup>th</sup> century by government forces. It also ushered in the modern era of prison and penal reform which saw the courts abandon their “hands off” doctrine and begin to enforce the constitution behind bars. In many ways, the government gave up a little bit to keep a lot when it came to its power to control, abuse, oppress and exploit prisoners.

One of the biggest changes was the change in language it used to refer to its detention facilities. Convicts and prisoners became “inmates” which had been used

to refer to patients in psychiatric facilities with the implication that inmates are being helped. Prisons and penitentiaries became correctional centers, implying people were being corrected. Guards became correctional officers implying both a parity with police in terms of social ranking and that people were somehow being corrected. The wardens became superintendents and prisons generally became much more bureaucratized. Yet the core violent, brutal nature of the institutions themselves did not change.

Recent years have seen a number of people seek to change how current and former prisoners are referred to, especially in media. My friend and long-time prisoner rights advocate Eddie Ellis was one of the proponents of this trend (I think he started it actually) and I think this is one of the few things we disagreed on and eventually agreed to disagree about.

Rather than being people centric, this approach is really an excuse for state violence and hides the daily brutality and dehumanization of the police state, just as enhanced interrogation becomes a euphemism for torture, collateral damage a euphemism for killing innocent civilians, etc. We should make no mistake about it: people are forced into cages at gun point and kept there upon pain of death should they try to leave. What are they if not prisoners? They did not somehow magically appear there and they stay there based on violence and fear of violence, not some invisible force field. Free will is critical, yet it doesn't exist in the prison context.

There is such a thing as objective reality but subjective personal experiences also shape perceptions and the use of language. In 1987, I was arrested by some 20 local and military police officers who threatened to blow my brains onto the floor with a shotgun if I resisted. I did not. For the next 17 years I was kept in a variety of maximum-security prisons surrounded by high walls, razor wire and towers with armed guards, all of whom had sworn an oath to kill me if I tried to leave without the government's permission. I felt I was very much a prisoner and had no choice in my captivity. Millions of people around the world are in the same

boat of involuntary confinement. *Prisoner* and *detainee* are accurate terms to describe them.

Returning citizen seems to be another disjointed term used to refer to both former prisoners and convicted felons, which is inaccurate at several levels. The vast majority of convicted felons or misdemeanants are never imprisoned and thus never leave their community. In a mobile society, not everyone returns to the same place but it also calls into question what citizen actually means. Until I went to prison I had never written an article that was published before, published a magazine, filed a lawsuit, lobbied the legislature and the governor's office, corresponded with and met with legislators, corresponded with judges, done radio, TV and newspaper interviews on issues of public importance, donated money to a political organization, organized strikes and boycotts, signed a petition, and more. These may well be all the hallmarks of an active and engaged citizen, the vast majority of US citizens who have never been to prison have not done a single one of these things, much less all of them.

The rise of the GLBT movement has seen importance attached to the pronouns people use. These days there are few virtual events that I attend among advocates where people don't introduce themselves by their name, the organization they belong to and the pronouns they wish to be referred to by. Asking prisoners and ex-prisoners how they want to be referred to allows a degree of agency and self determination that is otherwise denied. Some people are fine with inmate, formerly incarcerated person (FIP), person in prison, etc. Others are not. To the extent language has meaning, let's not give police state violence a pass. Let's call it what it is.

Editorially, *PLN* will continue to refer to prisoners and detainees, guards, prisons, etc., unless we are quoting someone who uses a different term. The people who have referred to themselves as prisoners include Vladimir Lenin, Fidel Castro, Ho Chi Minh, Malcolm X, Assata Shakur, Jack London and many others. If prisoner was good enough for them, it's good enough for me. ■

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# What's in a Name?

## Exconvict, formerly incarcerated, or returning citizen?

by Jeffrey Ian Ross

IN THE FIELD OF CORRECTIONS, THERE ARE lots of labels, names, and terms that the public frequently applies to people who are housed in, live in, and are processed by jails and prison that I dislike.

These terms are frequently used in a simplistic and dehumanizing manner. Take for example, the word offender. I think we can agree that many of things that people who are convicted did were offensive, but not all actions that they may have engaged in rise to this label, and as we know, some people who are incarcerated are wrongfully convicted.

But when it comes time to choose the appropriate names for someone who is locked up in or released from a carceral setting, a sufficient amount of nuance must be observed. Among people who are incarcerated in the United States, they differentiate among the labels prisoners, inmates, and convicts. Each term means something different to them, however, this is a different discussion.

But the current tendency to use the expressions or terms formerly incarcerated or returning citizens, by well-meaning activists and academics, people working in the field of restorative justice, or worse the perpetual bomb throwers, who somehow magically show up during these discussions, is short-sighted. Worse, there is often an implicit suggestion that the scholarship that has been done to date using the terms exconvict (including convict, felon, inmate, or prisoner) is somewhat suspect.

Let's start with the expression returning citizens. When a formerly incarcerated

person is released from carceral custody, not all of their rights are restored. This includes, but is not limited to serving on a jury, voting, and owning a gun. Thus, to call them a returning citizen may be aspirational, but it does not accurately reflect their status.

Next, just because we change the term to "formerly incarcerated" or "returning citizen" does not change, blunt, nor erase the stigma or objectification society gives to people who have criminal records. There are innumerable collateral consequences of a criminal conviction that go beyond the label we ascribe to people who have spent time behind bars. For instance, criminal records hurt the chances for many people to secure appropriate housing or to gain employment.

Finally, most of the "we don't call them convicts and excons anymore" crowd, do not ask convicts, or exconvicts, the labels they prefer. And if they do ask incarcerated people what terms they like, the studies that have been done don't use rigorous social scientific methods and the results are not conclusive.

Reginald Dwayne Betts, who after spending over eight years incarcerated in a Virginia prison, became a respected poet, and upon release completed Yale Law School, and was recently awarded a MacArthur genius grant, put it most clearly when he stated, "I really just don't like being called formerly incarcerated as a part of my title. I would much rather be called a carjacker or a convict or an inmate or a jailbird. Cause to do all this shit and be reduced by your allies to a condition

brought on by the pistol you held is wild."

Why then do some people insist upon using the labels formerly incarcerated or returning citizen?

Some of these individuals may be attempting to draw a distinction between old terms and new ones in an effort to effect change. But, as there's no consensus among the formerly incarcerated community how they want these terms used, policing this language amounts to little more than virtue signaling.

Thus insisting that we must change the label of exconvict to formerly incarcerated or returning citizen seems more like misplaced effort.

It does not materially improve the pressing and more important issues at hand. It does not improve the lives of prisoners, ameliorate inhumane prison conditions, solve the problems of mass incarceration, and it does not solve the real challenges that people who are released from jail or prison face, and it does not improve their lives. ■

*Jeffrey Ian Ross is an author and criminologist specializing in the fields of policing, corrections, political crime, violence, abnormal-extreme criminal behavior, and crime and justice in American Indian communities. Ross has been a professor at the University of Baltimore since 1998. This piece was originally published October 7, 2021 at the blog [jeffreyanross.com](http://jeffreyanross.com). Reprinted with permission. It can be found at: [jeffreyanross.com/whats-in-a-name-exconvict-formerly-incarcerated-or-returning-citizen/](http://jeffreyanross.com/whats-in-a-name-exconvict-formerly-incarcerated-or-returning-citizen/)*

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# Louisiana Prisoners Used as Slave Labor During Hurricane Ida, Families Left in the Dark for Weeks

by Brian Dolinar

**W**HEN HURRICANE IDA MADE LAND-fall this past summer, it was the deadliest and most destructive to hit Louisiana since Hurricane Katrina. In 2005, many prisoners were not evacuated and left for days in their cells without food or clean water, standing chest-high in flood water.

This time around, prison officials evacuated some, and left others behind who were used essentially as slave labor to lay sandbags in preparation of the storm. Families went for weeks without getting a phone call from their loved ones, left to worry about their wellbeing. On top of everything, the hurricane happened in the midst of a pandemic, with the authorities unprepared to face the challenges.

Louisiana incarcerates more people per capita than any state in the US, with 1,094 out of every 100,000 residents behind bars. According to Prison Policy Initiative, Louisiana locks up a higher percentage of its population than any other nation. Among some 50,000 people incarcerated, about 12,000 are held at local jails in parishes, what Louisiana calls its counties.

On August 29, 2021, Hurricane Ida touched down in Louisiana as a Category 4 hurricane. In Louisiana, it left behind a recorded \$25-35 billion in damages and 33 people dead. A state of emergency was declared, there was widespread flooding, and power was out in some areas for nearly a month. Ida also impacted other areas in the Caribbean, Gulf Coast states, and the Northeast United States.

During Hurricane Katrina, Marlin Gusman, sheriff of Orleans Parish, where New Orleans is located, refused to evacuate hundreds of people in the local jail despite an evacuation order issued by the mayor. Prisoners would “stay where they belong,” he said. This time, Sheriff Gusman—who remains in office 16 years later—made the decision to relocate 835 people in his jail to prisons located on higher grounds in preparation for the coming hurricane.

Many were moved to the notorious Angola prison, a former slave plantation, and the largest prison in Louisiana. Family members reported not hearing from loved

ones for several days, even weeks, feeling they had been lost in the system.

Sheriff Gusman attempted to dismiss critics and quell public fears by citing new technology used to track individuals. “Our electronic wristband system,” Gusman said, “is in use as an extra level of security to ensure that we know the exact status and location of each inmate at all times.”

The relocation came with the additional need to take precautions to prevent the spread of COVID-19. According to Gusman, 22 individuals in custody had tested positive for COVID. He assured that they were quarantined and under the care of Wellpath, the private medical provider.

A total of some 2,500 people were moved from local jails, including those in Plaquemines, Acadia, St. Mary, Vermillion, Terrebonne, and St. Bernard parishes.

## Sandbagging for the Storm

SEVERAL PARISHES DID NOT HEED WARNINGS of the coming storm. Instead, they stayed in place and battened down their hatches. They included: the St. Charles Parish jail, located in Killona, that housed about 380 people; the St. John the Baptist Parish jail, located in LaPlace, that had about 60 people; and the Jefferson Parish jail, located in Gretna, on the banks of the Mississippi River, that held some 1,100 people.

In Lafourche Parish, Sheriff Craig Webre refused to move some 600 people at the jail, and instead used them to fill sandbags for flooding. Lafourche Parish President Archie Chaisson spoke to the local media, asking the public to get prepared, and thanking the sheriff for “inmates making some sandbags for us, should we need them.”

*Mother Jones* reported about Sheriff Webre who boasted on social media of using prisoners for free labor. On the sheriff’s Twitter and Instagram pages, he posted video of prisoners filling piles of sandbags. The posts were later removed from social media, spokesperson Capt. Brennan Matherne explained, “because we were getting so many responses it was hampering our

communication efforts in the middle of an impending Major hurricane.” The sheriff was, he said, “just trying to highlight the efforts of our inmate workers.”

Capt. Matherne defended the sheriff’s decision, saying that they did not evacuate the jail “because it was built to withstand the threats this storm presented.” Two days after the storm hit, the jail was running “essentially as normal,” with power generators and access to clean water.

Of course, under the conditions, prisoners didn’t have much of a choice to refuse filling sandbags.

## Bad Scenarios Went Through My Head

A WOMAN WHOSE NEPHEW IS BEING HELD at the Nelson Coleman Correctional Center, in St. Charles, about a half-hour west of New Orleans, spoke to *Prison Legal News*. She agreed to an interview on the condition that she remained anonymous, for fear of retaliation against her loved one. After the hurricane hit, Ms. Scott, we will call her, went for a month without hearing from her nephew.

Ms. Scott’s last messaged her nephew on August 29, just as the storm was landing down. He did not mention anything about the storm, he acted like everything was fine. She wondered if those at the jail had been told about it. “I didn’t want to agitate him,” she said, “he may not be aware of the seriousness of the hurricane.”

In the first days of the storm, she tried to call the jail, “but there was no phone service. I emailed, but there was no response.” A relative’s house in St. Charles Parish was “devastated.” There was a boil water advisory. She worried for her nephew. Did they have bottled water? Was there fresh air? Were they safe from COVID? “All the bad scenarios went through my head,” she said.

St. Charles Parish Sheriff Greg Champagne wrote on his Facebook page that a generator was powering the jail, and there was air conditioning. He made the snide remark that those in the jail were getting three hot meals a day, “much better conditions than the overwhelming major-

ity of our citizens.”

A month later, Ms. Scott’s nephew finally called the family to say he was okay. In the meantime, she reached out to elected officials at the state and federal level. She got a call back from someone at Louisiana Attorney General Jeff Landry’s office who made a “distasteful” comment. She also received a call from the office of US Representative Troy Carter, a person took down her information, but she never heard from them again.

This points to a “larger picture,” she said, of people “forgotten” during an emergency. “We can’t just write off people because they’ve been accused of a crime, or found guilty. Society and the media have allowed these people to be treated inhumanely.”

### Appalling Conditions

ON AUGUST 27, 2021, TWO DAYS BEFORE the storm, 36 teenagers from the New Orleans juvenile detention center were evacuated to the Elayn Hunt Correctional Center in St. Gabriel, an adult prison holding almost 2,000 men and women, the second largest prison in the state. A lawsuit

was filed by the Loyola Law Clinic on behalf of Families and Friends of Louisiana’s Incarcerated, Jane Doe and her 15-year-old son, claiming the move was illegal.

The juveniles, some as young as 14-years-old, reported of the “appalling conditions.” They were kept under lockdown in solitary cells “without air condition, poor-quality food, lack of programming, extreme heat, lack of sight and sound separation with the adults incarcerated at the prison.”

For days, they could not communicate with their parents and guardians, who were not told where they were sent. They were not returned to the juvenile facility until September 1. The suit asks a judge to block any future evacuations and force the city to develop a new plan.

On September 6, other prisoners started to be returned to local jails in Orleans Parish, and Plaquemines Parish.

Mei Azaad is an organizer with Fight Toxic Prisons, who worked with people incarcerated, their families and loved ones during Hurricane Ida. Azaad told *Prison Legal News* that it’s not the storm itself that’s the most dangerous, “people die

or become ill in the following weeks, for example, being forced to drink toilet water, and their numbers are underreported.” The lack of standardized policy was “the biggest problem,” and procedures are then implemented at the discretion of a local sheriff or warden.

As climate change intensifies, and hurricanes become more severe, prisoners like those in Louisiana will continue to be on the front lines of global warming, held captive by government officials who show little concern for their safety. ■



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# Will Federal Prisoners on Home Confinement Have to Return to Prison?

by Dale Chappell

**T**HE MILLION-DOLLAR QUESTION LATELY has been whether the thousands of federal prisoners released on home confinement to reduce prison crowding would have to return to prison once the pandemic is over. While it's not looking so good for those sitting at home waiting for the answer, let's take a look at how things got to this point and what some of the experts are saying.

It was a smart move: release low-level, non-violent federal prisoners to home confinement in order to reduce the population of the 122 federal prisons in the wake of COVID-19 spreading among staff and prisoners at a steady pace. But the move was made possible only after Congress created the Coronavirus Aid, Relief, and Economic Security Act (CARES Act), which expanded the authority of the U.S. Attorney General to allow the Federal Bureau of Prisons (BOP) to release prisoners to home confinement, no matter how much time they had left to serve. Prior to the CARES Act, the BOP could release prisoners to home confinement only during the last six months or ten percent of their sentences, whichever was less.

But the CARES Act contains some tricky language. It says that the BOP may place a prisoner in home confinement only during the "covered emergency period," which it defines as 30 days after whenever the declared national emergency over COVID-19 ends. The Department of Justice (DOJ) issued a memorandum just days before President Trump left office on January 19, 2021, saying that the BOP would have to return those prisoners on home confinement when the covered emergency was over. It interpreted the 30 days as Congress giving time for the BOP to return those on home confinement back to prison.

But according to over a dozen members of Congress who voted the CARES Act into law, that interpretation is dead wrong. "Obviously, if they can stay where they are, it's going to save the taxpayers a lot of money, and it would also help people who aren't prone to re-offend and allows inmates to successfully re-enter society as productive citizens," Sen. Chuck Grassley

said about the DOJ's memo. He pointed out that of the nearly 24,000 prisoners released to home confinement, only 151 had violated the terms of their release. Some reports say the number is much lower. If followed, the DOJ's memo would require the return of up to 8,000 prisoners.

Some experts say this was a "radical experiment" in prison alternatives. "This was the boldest home confinement experiment in federal prison history," Prof. Doug Berman, of the University of Ohio Moritz School of Law, said on his popular *Sentencing Law and Policy* blog. "Congress should use what happened here as evidence for expanding home confinement going forward."

President Biden stated throughout his campaign that he would work to reduce mass incarceration—which he helped fuel for decades as a senator between the 1970s until he left office in 2016, having authored, sponsored and proudly voted for hundreds if not thousands of "anti crime" bills that created more crimes, lengthened sentences and reduced prisoners' ability to challenge their convictions or conditions of confinement. While running for president though, he gave a tepid and lukewarm repudiation to his prior half century role in building the mass incarceration machine in America. "Reducing the number of incarcerated individuals will reduce federal spending on incarceration," his campaign website read. "These savings should be reinvested in the communities impacted by mass incarceration." Now people are calling on Biden to live up to his word and use his clemency powers to allow these people to stay out of prison. But that's unlikely.

As of July, the Biden legal team said that the DOJ's memo was correct. That means those on home confinement will have to return to prison once the pandemic ends. That also means that either the Executive or Legislative Branch needs to step up and do something. The *New York Times* reported that the Biden Administration is "wary of a blanket mass commutation" because it would be an "extraordinary intervention in the normal functioning of the

judicial system and it could create political risks if any recipient who would otherwise be locked up commits a serious crime." In other words, Biden's afraid of pulling a Mike Dukakis move, when the Massachusetts governor released convicted murderer Willie Horton on a weekend furlough, who then went on to commit robbery, assault and rape. Dukakis lost his bid for the presidency when Bush used this against Dukakis during the campaign after Democrat Al Gore raised it in the primary.

In August 2021, Prof. Berman suggested another approach: "Congress readily could (and I think should) enact a statute that provides for the home confinement program to be extended beyond the end of the pandemic," he wrote on his blog. "This problem is fundamentally a statutory one created by Congress in the CARES Act, and it could be readily fixed by Congress simply by adding a sentence or two to pending pieces of [criminal justice reform] legislation." He also suggested that compassionate release could be another fix to the problem, since Congress has now allowed prisoners to file compassionate release motions under the First Step Act of 2018. That, he said, could be a fix involving the Judicial Branch.

In short, there's lots of talk about keeping the thousands of federal prisoners released to home confinement out of prison. The almost non-existent recidivism rate of the 24,000 prisoners sitting at home instead of prison shows that this "radical experiment" in prison reform worked exceptionally well, experts say. But to date, none of the three branches of government has taken any steps to fix the problem. And any of those three branches could fix the problem. Inexplicably, they choose not to. The good news is in the meantime, no one is being returned to prison. Perhaps inertia will carry the day and with the passage of time, more prisoners complete their sentences winnowing down the number that can be returned. ■

Sources: *reason.com*, *reuters.com*, *thehill.com*, *nytimes.com*, *sentencing.typepad.com*, *forbes.com*

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# Seven Guards Fired Over Collins County Texas Jail Death

by Jayson Hawkins

**M**ARVIN DAVID SCOTT III WAS FAR from what most people would consider a criminal. The 26-year-old played football in high school, made straight As, and was described by friends and family as “generous to everyone around him.”

It is doubtful that police in Allen, Texas, a suburb of Dallas, knew anything about Scott when they arrested him on March 14, 2021 for a single marijuana joint. It turned into a death sentence.

Guards at the Collin County Detention Facility likely did not know about Scott’s history of mental illness when they strapped him to a restraint bed, pepper sprayed him, and put a spit hood over his head. Roughly four hours after entering the jail, Scott was dead. [*PLN*, Aug. 2021, p. 54]

Ensuing investigations by the Collin County Sheriff’s Office and the Texas Rangers led to the firing of seven guards and the resignation of an eighth.

“Evidence I have seen confirms that these detention officers violated well-established Sheriff’s Office policies and procedures,” said Sheriff Jim Skinner, although no details were provided as to what violations occurred.

In October 2021, the sheriff released a 41-minute video of the incident. It shows guards moving Scott, who is struggling, into a room and putting him in a restraint bed. He is seen in the video strapped down for about 18 minutes with the spit hood on, moving occasionally. When guards pulled the hood off, he was unresponsive. He was taken to a hospital where he was pronounced dead.

The Collin County Medical Examiner ruled that Scott’s death was the result of a “fatal acute stress response in an individual with previously diagnosed schizophrenia during restraint and struggle.”

A grand jury in June, 2021, cleared eight of the guards involved, even after watching the video. The guards who faced charges for Scott’s death were: Andres Cardenas, Alec Difatta, Blaise Mikulewicz, Rafael Paradez, Justin Patrick, James Schoelen, Christopher Windsor and Austin Wong.

Scott’s death, made more tragic by how easily it could have been prevented, takes place amid a national debate over

police reform. The circumstances of Scott’s arrest, which followed a disturbance call where police observed him “acting in an erratic manner,” point to a situation more appropriate for mental health professionals than cops, and the violent actions of the jail guards after Scott exhibited “some strange behavior” illustrate how mental health crises are often handled behind bars.

The grand jury released a statement urging that such crises be treated better. They recommended the formation of a group consisting of a “diverse group of Collin County community leaders, criminal justice and law enforcement stakeholders, local hospitals, and mental health providers.” The goal of the group should be to find the “best solutions for the treatment of individuals with mental illness who come in contact with the criminal justice system.”

District Attorney Greg Willis said in a press release he would be heading up

the formation of a mental health working group, “I too share the Grand Jury’s concern for the treatment of individuals suffering from mental illness, and I pledge to honor Mr. Scott by taking the lead in assembling the work group to look for lessons learned so that his tragic in-custody death will not have been in vain.”

The Scott family is being represented by civil rights attorney Lee Merritt, who in July announced he is running for Texas attorney general as a Democrat. Merritt wrote about the Scott case on Twitter: “The failure of prosecutors to secure indictments in this matter reflects a trend in Texas of undervaluing the lives of African American’s [sic] suffering mental health crisis.” As this issue of *PLN* goes to press, no lawsuit has been filed over Scott’s death at the hands of jail guards. ■

Source: *cnn.com*, *dailymail.co.uk*

## Kentucky’s Prison HCV Policy of Monitoring Without Treatment Constitutional

by David M. Reutter

**T**HE SIXTH CIRCUIT COURT OF APPEALS, in an unpublished opinion, held that the Kentucky Department of Corrections (KDOC) policy of refusing to provide Direct-Acting Antivirals (DAAs) to all prisoners infected with hepatitis C virus (HCV) is constitutional. The Court found that because KDOC provides regular monitoring of those prisoners’ condition, it is not deliberately indifferent to their serious medical needs.

The Court’s July 6, 2021, opinion was issued in a class action suit brought about by 1,200 KDOC prisoners, which is about 10% of its population, who are infected with HCV. They alleged that KDOC’s HCV policy violates their Eighth and Fourteenth Amendment rights.

KDOC screens prisoners for HCV and tests for antibodies in prisoners who have certain risk factors or request it.

If a prisoner tests positive for HCV, KDOC “(1) evaluates the inmate for signs and symptoms of liver disease, (2) obtains additional laboratory tests, (3) calculates the

inmate’s APRI score (which is used to assess the degree of liver fibrosis, if any), (4) offers vaccines for Hepatitis A, influenza, and pneumococcal, and (5) educates the inmate about chronic HCV.” The prisoner is then assigned one of three priority levels. Only level one receives treatment with DAAs, but an exception can be made if a prisoner exhibits an urgent medical need.

KDOC monitors infected prisoners every three to six months, depending on their health status. A prisoner can receive further testing, such as HCV genotype or a FibroScan of the prisoner’s liver if KDOC’s Regional Medical Director deems it necessary. (FibroScan, also known as transient elastography, is a non-invasive method for the assessment of hepatic fibrosis in patients with chronic liver disease.)

The district court granted the defendants summary judgment after determining “KDOC provided adequate treatment for HCV-infected inmates by diagnosing HCV and monitoring its progression.” The Class appealed.

The Sixth Circuit noted two standards apply to such claims. The no-treatment standard provides that when a physician diagnosis is a serious medical need, “the plaintiff can establish the objective component by showing that the prison failed to provide treatment.” Under the ongoing-treatment standard, the objective component is established by showing the treatment was “so grossly incompetent, inadequate, or excessive as to shock the conscious or to be intolerable to fundamental fairness.” The district court applied the ongoing-treatment standard. The Sixth Circuit found that was the correct standard. The Class argued on appeal “that only the cure provided by DAAs suffices as treatment.”

The Sixth Circuit said it could not agree that the Class “received no treatment at all.” The “KDOC plan provides for treatment in the form of diagnosing and monitoring HCV-infected inmates.” It found the Class was complaining about the adequacy of its treatment, which does not amount to an Eighth Amendment violation. In the court’s reasoning, no treatment amounts to treatment as long as prison officials are monitoring the progression of the disease. The district court’s order was affirmed.

In a dissenting opinion, Judge Jane B. Stranch opined that a jury could conclude the “treatment” KDOC provides HCV-infected prisoners is constitutionally inadequate. Judge Stranch noted the many symptoms that HCV causes. She also noted that studies prove that “administering HCV treatment at an early stage of fibrosis increases overall survival rates for patients compared at a later stage.”

The standard of care is to administer DAAs to persons with chronic HCV. By

“flouting the recognized standard of care, KDOC consigns thousands of prisoners with symptomatic, chronic HCV to years of additional and irreversible liver scarring,” wrote Judge Stranch.

Stranch continued, “Plaintiffs’ claim is therefore more than a mere ‘disagreement’ with the essentially adequate testing and treatment they have already received.” Judge

Stranch would have reversed for a jury to decide the matter. At this point HCV is a fully curable disease that afflicts significant numbers of the prison and jail populations of the USA yet prison and jail officials routinely deny treatment that would cure the afflicted citing costs. See: *Woodcock v. Correct Care Solutions*, 2021 U.S. App. Lexis 20116. ■

## All Massachusetts Jails to Provide Prisoners Ten Free Minutes of Phone Calls Per Week and Cap Charges on Additional Minutes at 14 Cents

**W**HILE THE MASSACHUSETTS DEPARTMENT of Corrections charges prisoners ten or 11 cents per minute for phone calls, the state’s sheriffs set their own rates individually. Some sheriffs charged more than 40 cents per minute.

Now, according to the Massachusetts Sheriff’s Association (MSA), all 14 sheriffs in the state have agreed to provide people incarcerated in their jails ten minutes of free phone usage per week and cap the charges for anyone using more than the allotted ten minutes at 14 cents per additional minute effective August 1, 2021.

MSA president and Suffolk County Sheriff Steven Tompkins said the sheriffs were aware of the need to maintain contact with friends and loved-ones to prepare prisoners for re-entry into society.

Another factor may have been a bill, S1559/H1900, backed by Prisoners’ Legal Services (PLS) and filed by State Senator Cynthia Creem and Representative Chynah Tyler, which would require the

provision of free telephone calls to people incarcerated in the state’s jails and prisons. In promoting the bill, PLS mentioned the phone calls’ positive effect on re-entry and noted that prisoners’ children would also reap benefits of family contact during a vulnerable time.

However, its most powerful argument was that “[p]risoners and their families should not be forced to choose between the cost of utilities and the cost of a child speaking with their parent or relative,” reminding us that it is prisoners’ families, often among the least affluent in society, who generally bear the burden of overpriced phone calls.

A joint hearing was held on October 21, 2021 between the House Judiciary Committee and the Senate Public Safety and Security Committee where advocates testified on behalf of the bill, but no vote was taken. ■

Source: [masslive.com](https://masslive.com)

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# Company Surveils Activists Opposing Construction of Prisons and Jails

by Keith Sanders

**A**S IF BUILDING PRISONS WERE NOT enough, companies are now engaged in what are called “corporate counterinsurgency” measures designed to influence public opinion by monitoring and surveilling groups opposing the construction of new prisons and other public works projects.

One architecture and design company in particular, HDR Inc., even has what it calls its STRATA team, dedicated to keep tabs on activist groups’ social media accounts for the government.

Documents obtained by a public records request and given to Motherboard, a *Vice News* project, detail how the billion-dollar firm utilizes the information gleaned from its surveillance. HDR has a program called “social listening” that monitors social media platforms 24/7 in order to discern key trends and influencers. The results of the monitoring are included in an “influencer” report that analyzes public sentiment by categorizing groups as “ethnic enclaves,” “barrios urbanos,” “scholars and patriots,” and “American dreamers.”

Building Up People Not Prisons, a prison abolition group, revealed documents showing how HDR “leverages large data sets to visually display social and political risk nationwide.”

For instance, in April 2021 the Board of Commissioners in Greene County, OH contracted HDR not only to build a new jail but also for “justice consulting and planning services,” according to Motherboard. HDR sends weekly reports to Greene County identifying “potential risks, influencers, social networks, and user demographics,” Motherboard added.

The data, supposedly, is to help guide the county in persuading local residents, who must vote to approve construction of the new jail, and more importantly, approve the bond issues to pay for it. In a company statement, HDR justifies its surveillance on the grounds that controversy is “costly, both in reputation and in dollars. Social and political risk deserves attention at the planning stage of a project or program where it can be carefully assessed.” [Editor’s Note: Of course, mass incarceration and a massive police state is costly as well, both in terms

of money and lives, yet the questions seems to be who profits from the latter.]

But activists and academics are not so sure. Instead of persuading public opinion, companies like HDR set out to neutralize opposition of controversial projects. A writer and expert on industry manipulation, John Stauber, told Motherboard that HDR’s techniques are “dressed like wolves in sheep’s clothing.” Stauber pointed out that HDR is “run like a public participation process” but “if members of the public are opposed in any way to the objectives of the project they become the enemy, to be dealt with and overcome through sophisticated and usually invisible PR and media management techniques.”

Nevertheless, HDR’s tactics are not always as effective as the company advertises. In response to campaigning by local activists, Travis County, Austin, TX put on hold its plans to construct a new women’s prison with HDR. The Massachusetts Department of Corrections recently signed a

contract with HDR in June 2021 to study and design a new jail for women, but only after extensive legal challenges by Families for Justice and Healing (FJAH), a local activist group.

Sashi James, an FJAH member whose parents had been incarcerated when she was a child, told Motherboard that “We don’t need the police. We don’t need cameras. We don’t need brand new prisons. We need resources.” When companies design infrastructure masquerading as public safety, when they “want to build a new prison,” James added, that “shows that the system only has one vision. And that’s to keep incarcerating us.”

*Editor’s Note:* As we go to press, Greene County is preparing for a Nov. 2, 2021 vote on imposing a 0.25% sales tax increase that would go towards the \$53 million construction cost of the new jail that HDR has been pushing for. 🗳️

Source: [vice.com](https://www.vice.com), [daytondailynews.com](https://www.daytondailynews.com)

## Federal District Court Orders All CDCR Employees be Vaccinated

by Douglas Ankney

**O**N SEPTEMBER 27, 2021, THE UNITED States District Court for the Northern District of California ordered implementation of the Receiver’s recommendations that “(1) access by workers to CDCR institutions be limited to those workers who establish proof of full vaccination or who have established a religious or medical exemption to vaccination and (2) incarcerated persons who desire to work outside of the institution or to have in-person visitation must be fully vaccinated against COVID-19 or establish a religious or medical exemption.”

Since 2005, the California prison medical care system has been under federally-ordered receivership [See *PLN*, Mar. 2006, pg.1]. COVID-19 falls under the Receiver’s authority. Until the dispute over mandatory vaccination, Defendants Gavin Newsom and others, including California Department of Corrections and Reha-

bilitation (CDCR) employees, followed the Receiver’s recommendations. Beginning in April 2020, the Court had conducted regular case management conferences focused almost exclusively on pandemic management that were attended by the parties and the California Correctional Peace Officers Association (CCPOA), the union which represents guards. Defendants cooperated with the Receiver by implementing measures to distance prisoners from one another; implementing a transfer matrix to reduce risk of transmission caused by movement of prisoners; implementing staff testing; setting aside isolation and quarantine space; and implementing measures to encourage staff and prisoners to be vaccinated.

Approximately 75% of prisoners and health care staff were currently vaccinated, and about 48% of custody staff were vaccinated. Despite the concerted efforts of the

parties and the CCPOA, the overall staff vaccination rate statewide was 55%, with rates at 30% at several institutions and as low as 18% at one institution.

The evidence revealed that the overwhelming majority of COVID-19 cases enter prisons via prison staff. Between May 2021 and September 2021 at least 55 outbreaks of COVID-19 were traced to staff. Altogether, more than 50,000 prisoners and 20,000 employees had become infected during the pandemic, resulting in 240 prisoner deaths and 39 staff members' deaths statewide. This evidence prompted the Receiver to make the above recommendations regarding mandatory vaccinations.

Defendants and the CCPOA opposed the recommendations, arguing in part that the most effective way to protect the prisoners would be to make vaccinations mandatory for all prisoners. But the Court rejected that argument, explaining:

"Through September 1, 2021, 385 fully vaccinated patients in CDCR custody have suffered COVID-19 breakthrough infections, and 94 of those patients had a COVID risk score of 3 or higher, indicating a high risk of severe disease. One patient who CCHCS [California Correctional Health Care Services] believes was fully vaccinated has died of COVID-19. Other patients with breakthrough infections have also experienced serious symptoms and there are early indications that some may have long-term symptoms."

The Court determined that the Defendants' failure to vaccinate all prison staff entering CDCR facilities demonstrated deliberate indifference under the Eighth Amendment. To establish an Eighth Amendment claim "based on a failure to prevent harm, the inmate must [first] show that he is incarcerated under conditions posing a substantial risk of serious harm." *Farmer v. Brennan*, 511 U.S. 825 (1994). Defendants did not dispute the risk of serious harm that COVID-19 posed to the prisoners and the community at large.

The second prong of the Eighth Amendment analysis required Plaintiffs to show that Defendants "have a sufficiently culpable state of mind," which in the instant case meant demonstrating the Defendants knew "that inmates face a substantial risk of serious harm and disregarded that risk by failing to take reasonable measures to abate it." *Farmer*.

Defendants in this case had taken actions in the past to abate the harm. But now that science and the evidence had shown vaccination to be one of the best methods—perhaps the best method—to protect prisoners from the serious risk of harm, it was unreasonable to not require vaccination.

Accordingly, the court ordered the Receiver's recommendations be implemented. The court also recommended that the Receiver examine the evidence on whether mandatory vaccination of all prisoners be implemented. The Defendants and the

CCPOA indicated they planned to appeal. See: *Plata v. Newsome*, USDC, ND CA, Case No. 4:01-cv-01351-JST.

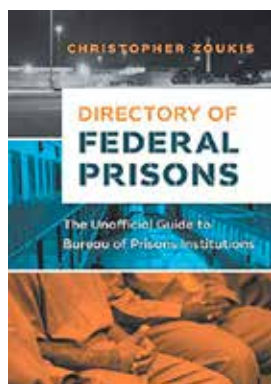
**Editors' Notes:** This case continues to unfold as we go to press with notices to appeal Judge Tigar's ruling leaving the requirement in limbo. Reporting shows CCPOA contributed \$1.75 million to Newsom's recall defense. On October 14, 2021 Kern County Superior Court Judge Bernard Barmann issued a temporary restraining order that will keep the state from enforcing an August 19 Public Health Department order requiring prison staff to be fully vaccinated. Barmann's temporary restraining order shields correctional officers from discipline while the court weighs the injunction. On October 22, 2021, Judge Barmann dissolved his previous ruling and reinstated the court order requiring prison guards to get vaccinated, but his new ruling only affects guards who work in or around health care settings in prisons. See: *California Correctional Peace Officers Association et al v. California Dept of Public Health*, Kern County Superior Court, Case No. BCV-21-102318. 🐼

Additional sources: [latimes.com](https://www.latimes.com), [sacbee.com](https://www.sacbee.com)

## Stop Prison Profiteering: Seeking Debit Card Plaintiffs

The Human Rights Defense Center is currently suing NUMI in U.S. District Court in Portland, Oregon over its release debit card practices in that state. We are interested in litigating other cases against NUMI and other debit card companies, including JPay, Keefe, EZ Card, Futura Card Services, Access Corrections, Release Pay and TouchPay, that exploit prisoners and arrestees in this manner. If you have been charged fees to access your own funds on a debit card after being released from prison or jail within the last 18 months, we want to hear from you.

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# Louisville Jail Moves to Have Free Phone Calls for Prisoners by First of the Year

by Kevin Bliss

**L**OUISVILLE, KENTUCKY'S METRO Department of Corrections (MDOC) who operates the city jail has been ordered by the Metro Council Budget Committee to stop charging prisoners for phone calls from the jail by December 31, 2021.

MDOC currently contracts with Dallas, Texas communications giant Securus Technologies for its jail phone system. Current calls cost prisoners and their families \$1.85 for 15-minute calls to local landlines, inter- and intrastate calls have additional per-minute fees. Calls to cell phones have a flat \$9.99 fee.

Lawmakers told MDOC director, Dwayne Clark, to create a new plan eliminating phone fees for prisoners and families by the beginning of next year. The current plan is too much of a hardship on families of the prisoners. "We should not be funding our jail on the back of the families whose loved ones are inmates and should be doing all we can to keep families connected to their loved ones, to ease reentry and reduce recidivism," stated Budget Committee Chair Bill Hollander.

Mayor Greg Fischer estimated the MDOC would generate revenue of \$700,000 from telephone kickbacks for the year 2021. The city plans to use the better revenue forecasts and federal American Rescue Act funds to cover half that revenue (\$350,000) and take some pressure off telephone fees until the end of the new contract. MDOC has an existing contract with Securus. It expires this year, but already plans are to cease collecting kickbacks for phone calls.

Louisville Family Justice Advocates coordinator, Judi Jennings called Securus a monopoly because prisoners are a captive audience and they are unable to go elsewhere for services. The calls are expensive and a great number of families with loved ones in jail have poverty level incomes. "We knew that it was also racially unjust and impacting poor families and Black families much more in our community," she stated.

Phone calls have become more important as a means of keeping families connected since the COVID-19 crisis. Research has proven community connections are a major influence on recidivism.

At the start of the pandemic, Securus began allowing prisoners of the jail two free phone calls per week to stay connected. Six months ago, that was reduced to one free phone call. Now prisoners in the jail do not receive any free phone calls.

According to research by the Human Rights Defense Center, jails continue to sign contracts with high phone call rates, profiting large hedge fund owned companies. With prisoners using more phone minutes due to COVID restrictions on visitations, that profit is increased. That said, since HRDC launched its Prison Phone Justice Campaign in 2012 the cost of

prison and jail phone calls has been steadily decreasing, just not fast enough.

Louisville joins New York City, San Francisco, San Diego, and Los Angeles in pushing to make prisoner phone calls free. Connecticut is the first state to make all state prison phone calls free up to 90 minutes per day.

Jennings said, "people in the jail have families, and they're often families with small children that often have enormous hardship because they've lost a loved one (and) they've lost a caregiver." ■

Source: *courier-journal.com*

## Hackers Breach Thousands of Security Cameras

by David M. Reutter

**A**N INTERNATIONAL GROUP OF HACKERS gained access to the security cameras at 68 organizations that use Silicon Valley start-up Verkada, Inc. They got into cameras at schools, prisons, police departments, hospitals, and other companies.

The incident was reported in March 2021 after a hacker identified as Tillie Kottmann contacted *Bloomberg News* with details about the hack. Kottmann said the breach was carried out by an international hacker collective. The intent behind the breach was to show the pervasiveness of video surveillance and the ease with which such systems can be compromised.

Kottmann's press release took credit for hacking Intel Corporation and Nissan Motor Company. The group's reasons for hacking are "lots of curiosity, fighting for freedom of information and against intellectual property, a huge dose of anti-capitalism, a hint of anarchism—and it's also just too much fun not to do it."

The hack "exposes just how broadly we're being surveilled, and how little care is put into at least securing the platforms used to do so, pursuing nothing but profit," Kottmann said. "It's just wild how I can see the things we always knew were happening, but we never got to see them."

According to Kottmann, the group used unsophisticated methods to gain access to Verkada's servers. They used a "Super Admin" account that allowed them to view all of Verkada customers' cameras. A user name and password for an administrator account was publicly exposed on the internet, allowing the hackers access.

Verkada confirmed the hackers "compromised" its platform on March 8 and 9, 2021. It said 97 customers, or less than two percent of its approximate 6,000 customer base, had their cameras accessed and video or image data viewed. The hackers may have accessed 4,530 cameras.

None if the cameras were viewed for more than 90 minutes. They downloaded 4GB of data, but what data was transferred is unknown.

Kottmann showed *Bloomberg* images from inside Alabama's Madison County Jail. Some of those images were from its 330 cameras "hidden inside vents, thermostats, and defibrillators, [to] track inmates and correctional staff using the facial recognition technology." The hackers also accessed live feeds and archived video, some with audio, of interviews with police officers and suspects.

One video stream was from Florida hospital Halifax Health, which is mainly a



mental health facility. It showed eight hospital staffers tackling a man and pinning him to a bed. Halifax Health, ironically, is featured on Verkada's website in a case study entitled: "How a Florida Healthcare Provider Easily Updated and Deployed a Scalable HIPPA Compliant Security System."

The hackers also gained access to the 17 cameras at Arizona's Graham County Detention Center. It had an archive file with video files that were given names by center staff. One from the "Commons Area" is titled "ROUNDHOUSE KICK OOPPSIE." Two videos from "Back Cell" are titled "STARE OFF—DON'T BLINK" and "LANCASTER LOSES BLANKET."

Kottman also said the group was able to obtain "root" access on the cameras, meaning they could use the cameras to execute their own code. This was a built-in feature that did not require further hacking. This could enable the hackers to hijack cameras or use them for a platform for future attacks, and allow broader access to Verkada's corporate network of customers.

"The integrity of each device's root filesystem and firmware was verified by checking hashes against an expected set. The

integrity check was run before and after a fleet-wide reboot of devices," Verkada said in a Security Incident Report published in response to the hacking. "No evidence of backdoors or lateral movement was detected in our logs."

The hackers did gain access via a customer support server using "admin-level credentials for executing support scripts." That server was "a misconfigured customer support server exposed to the internet" that allowed the hackers to find the customer support administration credentials.

Kottman said hackers were also able to download Verkada's entire customer list and the company's balance sheet. Verkada said the accessed customer files included names and email addresses but no passwords. It also said the hackers accessed a list of its sales orders.

Kottman said hackers watched a video that a Verkada employee set up in his home. He is seen completing a puzzle with his family.

"If you are a company who has purchased this network of cameras and you are putting them in sensitive places, you may not have the expectation that in addition to being watched

by your security team that there is some admin at the camera company who is also watching," said Eva Galperin, director of cybersecurity at the Electronic Frontier Foundation.

The US Department of Justice announced on March 18, 2021, that a grand jury in Seattle, Washington, indicted Kottman for conspiracy to commit computer fraud and abuse, conspiracy to commit wire fraud, and aggravated identity theft pertaining to activity that predated the Verkada hack. The indictment alleges Kottman is a Swiss computer hacker who has hacked dozens of companies and government agencies. It alleged Kottman leaked internal files and records of over 100 entities. Marcel Bossonnet, the Swiss attorney who previously represented Edward Snowden, has agreed to represent Kottman. Switzerland does not allow the extradition of Swiss citizens against their will. While Kottman's home and that of her parents have been searched by Swiss police she appears to be at liberty in Switzerland as we go to press. See: *USA v. Kottman*, USDC, W. Dist. WA, Case No. CR-21-048 RAJ. ■

Sources: *bloomberg.com*, *verkada.com*

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# Wisconsin Feels Effects of Staffing Shortage in State Prisons

by Kevin Bliss

**S**TAFFING SHORTAGES IN WISCONSIN'S maximum security prison, Waupun Correctional Facility, prompted the Wisconsin Department of Corrections (WDOC) in June of 2021 to ask for guards at the state's other prisons to voluntarily report to Waupun to work a two week pay period on a rotational basis through December. Many claim the shortage was due to former Governor Scott Walker's signing Act 10 into law in 2011. This bill put an end to collective bargaining.

Working a shift outside a guard's normal posting is colloquially known as a "force." It occurs when staff is needed for weekends or holidays. Yet, this is the first time anyone has been sent across the state to another prison for a force. The WDOC covers housing, food, and mileage costs for this force.

WDOC prison population is lower than the national average. However, statistics from the Vera Institute of Justice show the population has increased 464% since 1983 and 20% since 2000. The increased population has required a proportional increase in the need for guards, which has not occurred.

Waupun is currently understaffed by 45.3%, meaning it has 134 vacancies out of a possible staff of 296. This prison may be by far the worst in the state, but every prison has been feeling the effects of the staffing shortage. Of the maximum security prisons, Taycheedah has a 29.8% vacancy, Columbia 29.2%, Wisconsin Supermax 28.3%, Dodge 26%, and Green Bay 10.3%. The state's four prisons operating in Racine County are each understaffed between 9.9% and 16.8%.

WDOC has taken some minor steps to alleviate this crisis. For example, an entire cell hall in the prison has been closed to reduce the total number of prisoners housed there. New hires at Waupun will receive a \$2,000 signing bonus. Veterans have received added benefits. Within four months of taking office, Governor Tony Evers approved a 14% pay raise at six Wisconsin prisons for guards' starting salaries and added a \$5/hr. pay boost for certain veterans. Still, none of these efforts have corrected the problem.

Current wages for Wisconsin prison guards fall well below the national average.

Guards at the rank of sergeant earn approximately \$17.10/hr. While in surrounding states the salaries range from \$21.17 in Michigan, to \$22.60 in Minnesota, and \$26.38 in Illinois. The line guard salaries differ as much as 42% from surrounding states.

In 2018, the WDOC reported spending \$42 million in overtime costs. One guard said his salary had tripled for the year due to overtime. He worked an average of 95 hours each week. He was one of the 540 WDOC employees who had earned \$20,000 or more in overtime for the year.

The Associated Press (AP) published a report in February that said the low wages still cost taxpayers in the long run. "According to the nonpartisan Legislative Fiscal Bureau, the [WDOC] budgeted about \$57.3 million for overtime costs this fiscal year. They are also requesting \$88.3 million annually, which includes salary and fringe benefits, under the next state budget due to an expected increase in overtime costs and compensation," stated the report.

Measures are being recommended to address WDOC's staffing shortage. Legislators have proposed a bill (LRB-3392/LRB-3484) that would repeal Wisconsin's

law prohibiting advertising for prison guards on billboards. Politicians are calling for another \$5 hourly increase in guards' wages. Prisoner advocates push for the reduction of the overall prison population through alternative sentencing measures which would also reduce the need for more guards and necessary funds to cover them.

Act 10 effectively abolished unions. In 2010 the WDOC was unionized and had only 88 vacancies across the state. Today, there are 781, Waupun itself has more than 88. A 2016 American Federation of State, County and Municipal Employees report said, "Since Act 10 a record number of senior rank-and-file staff in corrections decided to retire rather than work dangerous duty where their voices would not be heard and respected by administration."

Speaking on the staffing shortage, Republican State Representative Michael Schraa said, "It's not safe for inmates and it's definitely not safe for staff. Something bad is going to happen." Which begs the question what if no one shows up to run the prisons? 🐼

Source: *journaltimes.com*

## First Prisoner Elected to Hold Public Office in Washington DC

by Kevin Bliss

**J**OEL CASTÓN, 44, A PRISONER OF THE District of Columbia Jail, may be the first incarcerated elected official in the nation. He won the special election June 15, 2021 for the Ward 7 Advisory Neighborhood Commission seat, beating out four others for the position—who were also fellow prisoners.

A Georgetown Prison Scholar who has served 26 years for a murder conviction at age 18, Castón was doing research for a podcast he hosted when he found that convicted felons could not only vote in the District of Columbia (even while still incarcerated), but could hold office as well. After considering what it meant to give residents of the jail a voice, Castón threw his hat in the ring as a write-in candidate. He then prepared a quick cam-

paign based on the principles of dignity and inclusion. And, with the help of the jail staff, Castón made a campaign video for release.

Castón won the first election hands down. But, an error in his voter registration address caused him to be disqualified. A special election was held June 15, 2021 to fill the open seat. This time, though, four candidates ran against Castón—Aaron Brown, Keith Littlepage-El, Gary Proctor, and Kim Thompson. What made this election unique was that every single candidate was a prisoner of the jail. Ward 7 was zoned in 2012, and then remained an empty seat for a decade. The zone (west Anacostia River) only encompasses three buildings—the jail, the Harriet Tubman Women's Shelter, and one residential building. Every vote but

one cast in the special election came from the jail. Castón won once again with 33% of the vote.

Castón was sworn in June 29, 2021 from inside the jail. International media immediately picked up on the unique story. Although as a Board Commissioner he does not dictate city matters, they do advise on policy governing zoning, traffic, police, and district budgets. This could have a tremendous effect on prisoners in the jail. "Imagine a single-member district where every voice matters, every disservice is heard, and every person is valued," stated Castón. "Here's an opportunity to become officially recognized as a spokesperson for a demographic that I care so much about, and so for threat regard, I felt obligated to do it."

As a commissioner, Castón will now be required to distribute government information, identify concerns, and monitor complaints. Already, he said he has been inundated by constituents' emails, over 600 within the first month. He wants to address gender disparities in the jail, living conditions, reentry, and education for prisoners.

He says his top priority was a financial literacy class, because poverty is one of the greatest factors determining criminality. Teaching prisoners financial literacy will help them to maintain their freedom.

Castón said the election and what it represented should help reduce recidivism for those participating. Activism builds a sense of belonging within the community. The enfranchisement (the right to vote) of prisoners in DC is ultimately a result of activism. Prisoners now have a voice in

matters that specifically concern them: 23 hour-a-day lockdowns, living conditions, medical care, food quality, etc. Becoming involved creates ties to the surrounding community. And, community ties are a proven factor to helping reduce recidivism. "If I can get you thinking like this on the inside, the mindset will follow you to the outside," said Castón.

Castón may not be able to finish his term in office. He is currently fighting his juvenile murder case in court and if he wins, he will no longer reside in that district. But, he hopes to do some good while he is in there and pave the way for others to follow in his footsteps.

*Editor's note:* Whether anything actually changes remains to be seen. The axiom "if voting could change the system it would be illegal" exists for a reason. In 1920 Socialist Party candidate, and famed American labor leader, Eugene Debs, ran for president from a federal prison cell after being charged with sedition for giving a speech urging resistance to the draft. He was convicted and sentenced to 10 years in prison in 1918, which was later commuted in 1921. Debs received 919,799 votes, 3.4 % of the total case for president. Perhaps the tradition of running for office from prison will make a comeback? 🗳️

Source: *georgetown-voice.com*

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# \$72,000 Settlement Over Corizon's Lack of Medical Treatment to Injured Arizona Prisoner

by Matt Clarke

ON AUGUST 8, 2020, CORIZON HEALTH, Inc. agreed to pay \$20,000 to settle its part of a federal lawsuit brought by an Arizona prisoner who suffered a partial foot amputation after Corizon delayed effective medical treatment.

Arizona state prisoner Edmund V. Powers fell 60 to 80 feet, suffering severe injuries which included a broken spine, ten broken ribs, a broken left hip, and a "shattered" pelvis and left foot. He underwent multiple surgeries and physical therapy, relearning to walk with the assistance of an elevated left shoe, a brace and a cane. An Arizona Department of Corrections (DOC) physician determined that he was "disabled" and issued a special needs order (SNO) that he was subject to modified work duties which were not a direct threat to his health and safety. Following additional surgeries, he was in a wheelchair for months, then approved to use a wheelchair for long distances.

A specialist reviewed an MRI of Powers and recommended a custom lift boot and restriction to partial weight bearing for four weeks while Powers awaited additional surgery. Both Registered Nurse Kelly Rogers and Nurse Practitioner Carrie Smalley

had notice of the recommendations, but refused to modify the SNO.

The next day, Powers was ordered to work in the kitchen. He showed supervising guard D. Alvarado the SNO. Alvarado took the cane when Powers was working even after Powers told Alvarado he needed it for balance and it was painful for him to walk without the cane. Alvarado assigned Powers duties that included lifting heavy buckets and pallets and loading a trash compactor.

After about ten days working in the kitchen, Alvarado told Powers to use a squeegee taped to the end of a wooden stick to clear ankle-deep water from the flooded prisoners' dining area. Powers objected, but Alvarado ordered him to do the job. Powers slipped, fell, and was injured.

Prison medical staff examined Powers and sent him to his cell where he spent the night in pain. He could see the skin graft was torn. His pelvis was x-rayed the next day, but Smalley denied his request to x-ray his foot, citing Corizon's cost-reduction policies.

Nearly two months later, a "deep bone

infection" was discovered during surgery. The infection had not been present before the fall in the kitchen. The surgeon ordered an infectious disease consult.

Corizon officials delayed the consult for nearly two months, treating Powers with ineffective antibiotics instead. At the consult, an MRI was ordered within seven days. Corizon took a month to have the MRI done. It showed severe damage caused by an advanced infection. It took another month for Corizon to have a biopsy performed confirming the infection.

Ultimately, Powers suffered amputation of the fourth and fifth metatarsal bones in his foot. He filed a pro se federal civil rights lawsuit against DOC officials, Corizon and Corizon employees.

After the court refused to dismiss several of the claims, Corizon settled their part of the lawsuit for \$20,000. On September 24, 2020, defendants Daniel Alvarado, Rebecca Fleis, and Richard Ochoa reached a settlement with Powers, agreeing to pay him \$52,500, but admitting no wrongdoing. See: *Powers v. Alvarado*, USDC, D. AZ, Case No. 2:19-cv-00310-GMS. ■

## Eleventh Circuit Upholds Immunity of Federal Prison Guards Under FTCA, Even for Blatant Unconstitutional Acts

by Dale Chappell

IN A MOVE THAT SURPRISED FEW, THE U.S. Court of Appeals for the Eleventh Circuit went against the grain of almost every other court and held on June 9, 2021, that the discretionary function exception, which grants immunity to federal employees when they injure someone while exercising their discretion on the job, applies even when the employee violates someone's constitutional rights, no matter how blatant.

It's a case that's disturbing but shows the disregard for human life that prison officials have for prisoners. About six years ago, Mackie Shivers was sleeping when his "cellie," Marvin Dodson, attacked him with a pair of scissors, stabbing him in

the eye. Shivers wound up losing that eye. But it could have been prevented, he said, because he repeatedly told staff about his cellie's violent actions and how he feared for his safety. Both men were in the U.S. Penitentiary at Coleman in Florida, with Shivers serving a mandatory life sentence after losing a drug case at trial. Dodson was also serving a drug sentence and had been deemed a safety risk because of his numerous violent acts while in prison. Somehow the two men lived together for eight months until the stabbing.

Shivers sued the BOP under the civil rights provision in *Bivens v. Six Unknown Named Fed Agents*, 403 U.S. 388 (1971),

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and under the Federal Tort Claims Act (FTCA). The *Bivens* case provided a remedy for a constitutional violation by a federal employee, and the FTCA provided a remedy for the injury sustained due to a federal employee's violation of state law. But, as is common with lawsuits against federal employees (especially law enforcement, including prison guards), there are many immunities. His *Bivens* claim was dismissed because he failed to properly exhaust his administrative remedies. While he provided a copy of the final appeal (BP-11), the government said it never received it and the court believed them. Shivers could not, however, produce proof that he mailed it or that anyone received it, either by certified or return-receipt mail.

Shivers then ran into an obstacle called "discretionary function exception" (DFE), which grants immunity to any federal employee who injures someone while acting within their discretion on the job. Shivers acknowledged this well-known exception, but argued that it doesn't apply if the federal employee violates the Constitution. In effect, he argued for a constitutional-violation exception to the DFE exception. It was a

valid argument, though, with Judge Bev Martin granting Shivers' *in forma pauperis* status on the issue for appeal. She noted that a "vast majority" of other courts have held exactly what Shivers was arguing—eight other courts to be exact.

But on appeal, a split panel of the Eleventh Circuit diverged from the course of those other courts. Two of the judges said that there is no such thing as an unconstitutional-act exception to the DFE. The court noted that the FTCA provides a remedy from violation of state law by federal employees, and has nothing to do with constitutional violations by them. It further noted that Shivers' *Bivens* claim was the proper method to argue the constitutional violations by prison staff, but that he failed to properly pursue that avenue because of his failure to exhaust his remedies.

"The inquiry is not about how poorly, abusively, or unconstitutionally the employee exercised his or her discretion but whether the underlying function or duty itself was a discretionary one," the court said. In other words, no matter how bad a prison staffer's constitutional violation may be toward a prisoner, even if grossly wrong,

there is no remedy for it under the FTCA. There is no way to "circumvent" the limits on constitutional tort actions under *Bivens*, the court said.

The lesson here is that a prisoner does in fact have a remedy for a constitutional violation, such as prison staff's blatant disregard for a prisoner's safety. But it is not the FTCA, at least not in the Eleventh Circuit. That type of claim must be brought by a *Bivens* action after properly exhausting all administrative remedies. See: *Shivers v. United States*, 1 F.4d 924 (11th Cir.).



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# Weeks Without a Shower: Neglect Defines COVID-19 Containment in California Jails

*Incarcerated people have been denied basic services in the name of fighting the virus, exacting a heavy psychological toll.*

*by Brian Osgood, The Intercept*

**M**ICHAEL PITRE SPENT CHRISTMAS EVE in a frigid cell in the Sacramento County Main Jail. Wrapped in a blanket that hadn't been replaced in weeks, he thought back to previous holidays that he had spent with his two daughters. But now, with his unit under strict lockdown due to an outbreak of COVID-19, all Pitre could do was lie on his bed and cry. To make matters worse, he said, he had not been allowed to shower since he was booked into the facility on December 2.

In total, Pitre said he went six weeks without a shower, nearly the same amount of time he went without speaking to his daughters over the phone. After spending two weeks in near-total isolation in an intake cell, where he was allowed out only for occasional calls with his attorney, Pitre was moved to a two-person cell. His cellmate had also been denied access to a shower, and the two men splashed water onto their bodies from the sink in a humiliating daily ritual that did little to alleviate the pungent odors that filled the cell.

In January, when over 700 people incarcerated at the jail contracted COVID-19 in less than a month, Pitre said that he started to display symptoms, describing aches, pains, and shortness of breath. Despite filing multiple medical requests, he said, he was given only Tylenol by jail staff, many of whom refused to wear masks. When Pitre tested positive, according to his attorney Megan Hopkins, his requests for medical evaluation went ignored. "They've moved him multiple times, and they won't even replace the blankets he was using when he had the virus," said Hopkins. "It took weeks for them to even give him an inhaler for his asthma."

Sgt. Rod Grassmann, a spokesperson for the Sacramento County Sheriff's Office, stated that "all inmates have access to medical care" and denied that staff at the jail were not complying with mask rules. While Grassmann disputed the exact length of time that Pitre had gone without access to a shower, he confirmed it was a period of

several weeks. He noted that on January 8, the jail changed its practice of denying showers to people in intake observation or quarantine. "As with all policies throughout the pandemic, we are constantly reviewing and ensuring we are operating as safely and efficiently as possible," he wrote.

But as Hopkins pointed out, the jail's shower policy had long been an issue of dispute between the sheriff's office and attorneys monitoring compliance with a settlement resulting from a class-action lawsuit over conditions at the facility. Attorneys representing people in custody at the jail raised the issue in May 2020; five months later, a court-appointed medical expert wrote that while the sheriff's office justified the policy in the name of fighting the virus, it was in direct contravention of the recommendations of the Centers for Disease Control and Prevention. It was only after attorneys threatened to escalate the issue in federal court that the sheriff's office issued a directive to restore shower access.

As the virus spread through California's jails, those charged with the protection of people in custody have responded with draconian measures that exact a heavy psychological toll, incarcerated people and their loved ones told *The Intercept*. Meanwhile, apathy and neglect from staff members undermine the sacrifices made to contain the pandemic.

"They don't communicate with us at all. All around you people are getting sick, and they don't give us any information," said Jose Armendariz, who is incarcerated at the Theo Lacy Facility in Orange County. "Our lives are in their hands, but they don't even recognize us as human beings. They don't care if we live or die. So many people have expressed suicidal thoughts."

## **They Believe He Deserves This**

SINCE THE PANDEMIC BEGAN OVER A YEAR ago, advocates of criminal justice reform warned that unless steps were taken to reduce the size of California's swollen incarcerated population, carceral facilities would inevi-

tably become hotspots for the virus. Their concerns have largely been validated: Social distancing has proved to be a fantasy, and even those in the single-person cells of death row have not escaped the reach of the virus. According to the *New York Times*, the case rate in California's prison system is over four times that of the general population.

In Orange County, the sheriff pushed back against a court order to decrease the incarcerated population in order to enable social distancing. County lawyers had argued that people inside Orange County jails were safer from the virus than they would be anywhere else. The jails subsequently recorded more than 2,000 cases. Sgt. Dennis Breckner, a spokesperson for the Orange County Sheriff's Department, told *The Intercept* that "through our mitigation efforts and strict safety protocols, the number of Covid-positive inmates dropped from over 1,200 late last year to only two" by late March.

"Whenever I tell guards they aren't following their own rules, they just say, 'Well, maybe you shouldn't have ended up in here.'"

"Everything they do is for the sake of avoiding scrutiny and looking good on paper," said Daisy Ramirez, Orange County jails conditions and policy coordinator at the American Civil Liberties Union of Southern California. "The Orange County sheriff has been violating the human rights of incarcerated people for years, and the pandemic has exacerbated all of those tendencies. The only time changes are made is when they feel pressured."

Breckner told *The Intercept* that all incarcerated people are provided with personal protective equipment on a regular basis. But Tony Garcia, a 62-year-old held at the Theo Lacy Facility, recalled that for the first three months of the pandemic, he had to fashion a face mask out of a torn piece of bed sheet.

His trial has been delayed multiple times due to the pandemic, and he fears that it could be set back again. "Every time I'm transported to court, the guards aren't

even wearing masks,” he told *The Intercept* during a phone call in March. “The guards aren’t taking it seriously at all.” Breckner denied that CDC procedures were not being followed by guards.

Garcia’s family members say that the conditions inside the jail have become a source of constant anxiety. “He’s in his 60s, he’s very vulnerable,” Garcia’s sister Clara Sanchez said. “But because he’s in jail, they believe he deserves this. They don’t treat him like a human being with rights.” Rhetoric that blames incarcerated people for their exposure to the virus is a common complaint. “Whenever I tell guards they aren’t following their own rules, they just say, ‘Well, maybe you shouldn’t have ended up in here,’” Armendariz said.

Breckner and Grassmann said that vaccines are being made available to medically vulnerable people jailed in their respective facilities, and Garcia confirmed that he had been vaccinated. But those on the inside reported that many are skeptical of vaccination efforts due to mistrust of staff. “It’s not like it’s just vaccine skepticism. We trust the vaccine, but we don’t trust the people administering it,” Armendariz said.

Pitre is deciding whether or not he will accept the vaccine and said several guards have told him that it could have lethal side effects. He recalled that one guard told him he didn’t need the vaccine because he had already been infected. “Some of the guards don’t even believe it’s real,” Armendariz said of COVID-19. “They tell us it’s being exaggerated.”

## The Prison Inside the Prison

EXPERTS WARN THAT FACILITIES THAT FAIL to make meaningful distinctions between medical isolation and solitary confinement may be discouraging incarcerated people from reporting symptoms out of fear of spending time in near-total isolation. “Solitary confinement is linked to heightened suicidal tendencies and self-harm. It has a devastating impact on people’s mental health,” said Hadar Aviram, a professor of criminology at the University of California, Hastings College of the Law. “It’s used to discard people that don’t fit neatly into the prison system.”

Michael Saavedra, a legal coordinator with the advocacy group Youth Justice Coalition who spent 10 years in solitary confinement, put it more bluntly: “Solitary confinement is the prison inside the prison. People call it ‘the hole.’ It breaks people.”

Grassmann stated that “from the beginning,” people in medical isolation at Sacramento County jails have been given access to things like tablets, games, and word puzzles to help pass the time. Pitre confirmed that these forms of recreation have been made available but said that he was not given access to them during his two weeks in medical isolation upon intake.

Korinda Clement said her son, Gabriel Clement, who is paralyzed from the chest down, was kept in quarantine for over three weeks at Sacramento County Main Jail in almost complete isolation after spending several hours in the hospital. Her son’s catheter had become detached, she said, and the jail’s medical staff were unable to reattach it, despite it being a fairly simple procedure. They instead sent him to the hospital on New Year’s Eve.

“They say it’s about containing the pandemic, but they aren’t even wearing masks or sanitizing properly.”

Korinda, who works at a hospital in Sacramento, said she understands the need for quarantine. But what she could not make sense of was the neglect her son faced as he was warehoused in an isolation cell for more than a week past the 14 days the CDC recommends.

“They just threw him in there and left him,” said Korinda. “They say it’s about containing the pandemic, but they aren’t even wearing masks or sanitizing properly.” One day, when her son went to shower, he said

that the curtains and floor were stained with feces and blood. “He’s where he is because he’s made mistakes,” she said. “But they treat him like he’s lower than an animal.”

In February, her son was transferred to a state prison in Corcoran, California, where she worried she would have to start the process of communicating his medical needs all over again. The prison Gabriel was transferred to has reported 3,011 confirmed cases of COVID-19 and seven deaths.

The outbreaks don’t stay contained inside the walls of the jail. One person incarcerated at Theo Lacy tested positive but was released before his test results came back. Unaware that he had the virus, the person visited his mother, who later contracted COVID-19. She was sent to the hospital on Christmas Day and died four days later.

“People forget that we’re human beings too,” Armendariz said. “Some of us have made horrible mistakes and caused people real harm and sadness. But we’re people too. We have families we love and want to see again. We don’t deserve to die.”

*This article was originally published on May 19, 2021. Republished with permission from The Intercept, an award-winning non-profit news organization dedicated to holding the powerful accountable through fearless, adversarial journalism. Sign up for the Intercept’s Newsletter.*

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# Audit Reveals Federal Bureau of Prisons' Chaplaincy Services Branch Critically Depleted

by Casey J. Bastian

THE OFFICE OF THE INSPECTOR GENERAL completed an audit of the Federal Bureau of Prisons (BOP) Chaplaincy Services Branch (CSB) in July 2021. The CSB is responsible for the BOP's religious services nationwide. The program is intended to ensure that the constitutional right of prisoners to practice religion is protected. Almost 70 percent of the BOP prisoner population identifies with a particular faith group or tradition.

The audit revealed that the CSB is so depleted that a mere 236 personnel are serving more than 150,000 prisoners. This results in only eight of the 26 recognized faith groups being represented. The audit concluded that "a significant shortage in the number of chaplains and other chaplaincy services staff impairs the BOP's ability to implement a safe and effective religious services program."

The audit identified five key areas

requiring improvement and policy updates to help ensure prisoners' access to religious services as well as the safety and security of the institutions. As well as identifying the current deficiencies, the audit offered several recommendations to alleviate those problems. On May 21, 2021, the BOP adopted several of the recommendations while promising to implement those changes in a reasonable amount of time. A target date of no later than the end of fiscal year (FY) 2022 has been set for most changes.

The first recommendation is to address chaplaincy shortages and lack of diversity among represented faith groups. This can be done by reassessing chaplaincy educational requirements, reconsidering the current age restrictions, and reviewing the Chaplain Trainee Program model to expand available hiring opportunities. The BOP responded by writing that the recommendations will result in presenting "draft policy to the National Union by the end of FY 2021" for approval.

The second recommendation is to address the security issues arising from the BOP's "understaffed, overburdened, and diversity-challenged chaplaincy." The audit report suggests the policy on prisoner-led services should be modified to prevent prohibited prisoners from doing so. The BOP will also increase monitoring equipment within the chapel areas of the institution and reexamine current prohibitions against monitoring in accordance with any governing law.

Finally, the BOP should establish new security procedures for faith group lockers located in the chapel areas to prevent unauthorized materials becoming available to the prisoners. A report by the *Detroit Free Press* noted that of the dozen prisons included in the audit, three prisons where investigators inspected storage lockers reserved for religious materials resulted in locating prohibited items, including information that "advocated violence and extremist beliefs..." and "documents and images advocating white supremacy."

The third recommendation is to ensure robust chapel libraries. This might be done through a comprehensive review of the Chapel Library Database (CLD) within the CSB. This will ensure an accurate inventory of appropriate resources, including foreign language materials, that have not been previously reviewed and included in the CLD. The BOP shall also establish clear guidance for the handling of materials deemed inappropriate for prisoner use.

The fourth area of improvement is to overhaul the insufficient religious volunteer vetting process. This will allow the BOP to ensure that the volunteer information is accurate. The BOP should conduct analysis of volunteer contact information periodically to ensure that the volunteers are aware of the policy on prohibited conduct. The audit identified four examples of serious violations of the current policy on unauthorized contact. This will ensure increased scrutiny to monitor similar unapproved contact.

The fifth recommendation is for the BOP to provide better support for the current chaplaincy services staff so that those staff may focus their attention on the primary duties as required by policy. The audit report provides four specific acts for this issue. The CSB is to develop a strategy to strengthen its volunteer ranks, develop a strategy to avoid staffing shortages arising from anticipated leaves of absence, centralize the primary responsibilities to increase awareness of issues the chaplains might face, and use existing technologies to provide solutions to alternative religious services. ■

Source: *freep.com*, *oig.justice.gov*

## If You Write to *Prison Legal News*

We receive many, many letters from prisoners – around 1,000 a month, every month. If you contact us, please note that we are unable to respond to the vast majority of letters we receive.

In almost all cases we cannot help find an attorney, intervene in criminal or civil cases, contact prison officials regarding grievances or disciplinary issues, etc. We cannot assist with wrongful convictions, and recommend contacting organizations that specialize in such cases – see the resource list on page 68 (though we can help obtain compensation *after* a wrongful conviction has been reversed based on innocence claims).

Please do not send us documents that you need to have returned. Although we welcome copies of verdicts and settlements, do not send copies of complaints or lawsuits that have not yet resulted in a favorable outcome.

Also, if you contact us, please ensure letters are legible and to the point – we regularly receive 10- to 15-page letters, and do not have the staff time or resources to review lengthy correspondence. If we need more information, we will write back.

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# To End Mass Incarceration, We Need to Bust the Myths That Prop It Up

*An interview with Victoria Law*

by James Kilgore, Truthout.org

One of the most pervasive myths about incarceration is that it makes a society safer. Now, a leading journalist who focuses on the criminal legal system has taken on that question in her new book.

Victoria Law is a prolific reporter who is perhaps best known for spending years in the trenches exploring the experiences of women in prison. Her work always centers the voices of impacted people, while maintaining a broad lens on mass incarceration and digging deep into a wider variety of issues related to prison and jails.

Having recently released a joint book with Truthout editor Maya Schenwar in July of last year, *Prison By Any Other Name*, Law already has another book on offer. This new work, *“Prisons Make Us Safer”: and 20 Other Myths About Mass Incarceration*, is designed as a primer. [It is now available in paperback from HRDC, see ordering information on page 70.] While promoted as a rudimentary guide to the issue of mass incarceration, this volume provides both basic facts and figures while tackling some of the more complex carceral debates in an accessible way. With clear-cut analysis and a plethora of factual information, Law addresses issues like private prisons, the idea of releasing everyone convicted of a nonviolent offense, the perception that immigration has nothing to do with mass incarceration, and the notion that only cisgender Black men are incarcerated. I had the pleasure of interviewing her about the book for this article. She touched on all those issues and provided an especially rich analysis of why we need to pay so much more attention to women and transgender folks who are incarcerated.

**James Kilgore:** *What inspired you to write this book, and how did you find the energy to do it after just having published Prison By Any Other Name?*

**Victoria Law:** I see the two books as complementary. *“Prisons Make Us Safer”* is a primer for people just beginning to think about incarceration while *Prison By Any Other Name* is for readers who have already identified mass incarceration as a problem

and are thinking about ways to shrink the prison population. That book is to warn against reforms that might seem like they decrease the numbers of people in physical jails and prisons, but actually expand similar systems of surveillance and control to homes, communities and other institutions.

*I know you are a voracious reader, so I am wondering as you wrote this book, what authors or activists came into your mind as sources of inspiration for this work?*

Angela Y. Davis has inspired all of my work. I’m also heavily influenced by the continued work of Beth Richie, Ruth Wilson Gilmore and Mariame Kaba, to name just a few amazing abolitionists who are organizing and documenting their work.

Aishah Shahidah Simmons’s *Love WITH Accountability* was pivotal to rethinking about safety from family violence, particularly child sexual abuse.

Leah Lakshmi Piepzna-Samarasinha has long highlighted responses to intimate partner violence in activist communities; her work, along with that of Mimi Kim of Creative Interventions and Ejeris Dixon, who started the Safe Neighborhoods Campaign in Brooklyn, illustrates initiatives happening right here and right now to building a world that doesn’t rely on prisons and punishment.

*Your book is about myths that prop up and perpetuate mass incarceration. Can you tell us a bit more about these myths? How do they work? Are they like a Trumpian “Big Lie” or do they contain some kernels of truth?*

One of the most widespread myths is that we need prisons to keep us safe(r). It’s a myth we’ve been fed since childhood from school seminars about safety, to crime shows and daily news hours. Every abolitionist has been asked, repeatedly, some variant of “How will we stay safe?” The U.S. has less than 5 percent of the world’s population and approximately 25 percent of its prison population. If prisons kept us safe, then the U.S. should be the safest nation in the world. That’s obviously not the case but it’s a persistent myth that tugs at people’s fears about violence and safety.

Some other myths acknowledge that

prisons are problematic, but then blame the bloated prison populations on the private prison industry (which incarcerates approximately 8.5 percent of the nation’s prisoners and 73 percent of those detained by U.S. Immigration and Customs Enforcement) or private corporations that utilize prison labor. Some myths shift the onus of mass criminalization and incarceration away from systemic failures—such as endemic racism, poverty and cut-away social safety nets—to the individual.

These myths take reality—for example, that Black people are disproportionately targeted and incarcerated—and twist a distorted explanation—that they commit more crimes, not that the U.S. has a long history of racism that manifests today in current structural inequalities, including the systemic racism inherent in policing as well as the perpetual under-resourcing of communities of color.

These myths justify the continuation of mass incarceration as a catch-all solution to all of society’s problems. If we don’t debunk these myths, then we end up either continuing down the same path of perpetual punishment (without any real safety) or else fall for proposed reforms that don’t address root causes of problems or ensure safety.

*Probably more than any other journalist, you have researched and written about gender issues in relation to mass incarceration, especially about the experience of women in prison and jail. How did that work inform how you tackled this book?*

Women make up roughly ten percent of the nation’s incarcerated population. Not only do women experience all the abuses facing incarcerated men, their gender allows the prison system—and a constellation of other institutions—to inflict additional injustices and violence on them. For instance, the majority of people in prison have children. When a father is imprisoned, he’s likely to have family members who will care for his children. He may not always see or hear from them, but he’s less likely to worry about losing them to foster care. When a mother is incarcerated, her children are five times more likely to end up in the



foster care system. Until recently, however, navigating family court and custody issues were not considered prison issues because it wasn't an issue that affected the majority (incarcerated fathers).

Similarly, including the experiences of trans women (who are often confined in men's facilities) highlights the transphobic violence inherent in incarceration. Trans people experience all the violence and harassment that cisgender people do; but they also face additional forms of discrimination, harassment and violence based on their gender identities.

By centering women (both cisgender and trans women), I include experiences that might otherwise not be thought of as prison issues but illustrate the insidious ways that mass incarceration devastates not only individual lives, but also families and communities. Centering women's experiences also pushes readers to think about how gender and gender identity complicate some of the myths about safety, fear and imprisonment.

*You devote considerable attention to the myths that surround domestic violence, both in terms of those who do harm and those who are harmed. Why do you think the myths surrounding these issues are so important?*

Among people incarcerated in women's prisons, past abuse—family violence, sexual violence and/or domestic violence—is so prevalent we now have a term for it: the abuse-to-prison pipeline. Until recently, this was a largely ignored pathway. For instance, there's some anecdotal evidence that many women imprisoned for the death of their partner or ex-partner had experienced sustained abuse from that partner. But there's no government data on what percentage of women incarcerated for murder or man-

slaughter had been abused by the person they killed. That's in large part because of the way our adversarial criminal legal system works—a prosecutor's job is to convict (or wring a guilty plea from a defendant), not to examine the underlying causes for why harm or violence happened.

It's only because of the sustained efforts of advocates, including currently and formerly incarcerated abuse survivors, that we're starting to see this pathway recognized—and legislative efforts being made to provide consideration for the role domestic violence might play. But it's been a long and slow slog. New York passed the Domestic Violence Survivors Justice Act in 2019. The law allows a judge to consider the role of abuse in the crime when sentencing an abuse survivor and mete out a less harsh sentence than the state sentencing guidelines recommend. The law also allows survivors to apply for resentencing if abuse was a significant factor. But it took advocates nearly ten years to convince lawmakers to pass this bill.

Even today, if a survivor brings up domestic violence in court, prosecutors (and often judges) dismiss these claims. We saw this last year, at the start of the pandemic, when Tracy McCarter, a Black nurse, was arrested and held for six months awaiting arraignment for the death of her estranged husband. At the start of the pandemic—when nurses were badly needed in New

York City's hospitals, and Rikers Island, the city's island-jail complex, was a hot spot of infection—prosecutors opposed allowing McCarter to be released pending trial. The district attorney's office could have looked at McCarter's statements about the abuse she had suffered—as well as her estranged husband's past acts of violence—and taken that abuse into consideration both in arguing against her release and, six months later, deciding whether to charge her with murder (which carries a higher sentence), manslaughter, a lesser charge, or no charge at all. But that's not the way that our criminal legal system works—there's little incentive for an assistant district attorney to believe a defendant's claims of abuse, let alone decrease the severity of the charges or drop them altogether.

*You offer both restorative justice and transformative justice as vehicles for addressing the harm and violence that our society typically responds to with punishment and incarceration (or even the death penalty). Can you briefly summarize the difference between the two and why you see them as so central to the elimination of mass incarceration and the creation of a different type of society than what racial capitalism has to offer?*

Restorative justice is a process centering the needs of the survivor rather than simply seeking to punish the person who caused harm. The process also includes people who have been indirectly affected,

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such as family members and other loved ones. This typically involves a facilitated meeting in which survivors are able to talk about the long-lasting effects of the harm caused and what they need to begin healing, including actions the harm-doer(s) can take. The harm-doer is encouraged to take responsibility for their actions and work to repair the harm. In our existing court system, the person accused of harm is encouraged to deny, downplay and dismiss the consequences of their actions.

Transformative justice centers the needs of the survivor while also working to transform the conditions that enabled the harm. It also doesn't rely on policing, imprisonment or other types of punishment.

Here's an example. Let's say that I, a small Chinese woman, am walking down the street and am attacked by a man yelling anti-Asian slurs. I hit him with the meat cleaver I have in my purse.

In a restorative justice process, we would (eventually) have a facilitated meeting in which I talk about the effects of the harm he has done to me—I'm now more concerned about being attacked because of my ethnicity, my gender and my size, and feel anxious every time I have to leave my house. I want to know why he's targeting Asians and help figure out what needs to happen to decrease the chances that he'll do so again. What resources are available to help him ensure that he won't do so? And what do I need to feel restored to my previous sense of safety?

In a transformative justice process, we would go deeper to examine the conditions that encouraged this attack. This includes all of what I said above, but we would also identify—and try to change—conditions that led to this harm in the first place. This would involve asking why he is attacking Asians: is it because he's bought the Trumpian Kool-Aid that Asians are responsible for COVID? Does he have mental health issues that are entangled in racism—and if so, how do we transform that? Also, what are the conditions that have made me fearful enough to carry a meat cleaver in my purse?

Under the current system, we'd both be arrested, jailed and no one would ask, "What are the conditions that need to be changed?" Racists would continue to attack

Asians; some of us would fight back, but the root causes would remain unaddressed.

Please note that this is a hypothetical example. While the threat of anti-Asian violence is ever-present these days, I do not carry either a meat cleaver or purse when I go out.

## **CFPB Hits JPay with \$6 Million in Fines and Restitution Over Fee-Heavy "Debit Release Cards"**

*by Chuck Sharman*


**I**n an order and settlement agreement released on October 19, 2021, by the federal Consumer Financial Protection Bureau (CFPB), prison financial giant JPay, LLC agreed to pay \$6 million in fines and restitution, after its prepaid debit cards were found to have taken unfair advantage of some 1.2 million prisoners who were issued one since 2011.

*PLN* has reported extensively on the whole debit card racket which takes money from prisoners and arrestees and then returns it to them on fee laden debit cards where the money's owner must pay exorbitant fees for the privilege of spending their own money. The Human Rights Defense Center (HRDC), who publishes *PLN*, currently has three class action lawsuits pending against debit card companies, Jpay, Numi and Rapid Financial Solutions. In 2015 HRDC petitioned the CFPB to take action against these debit card companies. Six years later, our call was heeded.

The so-called "debit release cards" were handed out with a prepaid account balance, in lieu of a check, for monies that were owed to those leaving custody of prisons that contracted with the Florida-based private financial services firm. Those monies included cash confiscated when a prisoner entered a lockup, as well as gifts received from relatives and friends, wages paid for prison work and "gate money" given to many prisoners upon release to help them reestablish economic life on the outside.

The amount that JPay was ordered and agreed to pay includes \$2 million in fines for five violations of the law, plus another \$4 million in restitution to victims.

That group includes nearly half of those who received a JPay pre-paid debit

[*Prison by Any Other Name* is available from HRDC for \$17.99 plus \$6 shipping for orders under \$50.] 

*This article was originally published at Truthout.org on April 6, 2021; reprinted with permission. Copyright, Truthout.org.*

card—some 500,000 people in all—who ended up being forced to pay the company a fee just to access their own money, CFPB noted, adding that in most prisons contracting with the firm, JPay held a monopoly in which its pre-paid debit card provided a prisoner their only option for getting the money they were owed.

That put JPay in violation of the Electronic Fund Transfer Act (EFTA), CFPB ruled. A key provision of EFTA—found at 15 U.S.C. §1693k(2) and its companion Regulation E, 12 C.F.R. §1005.10(e)(2)—forbids any requirement that consumers must "establish a Prepaid Account as a condition of receipt of a government benefit," CFPB noted.

The firm's fees were also found to be illegal because it failed to provide recipients in advance with a copy of a cardholder agreement—often called a "green sheet" for the color of the paper on which terms and conditions are usually printed—in further violation of EFTA and Regulation E.

Even in states where the firm was required to offer another way to request the money that would avoid fees, JPay buried the option in fine print and set a short time limit of seven to ten days to exercise it by providing an address where a check could be mailed—in and of itself a difficult task for many people who have been locked up and no longer have an address.

That put JPay in violation of sections 1031(a) and 1036(a)(1)(B) of the Consumer Financial Protection Act (CFPA), 12 U.S.C. §5531(a) and §5536(a)(1)(B), which prohibit consumer financial firms from engaging in such "unfair and abusive acts and practices," CFPB said. The firm also violated CFPA section 1036(a)(1)(A)—12 U.S.C. §5536(a)(1)(A)—by selling a service that

was noncompliant with federal consumer financial law.

The fifth and final violation was of the same CFPB sections, with CFPB finding that JPay also “engaged in deceptive acts and practices by making false or misleading representations about the existence, nature, or amount of fees applicable” to its prepaid cards.

That’s a technical way of saying that JPay bought contracts with prisons to hold a monopoly on returning money owed to prisoners upon release, using a debit card with a pre-paid balance that was quickly eaten up by fees—much more quickly than many prisoners could get their money out, in fact.

The cruelty that this scheme inflicts on a person already in a difficult situation—just released from prison, usually without a job and often without an address—is the reason behind a lawsuit filed against JPay in September 2021 by a former California prisoner, Adam Cain [See: *Adam Cain v. JPay Inc.* USDC, C. Dist. CA, 2:21-cv-07401-FLA-AGR].

When he left Chuckawalla Valley State Prison, Cain was given the cash in his prison account plus \$200 in state-provided “gate money”—\$213.50 in all—on a JPay prepaid debit card. Just months later, the card balance had been reduced to \$4.87, thanks entirely to JPay’s fees. Cain had never gotten a dime of his money.

He is represented in that suit by HRDC, California attorney John Burton and the Seattle law firm of Sirianni Youtz. CFPB took pains to note that nothing in its ruling prevents Cain or any other plaintiff from collecting full damages for injuries they can prove were caused by JPay. [See: *PLN*, October, 2021, page 28].

This victory over a particularly egregious prison profiteering practice comes after six years of advocacy and litigation surrounding these release cards, organized under the banner of HRDC’s Stop Prison Profiteering Campaign, which built on the Prison Phone Justice model of engaging with the Federal Communication Commission’s rulemaking and regulation process.

In March 2015, HRDC coordinated 69 additional organizations to sign on to a comment it had drafted and filed with CFPB during a public input process on changes to regulations over electronic transfers of funds, urging it to ban the compulsory use of prepaid debit cards to

return money that prisoners are owed when released. The organization also mobilized prisoners nationwide to submit comments on the topic. When JPay attempted to deny the nature of its contracts, HRDC was prepared with irrefutable examples provided by prisoners and public records requests filed to the docket for CFPB to review.

In Michigan, HRDC noted by way of example, JPay’s debit release card carried a long list of fees, including 50 cents to check its balance, 70 cents for each purchase made and \$2 for each cash withdrawal taken. Even if the cardholder does nothing, they are charged a 50-cent maintenance fee every month and another fee of \$2.99 after 60 days of inactivity. Should they try to cancel the card, though, they’ll get hit with another fee of \$9.95.

CFPB Director Rohit Chopra said that JPay’s fees were found illegal because “people could not obtain their money through other means” just as they could not “shop among prepaid card providers” or even “readily cash out the cards without paying a fee.” In a separate tweet, Chopra expanded on that idea, saying that JPay “exploited its captive customer base, harming the newly released and their families.”

For its part, JPay said it was “pleased” with the CFPB settlement, according to spokeswoman Jade Trombetta.

Founded in 2002 to bilk prisoners and their families by taking over money transfer services, JPay was acquired in 2015 by Securus Technologies, which was itself acquired in 2017 by Beverly Hills-based Platinum Equity Partners and rebranded Aventiv Technologies. Platinum Equity said that the settlement “is in keeping with” its emphasis on “collaboration with regulators and correction of certain past practices,” according to one of the firm’s partners, Mark Barnhill.

As a private firm, JPay does not have to release its financial results. In 2013, before it was acquired by Securus, the firm reported revenue of more than \$500 million. See: *U.S. Consumer Financial Protection Bureau Administrative Proceeding Consent Order, in the matter of JPay, LLC*, File No. 2021-CFPB-0006.

The settlement is posted on both the *PLN* and the CFPB websites. 📰

Sources: *New York Times*, *Washington Post*, *Reuters*, *StopPrisonProfiteering.org*

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# HRDC Prevails Over Wellpath as Vermont Supreme Court Rules Private Contractor Must Release Public Records

by David M. Reutter

**T**HE VERMONT SUPREME COURT CONCLUDED that under the Public Records Act (PRA) when “the state contracts with a private entity to discharge the entirety of a fundamental and uniquely governmental obligation owed to its citizens, that entity acts as an ‘instrumentality’ of the State.” That conclusion led the Court to find that Wellpath was required under the PRA to release “any records relating to legal actions and settlements arising” from the care it provided to Vermont prisoners.

The Court’s September 3, 2021 order was issued in an appeal by the Human Rights Defense Center (HRDC), the publisher of *PLN*. From 2010 to 2015, Correct Care Solutions, now known as Wellpath LLC, held a contract with the Vermont Department of Corrections (DOC) to provide medical care to every person in DOC’s custody. The contract paid Wellpath over \$91 million.

In 2015, HRDC sent Wellpath a PRA request seeking public records relating to all payouts for claims, lawsuits, or contracts arising from Wellpath’s provision of services under that contract. Wellpath declined to provide the requested documents, asserting that as a private entity it was not subject to the PRA. HRDC sent another request for those documents in 2017. Wellpath did not respond.

HRDC filed an action in Superior Court seeking to compel disclosure under the PRA. The parties filed cross motions for summary judgment. The trial court granted Wellpath’s motion. It applied the functional-equivalency test to determine if Wellpath was acting as a public agency, and it found Wellpath did not act as such “because the provision of healthcare is not a public function.” HRDC appealed.

The Vermont Supreme Court, in a 4-0 opinion, noted the PRA directs for liberal construction of the right to disclosure of records so the public knows what their government is up to. The Court did not determine whether Wellpath was a functional equivalent of a public agency. Rather, it found that Wellpath was an instrumentality of DOC during the contract period.

DOC had a statutory obligation to provide healthcare to its prisoners, and Wellpath, via the contract, became “the sole means through which the the DOC carried out the function of providing medical care to incarcerated persons.” Wellpath exercised the authority of the State in administering DOC’s policies on medical care. As such, Wellpath became an instrumentality of DOC and was subject to the disclosure obligations of the PRA.

The trial court’s order was reversed and remanded for a determination of what

documents were public records and whether any statutory exemptions applied. HRDC general counsel Dan Marshall briefed and argued the case before the Vermont Supreme Court. Robert Appel served as local counsel in the case. An amicus brief was filed on behalf of HRDC by the Vermont ACLU, the New England First Amendment Association, and Vermont Secretary of State Jim Condos and Vermont Auditor Doug Hoffer. See: *Human Rights Defense Center v. Correct Care Solutions LLC*, 2021 VT 63. ■

## Eleven Guards Fired after Death at Houston Jail

by Brian Dolinar

**A**S OTHER CITIES LIKE LOS ANGELES, Chicago, and New York have slowly begun to decarcerate their county jails, the Harris County Jail in Houston has resisted reform efforts. Over the years, *Prison Legal News (PLN)* has documented the persistent problems at the jail in Houston. The recent death of Jaqueree Simmons resulted in 11 guards being fired, and another six suspended. Despite the sheriff’s swift action, details of the man’s death suggest the widespread acceptance of abuses in the Lone Star State of Texas.

In October 2009, *PLN* ran a cover story about the Houston jail after the Department of Justice released an investigation concluding that “certain conditions at the Jail violate the constitutional rights of detainees.” From 2001 through June 2009, 142 prisoners died in Harris County’s jail—most were pretrial detainees. A new sheriff, Adrian Garcia, took over the jail in 2009 promising to do better, but an investigation by the *Houston Chronicle* showed that little progress was made. Between 2009 and 2015, 55 people died in the jail while awaiting trial.

Among them was Kenneth Christopher Lucas who died at the jail in 2014 while being restrained in an incident that was captured on video. An internal investigation cleared the officers. Five years later, the family settled for \$2.5 million in

a lawsuit against the county and seven jail officials [See: *PLN*, Mar. 2020, p.26].

On February 17, 2021, Jaqueree Simmons, 23 years old, died after he was beaten by guards in the Houston jail. The harrowing incident happened in the middle of a freezing winter storm that knocked out power at the jail.

Simmons’ abuses apparently happened out of view from the 1,490 security cameras in the 1.4 million-square-foot jail complex. The sheriff’s office conducted an investigation and released the following details.

On the morning of February 16, 2021, Simmons used his clothes to clog the toilet and cause flooding, a common act of protest practiced in jails and prisons, the reason for which was not revealed by the sheriff.

Guards responded by entering Simmons’ cell, beating him, and stripping him naked, none of which was formally documented as is required by the sheriff’s office.

At dinner time, a guard delivered a meal to Simmons in his cell, when Simmons threw a meal tray at the guard and “charged at him,” as was documented in a written report. The guard responded by punching Simmons in the face.

Later that night, several guards returned to Simmons’ cell to take him for a medical evaluation. They beat him another time, according to the sheriff’s investiga-

tion. "Again, detention officers used force against Simmons as they handcuffed him and escorted him out of the cell block. At this time, Simmons suffered multiple blows to his head." None of the officers documented the use of force.

Simmons had cuts on his face. The storm had caused a power outage, so the nurse ordered an X-ray be taken once power was restored. Once the power was back on, X-rays were never done.

The subsequent investigation found that no hourly checks were done as required by the sheriff. By noon the next day, Simmons was found unresponsive in his cell. He was taken to a hospital where he was declared dead.

The following guards were fired: Garland Barrett, Patricia Brummett, Joshua Dixon, Alysheia Mallety, Israel Martinez, Eric Morales, Jacob Ramirez, Alfredo Rodriguez, Daniel Rodriguez, Dana Walker, and Chadwick Westmoreland.

The suspensions include: Antonio Barrera, suspended for 10 days and will serve 180 days probation; Benny Galindez, suspended for three days and will serve 90 days probation; Jeremy McFarland, suspended for five days and will serve 180 days probation; Alexandra Saucier, suspended for three days and will serve 90 days probation; Ralph Tamayo, suspended for five days and will serve 180 days probation; Rene Vilaloboz, suspended for three days and is on probation for 90 days.

The Simmons family is being represented by Lee Merritt, well-known civil rights attorney who filed the civil suit against police for the death of Ahmaud Arbery in Georgia. Merritt issued the following statement:

"The treatment of Jaquarea Simmons was both inhumane and unconstitutional. It reflects a bigger crisis in our criminal justice system when our most vulnerable commit a crime and are treated as second-class citizens instead of protected. The Simmons family is grateful for Sheriff Gonzalez's action in holding the individuals responsible for Jaquarea Simmons death. Our office will work to make sure these individuals will be held accountable civilly and criminally and we will fight to address and reform the policies and practices that foster and environment of regular abuse." ■

Source: [abc13.com](http://abc13.com)

# IN THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF DELAWARE

In re: BOY SCOUTS OF AMERICA  
AND DELAWARE BSA, LLC,<sup>1</sup>  
Debtors.

Chapter 11  
Case No. 20-10343 (LSS)  
(Jointly Administered)

Hearing Date: January 24, 2022, at 10:00 a.m. (ET)  
Objection Deadline: January 7, 2022 at 4:00 p.m. (ET)

## **NOTICE OF (I) DEADLINE FOR CASTING VOTES TO ACCEPT OR REJECT PROPOSED MODIFIED FIFTH AMENDED CHAPTER 11 PLAN OF REORGANIZATION FOR BOY SCOUTS OF AMERICA AND DELAWARE BSA, LLC, (II) HEARING TO CONSIDER CONFIRMATION OF PLAN, AND (III) RELATED MATTERS**

**PLEASE TAKE NOTICE THAT** on September 30, 2021, the above-captioned debtors and debtors-in-possession (together, the "Debtors") filed:

- the *Modified Fifth Amended Chapter 11 Plan of Reorganization for Boy Scouts of America and Delaware BSA, LLC* [D.I. 6443] (together with all schedules and exhibits thereto, and as may be modified, amended, or supplemented from time to time, the "Plan");<sup>2</sup> and
- the *Disclosure Statement for the Modified Fifth Amended Chapter 11 Plan of Reorganization for Boy Scouts of America and Delaware BSA, LLC* [D.I. 6445] (together with all schedules and exhibits thereto, and as may be modified, amended, or supplemented from time to time, the "Disclosure Statement").

The Plan contains releases of the Debtors and certain third parties and related injunction provisions. These provisions could release and prohibit holders of Abuse Claims from filing lawsuits and asserting such claims against the BSA and certain non-debtor third parties, including Local Councils, Contributing Chartered Organizations, including TCJC, Settling Insurance Companies, including Hartford, and Participating Chartered Organizations, solely with respect to Post-1975 Chartered Organization Abuse Claims. Chartered Organizations are organizations that sponsored a Scouting unit, such as a troop or pack. The Plan provides a mechanism by which Abuse Claims against the BSA and certain-debtor third parties, including the Local Councils, Contributing Chartered Organizations, including TCJC, Settling Insurance Companies, including Hartford, and Participating Chartered Organizations, solely with respect to Post-1975 Chartered Organization Abuse Claims, will be channeled to a trust established pursuant to section 105(a) of the Bankruptcy Code.

Each Chartered Organization will automatically be deemed to be a Participating Chartered Organization under the Plan unless it (1) submits the opt out election form on or before the Plan Objection Deadline, (2) objects to confirmation of the Plan in accordance with the *Notice of Hearing to Consider Confirmation of Modified Fifth Amended Chapter 11 Plan of Reorganization for Boy Scouts of America and Delaware BSA, LLC*, attached as Exhibit 3 to the Solicitation Procedures Order and available at <https://omniagentsolutions.com/> BSA or on before the Plan Objection Deadline, or (3) is a debtor in bankruptcy as of the date of confirmation of the Plan. Participating Chartered Organizations shall receive certain limited protections under the Channeling Injunction, including the channeling of all Abuse Claims against such Participating Chartered Organizations that relate to Abuse alleged to have first occurred on or after January 1, 1976, in exchange for contribution to the Settlement Trust of Participating Chartered Organizations' rights under Abuse Insurance Policies issued on or after January 1, 1976.

Confirmation of the Plan is supported by the Debtors, the Future Claimants' Representative, the Creditors' Committee, the Coalition, and the Ad Hoc Committee of Local Councils. You should carefully review the Plan and the applicable release, injunction, and related provisions at <https://omniagentsolutions.com/>BSA.

### **PLEASE TAKE FURTHER NOTICE THAT:**

1. On September 30, 2021, the United States Bankruptcy Court for the District of Delaware (the "Bankruptcy Court") entered an order [D.I. 6438] (the "Solicitation Procedures Order") approving the Disclosure Statement. The Solicitation Procedures Order, among other things, authorizes the Debtors to solicit votes to accept or reject the Plan and establishes procedures related thereto (the "Solicitation Procedures").

2. The Bankruptcy Court has scheduled a hearing to consider whether to confirm the Plan beginning on **January 24, 2022 at 10:00 a.m. (Eastern Time)** (the "Confirmation Hearing"), which shall continue to the extent necessary on such dates as the Bankruptcy Court may designate. The Confirmation Hearing will be held before the Honorable Laurie Selber Silverstein, United States Bankruptcy Judge, at the Bankruptcy Court, located at 824 North Market Street, Sixth Floor, Courtroom No. 2, Wilmington, Delaware 19801.

3. Pursuant to the Solicitation Procedures Order, the Bankruptcy Court approved the Solicitation Procedures, which are attached to the Solicitation Procedures Order as **Exhibit 1**. Holders of Claims in Class 3A (2010 Credit Facility Claims), Class 3B (2019 RCF Claims), Class 4A (2010 Bond Claims), Class 4B (2012 Bond Claims), Class 5 (Convenience Claims), Class 6 (General Unsecured Claims), Class 7 (Non-Abuse Litigation Claims), Class 8 (Direct Abuse Claims), and Class 9 (Indirect Abuse Claims) (collectively, the "Voting Classes") are entitled to receive a ballot for casting a vote on the Plan (a "Ballot"). Holders of Claims and Interests in all other Classes under the Plan are presumed to accept or are deemed to reject the Plan. For a vote to accept or reject the Plan to be counted, a Ballot must be completed and returned in accordance with the instructions provided on the **Ballot so that it is received by December 14, 2021 at 4:00 p.m. (Eastern Time)** (the "Voting Deadline").

4. Pursuant to the Plan, holders of Claims in the Voting Classes are entitled to vote on account of their respective Claims. If you have not received a Ballot and are entitled to vote on the Plan, you may request a Ballot and voting instructions from Omni Agent Solutions (the "Solicitation Agent"), by (a) calling the Debtors' toll-free restructuring hotline at 866-907-2721, (b) emailing [BSABallots@omniagent.com](mailto:BSABallots@omniagent.com), (c) writing to Boy Scouts of America Ballot Processing, c/o Omni Agent Solutions, 5955 De Soto Avenue, Suite 100, Woodland Hills, CA 91367, or (d) submitting an inquiry on the Debtors' restructuring website at <https://omniagentsolutions.com/>BSA, and submit your Ballot as set forth above so that it is received by the Voting Deadline.

5. Pursuant to the Solicitation Procedures, all Direct and Indirect Abuse Claims in Class 8 and Class 9 of the Plan will be temporarily allowed in the amount of \$1.00 in the aggregate per claimant or as otherwise ordered by the Bankruptcy Court, solely for purposes of voting to accept or reject the Plan and not for any other purpose. If you have filed a Proof of Claim that is subject to an objection other than a "reclassify" or "reduce and allow" objection that is filed with the Bankruptcy Court on or before the Solicitation Date (a "Disputed Claim") and seek to challenge the disallowance or estimation of your Disputed Claim for voting purposes, you must file with the Bankruptcy Court a motion for an order, pursuant to Bankruptcy Rule 3018(a), temporarily allowing such claim for purposes of voting to accept or reject the Plan (a "Rule 3018(a) Motion"). Any Rule 3018(a) Motion must be filed with the Bankruptcy Court and served on the Debtors on or before **November 1, 2021**. If a holder of a Disputed Claim files a timely Rule 3018(a) Motion, such holder's Ballot shall not be counted unless a Resolution Event occurs with respect to such Disputed Claim prior to **December 14, 2021** or as otherwise ordered by the Bankruptcy Court.

6. The Plan proposes certain releases and injunctions in furtherance of the Plan. The Plan proposes a Channeling Injunction that permanently channels all Abuse Claims against the Debtors and the Protected Parties and Limited Protected Parties to a Settlement Trust established pursuant to section 105(a) of the Bankruptcy Code. In addition, the Plan proposes an injunction that permanently enjoins the pursuit of any claim against or interest in the Debtors, Reorganized BSA, the Settlement Trust, or its or their respective property to the extent such claim or interest has been discharged, released, waived, settled, or deemed satisfied in accordance with the Plan (other than the enforcement of any right pursuant to the Plan). For the specific terms and conditions of all the releases and injunctions provided for in the Plan, and the precise scope of the Claims and Demands to be channeled, please refer to the specific terms of the Plan, which can be obtained as described below.

7. If the Plan is approved by the Bankruptcy Court, all current and future holders of Abuse Claims against the Debtors can request and receive money only from the Settlement Trust. You should read the Plan and Disclosure Statement carefully for details about how the Plan, if approved, will affect your rights.

8. The Bankruptcy Court has issued the Solicitation Procedures Order describing how to vote on the Plan, and the Disclosure Statement contains information that will help you decide how to vote. Your legal rights will be affected if the Plan is approved.

9. Under the Solicitation Procedures approved by the Bankruptcy Court, attorneys for holders of Direct Abuse Claims may vote on the Plan on behalf of their clients, if authorized by each client. If you are unsure whether your attorney is authorized to vote on your behalf, please contact your attorney.

10. If you would like to object to the Plan, you may do so by filing your objection no later than **January 7, 2022 at 4:00 p.m. (Eastern Time)** (the "Plan Objection Deadline"). Any objections or responses to confirmation of the Plan, must: (a) be in writing; (b) state the name and address of the objecting party and the nature and amount of the Claim of such party; (c) state with particularity the legal and factual basis and nature of any objection to the Plan and include any evidentiary support therefor; and (d) be filed with the Bankruptcy Court, 824 North Market Street, Third Floor, Wilmington, Delaware 19801 together with proof of service on or before the **Plan Objection Deadline**, and served so as to be **actually received** by the parties listed in the Confirmation Hearing Notice (the "Notice Parties") on or before the Plan Objection Deadline, which service may be through the CM/ECF system, with courtesy copies by email to the Notice Parties.

### **OBJECTIONS NOT TIMELY FILED AND SERVED STRICTLY AS PROVIDED HEREIN MAY NOT BE CONSIDERED BY THE BANKRUPTCY COURT AND MAY BE DEEMED OVERRULED WITHOUT FURTHER NOTICE.**

If you would like to review the Plan, the Disclosure Statement, the Solicitation Procedures Order, or other documents related to the Plan free of charge, you may obtain these documents from the Solicitation Agent by: (a) calling the Debtors' toll-free restructuring hotline at 866-907-2721, (b) emailing [BSABallots@omniagent.com](mailto:BSABallots@omniagent.com), (c) writing to Boy Scouts of America Ballot Processing, c/o Omni Agent Solutions, 5955 De Soto Avenue, Suite 100, Woodland Hills, CA 91367, or (d) submitting an inquiry on the Debtors' restructuring website at <https://omniagentsolutions.com/>BSA. You may also access from these materials for a fee via PACER at <http://www.deb.uscourts.gov/>.

Dated: October 8, 2021, WHITE & CASE LLP, Jessica C. Lauria (admitted *pro hac vice*), 1221 Avenue of the Americas, New York, New York 10020, Telephone: (212) 819-8200, Email: [jessica.lauria@whitecase.com](mailto:jessica.lauria@whitecase.com) -and- WHITE & CASE LLP, Michael C. Andolina (admitted *pro hac vice*), Matthew E. Linder (admitted *pro hac vice*), Laura E. Baccash (admitted *pro hac vice*), Blair M. Warner (admitted *pro hac vice*), 111 South Wacker Drive, Chicago, Illinois 60606, Telephone: (312) 881-5400, Email: [mandolina@whitecase.com](mailto:mandolina@whitecase.com), [mlinder@whitecase.com](mailto:mlinder@whitecase.com), [laura.baccash@whitecase.com](mailto:laura.baccash@whitecase.com), [blair.warner@whitecase.com](mailto:blair.warner@whitecase.com) -and- MORRIS, NICHOLS, ARSHT & TUNNELL LLP, Derek C. Abbott (No. 3376), Andrew R. Remming (No. 5120), Paige N. Topper (No. 6470), 1201 North Market Street, 16th Floor, P.O. Box 1347, Wilmington, Delaware 19899-1347, Telephone: (302) 658-9200, Email: [dabbott@morrisonichols.com](mailto:dabbott@morrisonichols.com), [aremming@morrisonichols.com](mailto:aremming@morrisonichols.com), [ptopper@morrisonichols.com](mailto:ptopper@morrisonichols.com), Attorneys for the Debtors and Debtors in Possession

<sup>1</sup> The Debtors in these chapter 11 cases, together with the last four digits of each Debtor's federal tax identification number, are as follows: Boy Scouts of America (6300); and Delaware BSA, LLC (4311). The Debtors' mailing address is 1325 West Walnut Hill Lane, Irving, Texas 75038.

<sup>2</sup> Capitalized terms used but not otherwise defined herein have the meanings ascribed to such terms in the Plan, the Disclosure Statement, or the Solicitation Procedures (as defined below), as applicable.



# Second Circuit Reversed Dismissal of Former BOP Prisoner's FTCA Claim Against Dentist

by David M. Reutter

**T**HE SECOND CIRCUIT COURT OF Appeals reversed the dismissal of a former federal prisoner's complaint brought pursuant to the Federal Tort Claims Act (FTCA). The court concluded that a state rule that requires an affidavit of merit to state a claim for medical negligence does not apply in federal proceedings.

The court's August 25, 2021 opinion was issued in an appeal brought by Royce Corley. Acting pro se, Corley filed an FTCA complaint in federal court against a dentist and dental hygienist at FCI Danbury in Connecticut.

Corley alleged that on November 14, 2016, a dental hygienist damaged a filling in his wisdom tooth and broke a cap on one of his front teeth during a cleaning. A few weeks later, the cap on the front tooth fell off, exposing his chipped front tooth. Over the next few months, the dentist refused to replace the cap or repair the filling. The dentist attempted to extract the wisdom tooth on March 13, 2017, "in a painful procedure that caused the tooth to break into several pieces that were not entirely removed during the procedure." The tooth remained in pieces, causing severe pain, bleeding, and infection along with bad breath and difficulty sleeping and eating.

In May 2018, Corley filed suit in a New York federal court. That court transferred the action to Connecticut because that's where the incident occurred and it was where the defendants resided. After Corley filed an amended complaint naming the United States as a defendant as required by the FTCA, the government moved to dismiss because Corley failed to comply with Section 52-190a(a) of the Connecticut General Statutes.

That statute requires an affidavit from a similar health care provider be attached to the complaint with the service of process of a medical negligence claim. The affidavit must detail the basis for the formation of the opinion that medical negligence occurred.

The district court granted the government's motion due to Corley's failure to attach the affidavit as required by Section 52-190a(a). Corley timely appealed.

The Second Circuit Court of Appeals

affirmed the transfer of the case from New York to Connecticut. It, however, found the district court erred in applying Section 52-190a(a) instead of the Federal Rules of Civil Procedure (F.R.Civ.P.). The parties did not dispute that those rules apply in an FTCA lawsuit or that state law is the "source of substantive liability under the FTCA."

The Court said that "state law will apply only if it is substantive, rather than procedural." It noted that procedural law is "the judicial process for enforcing rights and duties recognized by substantive law," where substantive law is "the law that governs the rights and obligations of individuals within a given jurisdiction."

It concluded that Section 52-190a(a) was procedural. That law neither modifies the "standard of liability nor elucidates the types of evidence required to establish the standard, its breach, or causality." Instead, it is a pleading rule that places a roadblock in the path of plaintiffs advancing a particular category of claim. Section 52-190a(a) sets a heightened pleading that is in direct con-

tradition with F.R.Civ.P. 8, which requires "a short and plain statement of the claim showing the pleader is entitled to relief," the Second Circuit found. It also conflicts with F.R.Civ.P. 4, which governs the service of process in federal court, by mandating documents with that service that are "not typically required in federal court."

"[B]y requiring tort cases against it to be brought in federal court, the United States foregoes any tactical advantages a defendant might have under the procedural rules applied in state court." Error was found in the dismissal of Corley's complaint.

The district court's order was affirmed in part and reversed in part. Corley represented himself pro se in the district and appellate courts. See: *Corley v. United States*, 11 F.4th 79 (2d Cir. 2021).

*Author's note:* Absent expert testimony setting forth the appropriate standard of care in a case such as this, it is very difficult to win medical claims or get past summary judgement. 📌

## Indiana Prisoner Entitled to Credit Time During Period of Erroneous Liberty

by David M. Reutter

**T**HE INDIANA SUPREME COURT HELD that a prisoner who was erroneously released early "is entitled to credit time as if he were still incarcerated during the period he was erroneously at liberty."

The court's June 21, 2021 opinion was issued in an appeal brought by Jordan Allen Temme. He pled guilty in 2017 to several charges under two different case numbers. Temme was sentenced to a total of nine years with the sentences running consecutive to one another on the two case numbers. His projected release date was December 2020.

Five of the nine years were for felony offense to be served in the Indiana Department of Corrections (IDOC). The other offenses were misdemeanors. Upon intake into IDOC, prison officials erroneously awarded 450 days of jail credit that were

supposed to be credited to the misdemeanor offenses. That resulted in Temme being released to the Vanderburgh County Jail (VCJ) after serving only ten months of his felony sentences. He was also discharged from parole supervision.

After arriving at VCJ, Temme was again awarded the 450 days of credit. Although he raised questions that release date was too early, Temme was released on July 4, 2019, with 450 days left on his sentence. The state, on July 25, 2019, filed a Motion Requesting the Court Reexamine Defendant's Credit Time, alleging Temme was released without serving his full sentence. It requested that Temme be readmitted to IDOC to finish serving his full sentence. Temme filed a motion requesting he receive credit time from the date he was released through readmission to IDOC. In the

alternative, he requested the court modify his sentence to be placed on community corrections or work release.

The trial court denied Temme's motion and ordered that he be readmitted to IDOC to finish serving his sentence. The order was stayed pending resolution of an appeal. The Court of Appeals affirmed. See: *Temme v. State*, 158 N.E.3d 423 (Ind. App. 2020). The Indiana Supreme Court granted transfer so it could consider the appeal. "At its heart, Temme's argument is one of fairness—that re-incarceration would serve no rehabilitative purpose in his case because he bore no fault in his early release and because he had successfully reintegrated in society," the Court wrote.

Indiana's credit time statutes are not directly on point and federal case law presents differing tests to determine credit time while erroneously at liberty. One line of cases holds that a defendant who was erroneously released have that time from release treated in the same way as if he was incarcerated. The rationale behind that is the concept that the government cannot postpone or interrupt the release date when there is no fault accrued to the defendant.

See: *White v. Pearlman*, 42 F.2d 788 (10th Cir. 1930).

The Fourth Circuit Court of Appeals adopted a totality of the circumstances test. It requires consideration of the nature of the underlying offense, whether the defendant notified the government of his erroneous release, the amount of time remaining in the sentence, the defendant's ability to reintegrate into society, and the government's promptness in rectifying its error. See: *United States v. Grant*, 862 F.3d 417 (4th Cir. 2017).

Indiana law defines "credit time" as "the sum of a person's accrued time, good time credit, and educational credit." See: Ind. Code Section § 35-50-6-0.5(2). The Court found that section "only concerns credit time while an inmate is imprisoned or confined." It thought that "statute serves as a useful guide for determining what credit an erroneously released inmate is due for his time spent at liberty."

They announced a straightforward rule that does not relieve the defendant of his or her sentence. "As long as the defendant bears no responsibility in his early release, he or she is entitled to credit while erroneously at

liberty as if still incarcerated," the court held.

That rule "is grounded in the idea that the State may not play cat and mouse with a defendant so as to push back a prisoner's release date, particularly if the prisoner bears no responsibility for the State's errors." The trial court's order was reversed and the case was remanded to determine any credit time Tamme still owed. The time for the appeal and until the trial court makes its determination counts as part of that credit time. See: *Temme v. State*, 169 N.E.3d 857 (Ind. 2021). 📖

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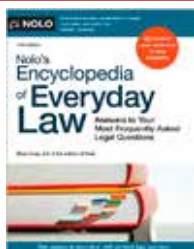
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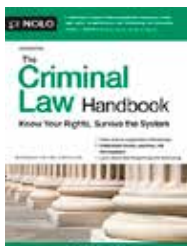
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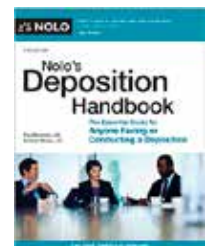
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# **\$731,000 Jury Award to Illinois DOC Prisoner Held 23 Months Beyond Release Date, Over \$210k in Fees Awarded As Well**

by David M. Reutter

**A**N ILLINOIS FEDERAL DISTRICT COURT found that a prison records clerk deprived a former prisoner of his liberty and caused him to serve 721 days beyond his sentence. A federal jury awarded the former prisoner \$721,000 in compensatory damages and \$10,000 in punitive damages.

That result was reached in a lawsuit by former Illinois prisoner Walter Brzowski, which he filed on December 28, 2017. According to the complaint, in 2010 Brzowski was convicted and sentenced in two separate criminal cases. In the first case, he received two concurrent one-year sentences and four years of mandatory supervised release (MSR). In the second case, he was sentenced to two concurrent terms of three years and four years MSR. The two sentences were run consecutively for a total of four years and four to eight years of MSR. Brzowski completed his sentences on September 10, 2013 and was released.

Brzowski was arrested on October 1, 2013, for violating his MSR and he returned to the Illinois Department of Corrections (IDOC) on November 29, 2013. He was found not guilty on October 10, 2014, of the offense that triggered his MSR violation. He then filed a habeas corpus petition stating that he had served his time and should be released. While that petition was pending, the Illinois Appellate Court reversed both of Brzowski's original convictions. He was subsequently resentenced to the three-year term on the second case and the first case that resulted in the one-year term was *nolle prosequi* on July 22, 2015, as part of a plea deal.

At the new sentencing hearing, the State's Attorney informed the court that Brzowski had served his time. The Court found he was due to be credited for 1,452 days time-served, which meant he had eight days to serve before his sentence was fully served.

Brzowski was returned to IDOC's custody. In a counseling summary, defendant Brenda Sigler incorrectly indicated that Brzowski was received into IDOC custody on July 28, 2015, rather than the correct date of July 30, 2011.

A June 8, 2017, order from the Illinois

Appellate Court determined that Brzowski was to be released immediately. However, he was not released until six weeks later, on July 20, 2017. To add insult to the injury, Brzowski spent 17 of those 24 months in segregation.

Brzowski, represented by Chicago-based attorneys Victor P. Henderson and Alexandra H. Hoffman, sued in federal court. He alleged violations of the Eighth

and Fourteenth Amendments, false imprisonment, and failure to intervene. A jury trial found Sigler liable. See: *Brzowski v. Sigler*, 2021 U.S. Dist. LEXIS 115054.

In addition to the jury award, on September 21, 2021, the court, in a separate ruling, awarded Brzowski \$206,994 in attorneys' fees, \$4,487.30 in costs. See: *Brzowski v. Sigler*, 2021 U.S. Dist. LEXIS 179128.

## **Eighth Circuit Clarifies Legal Standards for Conditions-of-Confinement Lawsuits Brought by Civilly-Committed Sex Offenders**

by Matt Clarke

**O**N FEBRUARY 21, 2021, THE UNITED States Court of Appeals for the Eighth Circuit issued an opinion clarifying the legal standards to be applied to lawsuits over conditions of confinement brought by civilly-committed sex offenders (CCSOs).

This is a class-action federal civil rights lawsuit brought under 42 U.S.C. § 1983 by lead plaintiff Kevin Scott Karsjens and 13 other named plaintiffs, all of whom have been committed to the Minnesota Sex Offender Program pursuant to the Minnesota Civil Commitment and Treatment Act: Sexually Dangerous Persons and Sexual Psychopathic Personalities, Minnesota Statute § 253D. The lawsuit initially had ten counts. Count 4 was dismissed and the district court decided to address the remaining counts in two phases, with Counts 1, 2, 3, 5, 6 and 7 in phase one.

Applying the strict scrutiny standard, the court found in the plaintiffs' favor on Counts 1 and 2, which alleged facial and as-applied due process violations. It issued an injunction without separate relief for Counts 3, 5, 6 or 7. The lead defendant, the Commissioner of the Minnesota Department of Human Services, and the other defendants appealed.

The Eighth Circuit held that the district court had applied an incorrect standard. Applying the correct standards—the “rational relationship” test for the facial challenge and the “shocks the conscience”

test for the as-applied challenge, the court reversed the district court's judgment and remanded “for further proceedings on the remaining claims.” See: *Karsjens v. Piper*, 845 F.3d 394 (8th Cir.2017).

On remand, the district court applied the “shocks the conscience” test to the remaining phase one counts and, holding the conditions of confinement did not “shock the conscience,” dismissed them. Plaintiffs appealed.

The Eighth Circuit examined the individual counts and concluded that the district court had applied an incorrect standard to all but one of them.

Count 3 alleged constitutionally inadequate treatment. The court found that this duplicated the as-applied due process claim of Count 2. Therefore, the district court had applied the correct standard to Count 3.

The court found that the remaining claims differed from those of Counts 1 and 2, which focused on the statutory scheme and the officials' implementation of it, the indefinite nature of the confinement, the lack of periodic review, and the administration of the treatment program.

By contrast, Counts 5, 6, and 7 presented claims and allegations focusing squarely on conditions of confinement, including the inadequacy of the meals, double-bunking, overly harsh punishment for rules violations, property being confiscated and destroyed before any hearing, the

lack of less restrictive alternative confinement, and the inadequacy of medical care.

The court had previously held that challenges to the adequacy of medical care provided to CCSOs was subject to the same “deliberate indifference” standard that applies to such challenges by convicted prisoners. See: *Senty-Haugen v. Goodno*, 462 F.3d 876 (8th Cir. 2006). Therefore, the trial court erred when it applied the “shocks the conscience” standard to the claims of inadequacy of medical care in Count 7.

The plaintiffs alleged that, taken as a whole, their conditions of confinement amount to punishment in violation of the US Supreme Court’s holding that CCSOs “may not be punished at all.” See: *Youngberg v. Romeo*, 457 US 307 (1982). This is similar to what the Supreme Court held with respect to pretrial detainees in *Bell v. Wolfish*, 441 US 520 (1979).

The *Bell* Court held that conditions of confinement were unconstitutional if, based upon the totality of the circumstance, they could be considered punitive. The Eighth Circuit had previously applied the *Bell* standard to CCSOs’ conditions-of-confinement claims. See: *Stearns v. Inmate Servs. Corp.*, 957 F.3d 902 (8th Cir. 2020), and now specifically held that the *Bell* standard applies to all CCSOs conditions-of-confinement claims except for claims of inadequate medical care. Therefore, it affirmed the dismissal of Count 3, but reversed the dismissal of Counts 5, 6, and 7, and remanded the case with instructions to apply the deliberate indifference standard to Count 7 and the *Bell* standard to Counts 5 and 6. See: *Karsjens v. Lourey*, 988 F.3d 1047 (8th Cir. 2021).

HRDC has covered news of the recent

social movement surrounding this case, including hunger strikes and protests [See:

PLN, Aug 2021, p.28.] We will continue to report on its developments. ■

## Prisoner Voting Population Grows as Illinois Bill Extends Polling Sites to County Jails

**T**HE PUSH TO RESTRICT VOTING RIGHTS and limit access to polling locations has gained momentum in the past several months. Advancing the false claims of excessive fraud and a rigged election by former President Donald Trump, state legislatures across the country have passed laws reducing voting hours, eliminating mail-in ballots, closing polling sites, and other restrictive measures.

Contrary to Republicans’ assertions, these laws adversely affect people of color and those of lower socio-economic status. For instance, some states have prohibited polling sites to open on Sundays when many African Americans traditionally cast ballots after church services.

However, one state is looking to buck this trend by expanding access to polling locations. In June 2021, Illinois Gov. J.B. Pritzker signed into law Senate Bill 825 which allows those who register to vote by mail remain on the list permanently and, more significantly, gives sheriffs the ability to open polling sites at their county jails.

Previously, only the sheriff in Cook County, the state’s largest jail, could establish a polling site at the county’s jail. Now, any county with less than 3 million residents can set up a temporary polling site at their jail.

“With attacks on voting rights on the rise in states across the nation, Illinois is proud to stand up for a strong, secure, and accessible democracy,” Gov. Pritzker said.

Yet some would argue that Illinois did not go far enough. The bill does not allow those convicted of an offense to vote while in custody, only those who are awaiting trial. Tellingly, only two states, Maine and Vermont, allow prisoners to vote, enfranchising less than one percent of the country’s incarcerated.

Washington D.C. also gives prisoners the right to vote, but the District goes one step farther: prisoners can even run for public office while incarcerated. This might seem like a pipe dream for most, but the impossible recently became possible. Joel Castón, a 44-year-old African American prisoner who has been incarcerated for 26 years in a D.C. prison, was elected to the office of neighborhood commissioner. Castón’s constituents include his fellow prisoners, who voted for him, and those outside prison walls. [See pg. 30-31.]

To perform his duties, Castón is allowed to use a computer to approve liquor licenses, schedule repairs to the neighborhood’s sidewalks and street, address budget issues, and other tasks associated with his office.

While the new Illinois law does not push as far as it could, it represents a hopeful trend to expand rather than restrict voting access to those previously denied their right to cast a ballot. Whether they will have candidates to vote for is another question. ■

Sources: *chicago.suntimes.com*, *ABC News*

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# Massachusetts Department of Corrections Sued Over Use of “Fake” Drug Tests on Legal Mail

by Casey J. Bastian

**T**HE MASSACHUSETTS DEPARTMENT OF Corrections (DOC) has been knowingly using drug tests described by plaintiff’s lawyers as “fake” on legal mail to both interfere with attorney/client communications and impose strict punishments without due process. These claims are the basis of a class complaint recently filed by affected prisoners and defense attorneys. “This flawed test has seriously harmed our clients, attorneys, and the attorney-client relationship, and the DOC should immediately stop using it,” said chief counsel Anthony Benedetti.

The tests in question are manufactured by Sirchie Acquisition Company (Sirchie) and distributed by Biotech, Inc (Biotech). The DOC acquired the tests for the purpose of preventing the introduction of contraband through the mail system; chiefly synthetic cannabinoids, which can be sprayed on paper and smoked. Sirchie manufactured the Narcotics Reagent Analysis Kit (NARK) 20023 test and claimed the tests use “crime lab accepted chemistry” designed to “function as a transportable narcotics laboratory.” The problem is that the NARK 20023 tests are fundamentally unreliable. One DOC employee stated that the tests result in false positives “up to 80% of the time.” In 2012, Sirchie issued its “Nark News” brochure that acknowledged it is “almost impossible” to develop a test that will not have “too many unacceptable false positives.”

The Nark 20023 tests ostensibly identify only eight of the synthetic cannabinoids formulas that have been known since 2013. Hundreds of formulas are believed to be in circulation. The National Forensic Laboratory Information System (NFLIS) says almost all of the formulas on the market would not be detected by Sirchie’s NARK 20023 tests. NFLIS data is confirmed by report data the DOC itself possessed prior to the events comprising the DOC conduct described in the class complaint. During a previous 18-month period, the DOC sends dozens of samples to the University of Massachusetts Medical School Drugs of Abuse Lab and it did not once identify one of the eight formulas the Sirchie tests claimed to detect. Every positive test result

the DOC submitted for secondary verification was proven to be false. Biotech was aware of the NARK 20023 test limitations when it secured the DOC contract. The DOC contract with Biotech demands that a vendor ensure product reliability and that false positives shall not exceed .05 percent. The DOC is required to monitor for rates exceeding the acceptable percentages and failed to do so the suit alleges.

On October 5, 2021, a class action suit was filed seeking to end these practices. The class complaint identifies four named plaintiffs. Two are DOC prisoners and two others are attorneys. Prisoners Ivey and Green were accused of attempting to introduce synthetic cannabinoids into the prison based on Nark 20023 test results. The only thing either prisoner had done wrong was to be in receipt of legal mail that the DOC staff determined to be “suspicious.” The legal mail was then tested. Without being found guilty of any offense, or even issued a disciplinary ticket, Ivey and Green were placed in disciplinary segregation. The complaint claims that this violates their due process rights because the DOC takes “immediate punitive measures” against any inmate in this situation. All based on knowingly faulty drug detection tests. The DOC does this prior to any opportunity for the prisoner to request secondary testing and while waiting for the results to come back from the lab after it is requested; this process can take months. It is also the prisoner who must pay for the secondary testing. It is alleged that the DOC uses the coercive tactics of this time and expense to force people to accept the charges in exchange for the punitive measures to immediately cease. Many prisoners have succumbed to this pressure.

Green and Ivey were eventually exonerated. It took two months for the results in Green’s case to be returned from the lab indicating that no drugs were present. Ivey had just been granted parole after 25 years and this incident placed that freedom in jeopardy. Adding insult to injury, both were required to pay for the tests themselves. Attorney Newman-Polk is Ivey’s attorney and one of the plaintiffs in the class complaint.

Newman-Polk described her experience in a statement in the complaint: “To say that this experience has been highly upsetting is an understatement. It has had a negative impact on my health and my family, as any accusation against Mr. Ivey was effectively an accusation that I committed a serious criminal offense. Although I did nothing wrong, I felt responsible for Mr. Ivey’s circumstances since I was the one who sent the mail.” Even though the lab results indicated that Ivey was innocent on September 18, it was not until October 14 that Ivey was released from segregation. The DOC had even sent Newman-Polk a letter on September 28 indicating that Ivey was being punished for introducing contraband, ten days after the DOC knew he was innocent.

Attorney McKenna is the second named attorney-plaintiff. McKenna had sent mail to a client in the DOC and the mail was tested for contraband. A faulty test indicated that drugs were present. The DOC placed the client in the disciplinary segregation and issued a ticket for introducing drugs. Months later the test results came back and proved that, once again, there were no drugs on the legal mail. McKenna’s client states that ten weeks after the results came back, the DOC still tried to pressure him into bringing a claim that McKenna had in fact intentionally sent contraband through the mail. McKenna had done no such thing. The outrageous conduct of the DOC brought McKenna incredible distress as a result of the false allegations. McKenna felt concerned for the possibility of criminal charges, loss of community standing, and the effect of the interference of attorney-client communications. These plaintiffs suffered because the DOC knowingly committed wrongful conduct and willfully violated its lawful duties. This negligence is the primary basis of the class-complaint. The plaintiffs are represented by the firms of Todd & Weld, Justice Catalyst and Braun Hagey & Borden. See: *Green v. Massachusetts Department of Corrections*, Suffolk Superior Court, Case No. 2184-CV-002283. ■

Source: *Reuter.com*



# Seventh Circuit: Local Rules Requiring Specific Filings to Summary Judgments Should Not be Used as a Sanction

by Dale Chappell

**P**ROVIDING AN EXAMPLE OF HOW THE rules apply to everyone—even pro se prisoners—the US Court of Appeals for the Seventh Circuit upheld the motion of summary judgment (MSJ) by the district court in denying a prisoner's federal civil lawsuit claiming bad medical care at the Wisconsin Secure Program Facility.

Somehow, Victor Robinson was given the wrong medication and afterwards he passed out and hit his head. How this happened was even more troubling since Robinson wasn't even on medication. Still, staff directed him to take this medication and he followed their orders. After he was rushed to a local hospital with a closed head injury, he sued prison officials in federal court for "deliberate indifference" to his medical needs. After screening under the Prison Litigation Reform Act, the district court allowed three claims to proceed and ordered prison staff to respond to the lawsuit. That's where things

went south for Robinson.

Prison staff filed a motion for summary judgment, asking the district court to grant judgment in their favor because Robinson's claims were deficient. Basically, they said that he failed to allege claims that could meet the strict standard for deliberate indifference. Part of the reason staff's MSJ was granted was because Robinson failed to properly respond to the MSJ. Instead, he reargued his claims and provided even more details as to why staff provided bad medical care that caused his injury. That was fatal to his lawsuit, since the facts alleged by prison staff in their MSJ were "admitted" in the record.

While the court of appeals ruled that the district court properly granted summary judgment to prison staff, it didn't agree with how the lower court went about it. "The district court was wrong to say that Robinson's failure to oppose the [MSJ] was sufficient grounds, standing alone, to grant the motion," the court

said. "Regardless of the local rules, a failure to file a timely response to such a motion is not a basis for automatically granting summary judgment as some kind of sanction."

With that said, the court upheld the grant of summary judgment and the denial of Robinson's lawsuit because his claims all failed on their merits. The court said that no jury could conclude that the medical provider at the prison violated Robinson's constitutional right by failing to intervene, that he failed to argue an underlying constitutional violation in the first instance, and that his state claims of negligence were barred by state law because he never identified the staff by their real names.

These are lessons learned the hard way for a pro se prisoner who was clearly harmed by staff's incompetence in ordering him to take medication that was not his and in following those orders. See: *Robinson v. Waterman*, 1 F.3d 480 (7th Cir. 2021). 🐼

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# Michigan DOC Eases Up on Pregnant Prisoners, Limits Shackles and Solitary Confinement

by Chuck Sharman

**U**NDER A NEW POLICY ANNOUNCED ON October 19, 2021, pregnant prisoners held by the Michigan Department of Corrections (MIDOC) will be restrained less and will also have more time to spend with their newborns once delivered.

When it takes effect November 22, 2021, the policy change will largely reflect procedures already put in place by MIDOC after a bill was sponsored by state Sen. Erika Greiss (D-Taylor) in 2020 to address concerns that infants were being plucked from their mothers' arms moments after birth.

"It's the saddest thing that I have not only heard of, but been through," said Siwatru-Salama Ra, who gave birth while locked up in 2018 at Women's Huron Valley Correctional Facility (WHVCF), the state's only prison for women.

Nine babies have been delivered to WHVCF prisoners in 2021, with two more still expecting, according to MIDOC spokesman Chris Gautz.

The new policy doesn't promise a new mother 72 hours with her infant, as Greiss's bill would have guaranteed had it not stalled before reaching a vote in the legislature. But it does say that MIDOC "shall not restrict the prisoner's contact with the newborn while in their assigned patient room subject to hospital protocols."

There are exceptions to the policy for mothers with a history of child abuse or neglect, as well as those whose contact with their children has been limited by Child Protective Services. Wardens also have the authority to approve exceptions to the rule.

Other provisions of the policy include:

- a ban on the use of restraints during labor;
- a one-hour limit on the use of restraints on pregnant prisoners, restricted to front-clasping handcuffs during transport;
- a guarantee that pregnant prisoners can pump breast milk;
- another guarantee that they can also work with health care staff and a doula to develop a birth plan;
- new limits on the use of segregation for pregnant prisoners; and
- new staff training in managing pregnant and post-partum prisoners.

Gov. Gretchen Whitmer (D) said she was proud of the work that MIDOC Director Heidi Washington and Greiss put into developing the new policy.

"Every pregnant Michigander deserves access to a safe birth, critical maternal healthcare, and essential post-partum supports," the governor added.

Greiss, who called the new policy "an important first step," has reintroduced another bill that died in 2020 to create an advisory board to provide oversight to WHCVF.

It is a sad commentary on the American police state that caging pregnant women, having them give birth while imprisoned, taking their children away shortly thereafter, limiting the solitary confinement of pregnant prisoners, is all somehow viewed as a progressive reform. Of course, as rules, these do not have the effect of law and confer no enforceable rights on the prisoners, they can be ignored or rescinded as prison officials see fit. 🐼

Source: *Detroit Free Press*

## D.C. Federal Court Rules District Providing Unlawfully Inadequate Education to Incarcerated Youth with Disabilities, Grants Preliminary Injunction

by Matt Clarke

**O**N JUNE 16, 2021, A FEDERAL COURT in the District of Columbia (D.C.) provisionally certified a class of disabled youth incarcerated in D.C. jails who were not being provided with the minimal amount of special education and related services required by the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400-1482, and issued a preliminary injunction requiring D.C. to provide them all the special education and related services mandated by their Individualized Education Programs (IEPs) through counselor- or teacher-led group classes or one-on-one in person or videoconference sessions.

The D.C. jail prisoners enrolled in the Inspiring Youth Program (IYP) filed a federal class-action civil rights lawsuit pursuant to the IDEA and other federal laws alleging they and about 60 other IYP students were being denied the free and appropriate public education (FAPE) mandated by the IDEA.

The IEP is the primary tool for implementing the IDEA. To create an IEP, the disabilities and educational and support needs of an individual are assessed and a plan created to provide a FAPE. For instance, Charles H. has a specific learning

disability and attention deficit/hyperactivity disorder (ADHD) that inhibits his progress in math and English. His IEP mandates 20 hours of specialized instruction per week in addition to the general education classroom instruction as well as three hours of behavioral support services and a half-hour of speech language pathology intervention per month. Israel F.'s IEP mandates 26 hours of special instruction weekly and two hours of behavioral support services monthly due to his emotional disturbance disability. Malik Z. has ADHD and an IEP that mandates ten hours of specialized instruction weekly and two hours of behavioral support services a month.

The defendants are the entities responsible for plaintiffs' education: D.C. Public Schools, the local education agency which is responsible for providing education to IYP youth; Office of the State Superintendent of Education, the state educational agency; and D.C., which is considered a "state" for within the meaning of the IDEA.

The plaintiffs alleged that, for over a year starting in March 2020, they were confined to their cells 23 hours a day and only received printed work packets, sporadically dropped off at their cells or delivered

via tablet, to further their education. The packets were few—Charles F. received only five in 33 weeks—and contained no instructions on how to complete the work. As a result, only two IYP students turned anything in. There was no instruction either in-person or via videoconferencing. There was no meaningful written feedback on the materials that were turned in and no explanation of difficult assignments. In

May 2021, some in-person instruction and support services resumed, but far less than called for in the plaintiffs' IEPs.

Although defendants admitted most of the alleged facts, they claimed to be doing as best as they could, given the pandemic.

The court held that plaintiffs had demonstrated they were likely to succeed on their IDEA claims. It held the pandemic did not excuse defendants' failure

to even begin the process of installing infrastructure to permit virtual instruction until mid-2021. The failure to provide a FAPE was an irreparable injury justifying the preliminary injunction ordering defendants to provide persons with an IEP incarcerated in the D.C. jails all of the services mandated by their IEPs. See: *Charles H. v. District of Columbia*, 2021 U.S. Dist. LEXIS 132383. ■

## Prison Officials Actions to Correct Inhumane Cell Conditions Merit Judgement in Their Favor

**T**HE SEVENTH CIRCUIT COURT OF Appeals affirmed an Illinois district court's summary judgment dismissal of a prisoner's claim that he was subjected to inhumane conditions and denial of medical care. The Court's ruling found that the defendants were not deliberately indifferent to the conditions the prisoner alleged.

The court's June 28, 2021, opinion was issued in an appeal brought by Illinois prisoner Adrian Thomas. He sued several officials at Pontiac Correctional Center.

Thomas alleged that on October 24, 2017, he was moved to a new cell, and its conditions were disgusting. He claimed there were feces, urine, and mold smeared on the walls, sink, and cell door. The mattress was soiled with feces and reeked of urine, over 100 dead flies were on the bunk bed, and the sink emitted only cold, black, and oily water.

Prison officials responded to Thomas's grievances. After about two weeks, he was given a new mattress, they said. Thomas admitted he used his sheets and blanket to avoid contact with the soiled mattress. He was also given a towel and disinfectant during his eight-week stay in the cell to clean the filth away. The feces stayed in the cell because, as Thomas indicated, he failed to use the disinfectant to clean the walls.

Prison officials also attempted unsuccessfully to fix the plumbing to get hot water in the cell. There was no evidence the water was unfit for consumption, and reports showed it passed regular testing.

Finally, Thomas asserted the cell's condition caused him to develop a rash. The evidence, however, showed he suffered only

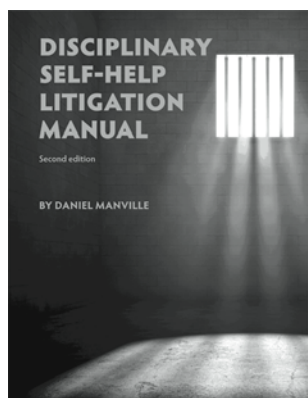
a small, clogged pore on his back that was treated with a warm compress to clear up.

Based upon the actions taken by the prison officials, the district court found the defendants were not deliberately indifferent to the conditions of Thomas's confinement or to his medical needs. As a result, it granted the defendants summary judgment. Thomas appealed.

The Seventh Circuit said that the "initial cell conditions Thomas described, if true, were inhumane, as they posed an excessive risk to his health and deprived

him of the 'minimal civilized measure of life's necessities.'" That, however, did not end the matter.

The Court found the district court was correct in finding no constitutional violation existed because the defendants responded to correct those conditions and they were not deliberately indifferent to Thomas's plight. This applied to both the cell's conditions and Thomas's medical condition. The district court's order was affirmed. See: *Thomas v. Blackard*, 2 F.4th 716 (7th Cir. 2021). ■



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## \$129,000 Bench Verdict for BOP Prisoner in Failure to Warn of Valley Fever

**A** CALIFORNIA FEDERAL DISTRICT COURT awarded a federal prisoner \$128,624.01 in damages in a lawsuit alleging officials at Federal Correctional Institute (FCI) Stafford in Arizona failed to warn him about Valley Fever.

The Court's July 23, 2021, order was issued following a two-day bench trial that occurred in January 2020. Prisoner Oscar Sandoval sued under the Federal Tort Claims Act. The United States moved to dismiss after the trial, asserting Sandoval was barred from recovery under the Inmate Accident Compensation Act, which is the exclusive remedy for work-related injuries. The Court granted the motion in part by prohibiting recovery for any injuries Sandoval as a result of not being provided a protective mask as an orderly at the prison. It denied the motion as to injuries he incurred as a result of Sandoval's failure to warn claim.

The Court's order detailed the facts presented at trial. It found that the Bureau of Prisons (BOP) had a duty to warn prisoners of hazards at their prison. It further found that officials at FCI Stafford breached that duty.

Valley Fever, or *Coccidioides immitis* and *Coccidioides posadasii* (Cocci), is in the area surrounding FCI Stafford. It is a naturally occurring soil fungus, which makes all dust suspect of carrying Cocci spores. An October 1, 2013, memo from Dr. Newton Kendig, then the BOP's Assistant Director of Health Services Division, listed FCI Stafford as a prison where all prisoners "must be made of, and periodically reminded of, the signs and symptoms of Valley Fever as well as accessing health serviced for evaluation and treatment." The memo included a "Lesson Plan detailing the information he wanted all FCI Stafford prisoners to know.

Prior to his diagnosis with Valley Fever, Sandoval was never warned of the risk of contracting Cocci while at FCI Stafford. In November 2014, Sandoval presented himself to medical with symptoms of Valley Fever. His symptoms worsened and he was diagnosed with pneumonia in December 2014. It was not until March 2015 that he was diagnosed with Valley Fever. Over the next few months, his symptoms recurred. At times, the medication to treat Valley Fever,

Fluconazole, was not available at FCI Stafford. He was transferred to another prison in Lompoc, California, in November 2015. Valley Fever has no known cure.

Sandoval's Valley Fever disseminated, which can reduce his life expectancy and requires he take Fluconazole for the rest of his life. The Court found the failure of staff to warn Sandoval of Valley Fever was the causation of his contracting the disease, and but for their failure to warn, Sandoval would have taken preventative measures. Their

failure to warn was "a substantial factor" in the dissemination of the disease.

Having found liability against the United States, the Court awarded Sandoval \$78,624.01 in future medical expenses and \$50,000 in noneconomic damages. On October 1, 2021, the court also taxed \$10,070.57 against the United States in favor of Sandoval. No appeal has been filed as this issue of *PLN* goes to press. See: *Sandoval v. United States*, 2021 U.S. Dist. LEXIS 137856. ■

## Lawsuit Over Denial of Medical Treatment for Painful Erection Causing Impotence in Oklahoma County Jail Reinstated by Tenth Circuit

by Matt Clarke

**O**N JANUARY 19, 2021, THE UNITED States Court of Appeals for the Tenth Circuit held that a county sheriff and three jail guards were not entitled to summary judgment based on qualified immunity in a lawsuit brought by a former jail prisoner who suffered permanent impotence after being denied medical treatment for a persistent, painful erection that lasted three days.

Dustin Lance was incarcerated at the Pittsburg County jail in McAlester, Oklahoma when he took a pill he got from another prisoner. He awoke the next morning with an erection that would not subside, a medical condition known as priapism. He reported this via intercom to guard Edward Morgan, who said he would put Lance in lockdown for taking the pill, but did nothing. Over the next three days, he made increasingly urgent requests for medical care to other guards, including Mike Smead, Dakota Morgan, and Daniel Harper. He even showed Smead his painfully engorged penis two days after he took the pill, but Smead did not mention it to the jail's nurse until the next day.

When the nurse asked him why he did not report the priapism sooner, Smead told her, "I thought he was just playing around."

Lance was in obvious pain, but none of the guards took him seriously.

When the nurse saw his condition, she

immediately asked that he be transferred to a local hospital. He was given medication at the hospital, but it did not help. The emergency physician told guards to take Lance to another hospital about 90 miles away that had a urologist on duty.

Instead of taking Lance to the second hospital, the guards returned him to the jail, further delaying his treatment. The jail obtained a judicial order for his release on his own recognizance. After his release, Lance was taken to the other hospital where a urologist operated, but could not prevent permanent injuries, including impotence that will likely be lifelong.

Lance filed a federal civil rights lawsuit under 42 U.S.C. § 1983 alleging the inadequately-trained guards were deliberately indifferent to his serious medical needs and the sheriff's policy to release prisoners rather than take them to an out-of-town hospital harmfully delayed his medical treatment. The court granted defendants summary judgment.

Lance appealed, aided by attorneys Megha Ram and Daniel M. Shapiro of the Roderick & Solange MacArthur Justice Centers in Washington, D.C. and Chicago, respectively, and Tulsa attorneys J. Spencer Bryan and Steven J. Terrill of Bryan & Terrill.

The Tenth Circuit found that Edward

Morgan was entitled to summary judgment because Lance had not given him enough information to know that a serious medical situation was occurring.

However, the other named guards were not entitled to summary judgment as Lance had adequately informed them about his serious medical condition and

they ignored it or even made fun of it. Pittsburg County Sheriff Chris Morris was also not entitled to qualified immunity because Lance's claims of inadequate training was supported by the guards' own testimony that they received no training on how to recognize a medical emergency and Lance testified that the pain had in-

tensified during the six hour period while he awaited release, per a former sheriff's policy, so he could go to a hospital. Therefore, the summary judgment was affirmed with respect to Edward Morgan and reversed with respect to the sheriff and other named jailers. See: *Lance v. Morris*, 985 F.3d 787 (10th Cir. 2021). 📖

## CoreCivic Prison at Center of Georgia Drug Trafficking Investigation

**J**ESSICA "THE MADAM" BURNETT IS SET to plead guilty to a series of charges which included conspiracy to distribute methamphetamines and marijuana as part of a major drug trafficking investigation covering several southern Georgia counties and correctional facilities.

Burnett was a sergeant at the CoreCivic-run private prison, the Coffee County Correctional Facility. At 41 years of age, charges stated that Burnett smuggled drugs, cell phones, and other items into the prison for gang members.

She and 47 other defendants were caught in Operation Sandy Bottom begun in 2018

when the Coffee County Sheriff's Office asked for assistance from the Federal Bureau of Investigation and the Coastal Georgia Violent Gang Task Force to address the growing drug problem in the Sandy Ridge neighborhood of Douglas, Georgia. The indictment was unsealed January 2021 and alleged 129 total charges against the defendants.

Police stated that the drug ring was run by the Gangster Disciples, expanded across Coffee, Bacon, Emmanuel, Jeff Davis, Pierce, and Wheeler counties in Georgia and was coordinated by members of the gang in the state prison system.

Burnett faces up to 20 years in prison

for her crimes. She and a second guard, Idalis Harrell, both are pleading guilty while others await trial on their charges. "Compromised correction officers who breach security to provide contraband to inmates represent a significant danger not only to inmates and guards, but also to citizens outside prison walls who are within reach of unmonitored jail communications from smuggled cell phones," stated United States Attorney H. Estes. "Jessica Burnett is rightfully being held accountable for violating her oath and endangering the community." See: *United States v. McMillan*, USDC, S. Dist. GA, Case No. 5:20-cr-00007-LGW-BWC. 📖

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# Sixth Circuit Holds Court Lacked Jurisdiction to Rule on Summary Judgment in Retaliation Suit by BOP Prisoner

**W**ALTER HIMMELREICH WAS A PRISONER at the Federal Correctional Institution in Elkton, Ohio for one count of producing child pornography on October 20, 2008, when he was assaulted by another prisoner, Peter Macari, due to the nature of his charge. Himmelreich stated that Captain Janel Fitzgerald retaliated against him when he filed a complaint about the attack and had him placed in protective custody. He filed a series of actions against Fitzgerald and the federal Bureau of Prisons (BOP) relating to violations of his First and Eighth Amendment rights. The Sixth Circuit Court of Appeals ruled on July 22, 2021, that the Court lacked jurisdiction. The appeal was dismissed and all fees were waived.

Macari was known as an antagonist who had violent hate for pedophiles. He was being released from confinement even though he had made several threatening comments about hurting a child molester when he got out. The day he was released he attacked Himmelreich. Himmelreich was then threatened with a transfer if he complained by Fitzgerald. On March 5, 2009 Himmelreich was placed in protective custody “without explanation,” he stated.

On October 20, 2008 Himmelreich filed a complaint stating several claims relating to the assault. It was originally dismissed for failure to state a claim. He filed a second tort action against Fitzgerald in her individual capacity while working “under the color of state” and the BOP on February 11, 2010. It was dismissed as falling under the discretionary-function exception rule of the Federal Tort Claims Act.

Himmelreich’s first tort denial was appealed and allowed to continue on the claims of retaliation and failure to protect, violations of his First and Eighth Amendment rights. Several motions followed suit, the latest of which was an Appellate Court decision on a motion for summary judgment filed by Fitzgerald. She claimed Himmelreich did not state a cognizable *Bivens* claim in the complaint and that she, with representation provided by the BOP, should not be responsible for appellate fees. See *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971).

The Sixth Circuit Court of Appeals

ruling stated that since the denial of the motion for summary judgment was not a final order, the court lacked jurisdiction. The appeal was dismissed and Himmelreich was allowed to move forward with his claims. Also, as the appeal was dismissed, Fitzgerald would not be responsible for any

appellate fees. See: *Himmelreich v. Fed. Bureau of Prisons*, 5 F.4th 653 (2021). Almost 11 years to the day after the case was first filed, it remains pending before the district court. See also: *Himmelreich v. United States of America*, USDC, N. Dist. OH, Case No. 4:10-cv-00307-BYP; 📄

## Fifth Circuit Holds Defendants Entitled to Sovereign Immunity For Denial of Sex-Reassignment Surgery to Texas Prisoner

by Matt Clarke

**O**N JULY 30, 2021, THE UNITED STATES Court of Appeals for the Fifth Circuit vacated orders denying sovereign immunity to some defendants in a lawsuit brought by a transgender Texas prisoner seeking access to sex-reassignment surgery, female commissary items, and a long-hair pass.

Texas Department of Criminal Justice (TDCJ) prisoner David Allen Haverkamp, also known as Bobbie Lee Haverkamp, was diagnosed with gender dysphoria. Dr. Walter Meyer prescribed a 12-month course of hormone therapy and said sex-reassignment surgery was available. Haverkamp requested the surgery. Meyer later said the University of Texas Medical Branch (UTMB), in its provision of medical services to TDCJ prisoners, “is going to have to face the inevitable that gender reassignment surgery is going to happen.” But, near the end of the hormone therapy, Meyer met with him and told him “very plainly that TDCJ would not pay for surgery.”

Haverkamp filed a federal civil rights lawsuit alleging violations of the Equal Protection Clause because biological women prisoners were given medical necessary care that included vaginoplasty and Haverkamp was refused similar, sex-reassignment surgery.

The lawsuit was initially filed against a physician and Dr. Lannette Linthicum, Director of TDCJ’s Health Services Division and a member of the Texas Correctional Managed Healthcare Committee (CMHCC). The CMHCC develops and approves the managed health care plan delineating the level of health care for TDCJ prisoners and ensuring access to needed care. After defense counsel advised the court that, if Haverkamp was seeking

surgery, he should have named Dr. Owen Murray from UTMB and, if seeking a policy change or new policy, the principal members of the CMHCC were the appropriate defendants, Haverkamp amended the complaint with the new defendants—Murray and the entire CMHCC.

Some CMHCC members filed motions to dismiss contending Haverkamp’s claims were barred by Eleventh Amendment sovereign immunity. Haverkamp lacked standing because they would not redress his alleged injuries, and there was no plausible equal protection claim. The trial court denied the motions.

On interlocutory appeal, the Fifth Circuit noted that, under *Ex Parte Young*, 209 U.S. 123 (1908), there is an exception to Eleventh Amendment immunity if the state official sued has “some connection with the enforcement of the [challenged] act.” The mere formulation and promulgation of policies is insufficient for the exception. The court held that Haverkamp had not alleged who overrode Dr. Meyer’s recommendation for surgery, feminine items, and a long-hair pass, or even that there was a dispute between him and higher UTMB officials. It was not plausible, based on the facts pleaded, that the CMHCC had any connection to the enforcement of a policy that resulted in Haverkamp being denied the surgery, items or privileges. Therefore, there was no justification for an exception and defendants were entitled to sovereign immunity. The district court’s orders denying sovereign immunity were vacated and the case remanded for further proceedings. See: *Haverkamp v. Linthicum*, 6 F.4th 662 (5th Cir. 2021). 📄

## \$5,000 Award for Pro Se Florida DOC Prisoner in Unjustified Pepper Spraying

A FLORIDA FEDERAL DISTRICT COURT awarded \$5,000 to a prisoner on September 16, 2020, for a guard's use of excessive force.

While at Everglades Correctional Institution, Florida prisoner Mazzard B. McMillian and other prisoners were found in the wrong dormitory during a prison count. As they were being escorted to confinement, Colonel Patrick Riggins ordered all of the prisoners to get on the ground.

McMillian complied with the orders, did not resist, and held his hands behind his back. Despite his compliance, Riggins pepper sprayed McMillian. Riggins and another guard dragged McMillian from outside the confinement area onto the grass and then to a shower. McMillian's complaints of trouble breathing and seeing were ignored and he was placed in a cell.

The Florida Department of Corrections conducted an investigation and Riggins was terminated. He was also criminally charged. He pleaded guilty to battery on an inmate and a charge of falsifying an official record was dismissed. He was sentenced to 100 hours of community service, a \$100 fine, and an anger management class.

For his part, McMillian sued Riggins and several other officials.

The claims against Assistant Warden Herin were dismissed after a settlement was reached. McMillian moved for a default judgment against Riggins. The clerk entered a default judgment and the court granted McMillian's motion for default judgment. That order limited judgment to liability only.

The court held a video conference on September 14, 2020 to determine a damage award. Both McMillian and Riggins appeared pro se. McMillian sought \$250,000 for his injuries. He claimed loss of his 20/20 vision, skin irritation on his face, complications in his asthma, and "major stress."

At the hearing, "McMillian testified, credibly, to the shock, agony, fear, and distress Riggins inflicted upon him when when Riggins, unprovoked, pepper sprayed McMillian at close range." The court found McMillian was entitled to \$5,000 for compensatory damages for the pain and suffering he experienced.

The court rejected awarding a higher

amount because McMillian failed to carry his burden to establish that the pepper spray medically caused a diminishment in vision, sensitivity to light, aggravation of his existing

asthma, or major stress disorder. The court entered final judgment in McMillian's favor and the case was closed. See: *McMillian v. Riggins*, 2020 U.S. Dist. LEXIS 170012. 📄

## California Fire Crew Prisoner's Escape Attempt Leaves Trail of Destruction

A CALIFORNIA PRISONER WHO TRIED TO escape in a stolen fire truck left "half a block of destruction." He was caught shortly after he tried to carjack another vehicle.

On July 5, 2021, the prisoner was working on the scene of a brush fire with a crew of prisoners and fire fighters with the California Department of Forestry and Fire Protection. The 31-year-old prisoner, Cameron Zoltan Horvath, stole an all-wheel-drive wildland firefighting engine in his attempt to flee custody. He, however, "can't drive," said California Highway Patrol Sgt. Dave Varao.

The prisoner drove through a fence and in onto the nearby Rack-It Truck Racks property where he rammed into one if the business's vehicles, a tree, and another fence. He then jumped a curb and became stuck in a ditch. The prisoner, who officials did not identify, then ran back onto the Rack-It property and attempted to carjack an employee's vehicle as they were leaving. They fought, but the employee ran back to the business and locked himself in.

The prisoner ran back the way he'd come and was caught. "He basically made a loop—he didn't do a very good job of getting away," said Bill Wilde, who lived in the area.

"It's a half block of destruction from him trying to steer this big truck, which he probably didn't know how to drive very well, ricocheting off fences and trees," said Varao. The prisoner, who had been locked up since 2015, was hospitalized in good condition. No other information was given about him or

if other such incidents had occurred.

As reported extensively in news media, the California prison system uses thousands of prisoners to fight fires and risk their lives for a few dollars a day. Prisoners are literally giving their lives to defend the mansions of billionaires, as we have reported in prior issues of *PLN*. While legions of state officials, including now vice president Kamala Harris, are quick to defend prison slavery, they tend to have little to say when the slaves try to escape. 📄

Source: *sacbee.com*



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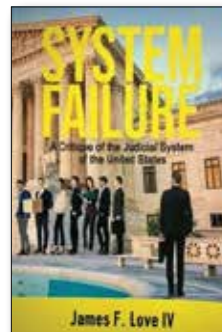
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# Oregon Suspends Outside Prisoner Work Crews After Prisoner Escape Sparks International Incident

by Mark Wilson

ON SEPTEMBER 22, 2021 OREGON prison officials suspended outside prisoner work crews “in order to review any potential changes following a walk away earlier this year” according to an internal memo sent by Oregon Department of Corrections (ODOC) Director Colette Peters and Deputy Director Heidi Steward.

The pause comes in the wake of a high-profile international incident. Fourteen-time felon, Jedaiah Lunn, 36, was incarcerated at the South Fork Forest Camp, a 200-bed minimum-security prison on the Oregon coast operated by ODOC and the Oregon Department of Forestry. While on a work crew at the Gales Creek Campground on April 14, 2021, Lunn walked away, accosted two women who are Japanese nationals, brutally beating them with a large stick, and severely injuring both of them. He then stole their car. Later that day he was caught and arrested. Lunn faces multiple charges, including attempted murder, first-degree assault, first-degree robbery and escape.

The incident prompted angry Japanese government officials to write Oregon Governor Kate Brown demanding answers. After taking several months to respond, Brown initially stood by the program. The Forest Camp has “largely been successful” Brown wrote to a Japanese diplomat.

Of course, the program’s success was little comfort to the women who were attacked. They recently brought federal suit against ODOC and the Forestry Department.

*OregonLive.com* stated, “The suit lists Corrections Director Colette Peters and Forestry Director Peter Daughtery as defendants and alleges negligence by the state. It does not cite the amount in damages the women and their husbands are seeking.”

Although work has been suspended at forest, campground and park sites, Peters and Steward said prisoner fire crews will continue to operate. They referred questions about the decision to the Forestry Department.

“With public safety as our number one priority, we are taking this time to review measures already implemented, as well as whether there are any additional measures

that could supplement these,” said Forestry Department spokesman Jason Cox. He declined, however, to explain the timing of the decision or how long the program will be suspended. He would say only that an administrative review of Lunn’s escape is ongoing. See: *Y. et al v. Oregon Department of Corrections et al*, USDC, D. Or. Case No. 3:2021cv01042.

*PLN* will report on any significant developments in the civil and criminal cases. This is a typical example of the ongoing public safety costs of prison slavery where the exploitation of a cheap, expendable work force is considered a paramount governmental objective. ■

Source: *chronline.com, oregonlive.com*

## Forced Shaving of Muslim Colorado Prisoner’s Beard Unconstitutional

by David M. Reutter

THE TENTH CIRCUIT COURT OF APPEALS reversed the dismissal of a Colorado prisoner’s 42 U.S.C. § 1983 action alleging a guard violated his First and Fourteenth Amendment rights by forcing him to shave off his beard. The court found the prisoner’s complaint stated a claim and the guard was not entitled to qualified immunity.

The Court’s August 10, 2021 opinion was issued in an appeal by prisoner Tajuddin Ashaheed. He has practiced Islam for decades, following the Sunnah practice of leaving one’s beard to grow. He believes that shaving his beard would violate a core tenet of his faith.

The Colorado Department of Corrections (CDOC) was well aware of Ashaheed’s beliefs. While serving a sentence in 1993, he signed a declaration of religious affiliation documenting his faith. He was allowed to grow a beard while serving that sentence. He was also allowed to wear a beard while serving a sentence in 2014 until his March 2016 parole.

He arrived at CDOC’s Denver Reception and Diagnostic Center to serve a short sentence for a parole violation. An intake officer verified Ashaheed’s religious affiliation and updated his file to reflect Muslim adherence. Once the intake process was complete, Ashaheed was ordered by Sgt. Thomas E. Currington to shave off his beard. The center’s policy requires prisoners to shave their beards at intake, but that policy provides an exemption for prisoners who wear a beard as part of a religious tenet.

Ashaheed invoked that exemption, but

Currington said that to qualify the prisoner must grow a full beard. Ashaheed responded “that he is physically unable to grow a full beard, reiterated that his beard is worn for religious practices, and stated that his religious affiliation is documented in his CDOC file.” Currington “replied ‘that he didn’t want to hear it.’” He then threatened that Ashaheed “would be ‘thrown in the hole’”—solitary confinement—if he did not agree to be shaved. Ashaheed submitted to be shaved by the prisoner barber.

The complaint also alleged that other prisoners were allowed to keep items of religious significance, such as bibles, crosses, and wedding rings. Ashaheed asserted he was singled out because of his Muslim faith.

After he filed his lawsuit, Currington moved to dismiss. The district court granted the motion and Ashaheed appealed. While the district court found a constitutional violation existed, it found Currington was entitled to qualified immunity. The Tenth Circuit disagreed.

It concluded that when Currington violated the center’s policy by refusing to grant him the exemption under that policy, he violated the Ashaheed’s First Amendment right to free exercise of religion. “He not only intentionally discriminated against Mr. Ashaheed’s religion, but he did so with animus.” As the right to free exercise of religion was clearly established, Currington was not entitled to qualified immunity.

The Tenth Circuit also disagreed with the district court that Ashaheed failed to

state an equal protection claim. “We do not find a meaningful distinction between a prisoner who invokes a policy-based

religious distinction exemption to a beard-shaving requirement and prisoners who seek to keep religious items under a policy.

The district court’s order was reversed and remanded. See: *Ashabeed v. Currington*, 7 F.4<sup>th</sup> 1236 (10th Cir. 2021). 📖

## Broward County Florida Sheriff Rejects Independent Reviews of Detainee’s Death

**F**LORIDA’S BROWARD COUNTY SHERIFF’S Office (BSO) has refused overtures to allow an independent investigation into the death of a pretrial detainee.

Kevin Desir, 43, lost consciousness during a January 17, 2021, confrontation with guards at the Broward County Jail (BCJ). He died ten days later. Desir was in jail on charges of marijuana possession and criminal mischief.

It was known that Desir had a history of mental health issues, including bi-polar disorder. The *Sun Sentinel* reported that the confrontation occurred while Desir was having “an apparent mental health episode” at BCJ. Public Defender Gordon Weekes has been critical about how BSO handles detainees with mental health issues.

No further details of the confrontation, which was captured on video, have been made public. A private doctor and members

of Desir’s family have been allowed to view the video of the encounter. They are under a strict gag order to not release any details of what the video contains.

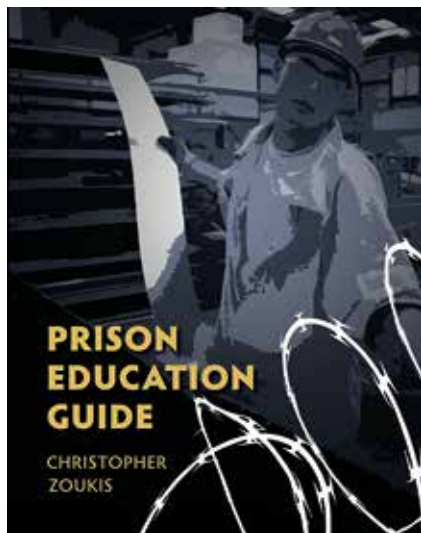
Desir’s autopsy report lists the cause and manner of death as “undetermined.” His family and attorneys are waiting for the Broward Medical Examiner’s office to provide complete information for their expert to review.

In February 2021, Broward State Attorney Harold Pryor sent a letter to the Florida Department of Law Enforcement (FDLE) to request the investigation of Desir’s death. The FDLE, however, said it could not insert itself into the investigation without an invitation from BSO. “We don’t have jurisdiction to just take over someone else’s investigation,” said FDLE spokeswoman Gretl Plessinger.

Broward Sheriff Gregory Tony made clear in a response letter to Pryor that his office would handle the investigation. “Your request is based upon an unsupported opinion that such actions [an FDLE investigation] would ‘eliminate any potential appearance of impropriety,’” Tony wrote. “I have zero tolerance for employee misconduct, and I have an unwavering commitment to accountability and transparency.”

Jeremy McLymont, an attorney for Desir’s family, said of the autopsy report in June 2021, “It answers no questions. It’s almost five months later, and they still don’t want to explain why a nonviolent offender is dead.” As of press time, the investigation into Desir’s death remains in limbo and no litigation has been filed. 📖

Source: *Sun Sentinel*



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# \$8.6 Million Award Against Wexford for Deliberate Indifference to Prisoner's Kidney Cancer

**A**N ILLINOIS PRISONER WAS AWARDED \$11 million by a federal jury in a lawsuit alleging doctors with Wexford Health Sources, Inc. (Wexford), were deliberately indifferent to his serious medical needs by failing to treat his kidney cancer. The Court also awarded \$667,201.45 in attorney fees and costs.

The award was the result of a December 2019 jury trial in which the jury found Wexford, Dr. Abdur Nawoor, and Dr. Rebecca Einwohner failed to act reasonably when William Kent Dean, a prisoner at Taylorville Correctional Center presented that he had painless blood in his urine. Dean pursued, with the assistance of pro bono counsel, claims arising from alleged delays in the diagnosis and treatment of his kidney cancer.

The jury awarded Dean \$100,000 for physical pain and suffering, \$500,000 for emotional pain and suffering, \$100,000 for disability and loss of normal life/diminished life expectancy, and \$300,000 for future medical care and supplies. It also awarded \$10 million in punitive damages to punish Wexford for its reprehensible conduct..


In reviewing the Defendants' motion for judgment in their favor or a new trial or to reduce damages and a set off, the district court said in a September 28, 2020, order that the jury heard testimony that allowed it to conclude the only acceptable medical approach for a patient like Dean was a CT scan to rule out cancer. This was not done for months after Dean presented with "gross, painless hematuria." Dean's pleas for help were met with indifference. The court, therefore, found the jury's compensatory damages

awards totaling \$1 million was warranted.

It, however, granted remittitur of the punitive damages award. The court found that award was excessive. It remitted that award to \$7 million. "This award recognized the reprehensibility of Wexford's conduct and the harm Plaintiff suffered, should be sufficient to deter future similar conduct, and also stays within the bounds of due process," the court wrote. The court ignored that Wexford as a for profit medical company only cares about its bottom line and its business model is based on providing as little medical care to prisoners as possible while bilking the government out of as much money as possible.

The court denied a set off of \$10,000,

which the is the amount an Illinois Department of Corrections employee settled for before trial. The court found the defendants failed to meet the burden for a set off.

Dean's motion for attorney fees and costs was granted. It awarded \$602,786.25 in attorney/paralegal fees and \$31,077.53 in expenses. This amount was less than 25% of the jury award, so it was ordered to be paid from that award under the PLRA. An award to \$33,337.67 for a bill of costs was also granted. Dean was represented by William Strom and Joel Pelz with Jenner Block and Craig Martin and Chloe Holt with Wilkie Farr & Gallagher. See: *Dean v. Wexford Health Sources, Inc.*, 2020 U.S. Dist. LEXIS 200112. 

## \$170,000 Settlement By New Jersey DOC in Transgender Lawsuit With New Policy

by Jayson Hawkins

**T**HE NEW JERSEY DEPARTMENT OF Corrections had a policy of housing prisoners according to their gender assignment at birth, regardless of whether they are transgendered or of any non-binary sexual orientation. As a result, when Sonia Doe (not her real name) was sentenced to prison, she was sent to a male prison in 2018, even though she had publicly lived as a woman since 2003.

From March 2018 to August 2019, Doe was housed in four different men's prisons, subjected to strip searches by male guards, lived constantly under the threat of sexual assault by other prisoners, and was repeatedly ridiculed and harassed by prison staff.

The New Jersey Department of Corrections (NJDOC) operated a policy for transgender and intersex prisoners based on the mandates of the federal Prison Rape Elimination Act (PREA) and state legislation. This policy mandated identifying prisoners in these categories, assessing their risk level, addressing them with proper pronouns, and housing them in a manner consistent with their safety and the general security of the institution.

What Doe encountered when she was processed into NJDOC was not at all con-

sistent with the department's stated policy. She was asked questions related to gender identity, but NJDOC housed her with male prisoners. On multiple occasions, she was harassed, forced to strip in front of male prisoners, and threatened with sexual assault. Despite the department's policy, Doe found that transgender housing was based solely upon a prisoner's genitalia. Hormone medications like those Doe had been taking since 2003 were routinely curtailed or denied.

After filing dozens of complaints over the course of a year and repeatedly attempting to be transferred to a female prison, Doe filed a complaint in the New Jersey Superior Court seeking to enjoin NJDOC from discriminating against her on the basis of gender and seeking compensation and punitive damages for the more than seventeen months of "verbal and sexual harassment, physical assault, and continuous discrimination, including being housed in conditions of prolonged solitary confinement."

On June 28, 2021, NJDOC and Sonia Doe entered into a settlement agreement that includes a new NJDOC policy on transgender, intersex, and non-binary prisoners; \$125,000 in monetary damages

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for Doe; \$45,000 in attorney fees for her ACLU attorneys; and the restoration of lost commutation time that stemmed from a disciplinary case lodged against Doe after she was assaulted.

The agreed policy changes significantly amend the existing NJDOC procedures for housing transgendered prisoners as well as changes in regard to searches, medical care, and personal respect. In terms of housing, the department will now have a multi-stage review to determine if a prisoner's gender identity deviates from that assigned at birth, and if so, whether the deviation presents a health or safety risk if they were assigned housing based on presumptive gender classifications. If the department determines


that special considerations must be made, a PREA Accommodation Committee will review the prisoner's situation based on a dozen criteria, provide the transgender prisoner with a hearing to determine appropriate housing, allow the prisoner an opportunity to present the committee with additional information, and provide a written record of the subsequent decision and rationale. If the prisoner does not agree with the decision, he may appeal to the commissioner.


Additional elements of the settlement include guarantees that non-gender conforming prisoners will not be compelled to shower with prisoners of a different sex, nor will they be strip searched by guards of

the opposite sex. Guards and other staff will also be required to use pronouns consistent with a prisoner's gender identity.


Sonia Doe says she is still haunted by her time as a prisoner, but in a statement announcing the settlement, she said, "It's a relief to know that as a result of my experience the NJDOC has adopted a substantial policy change so no person should subjected to the horrors I survived." See: *Sonia Doe v. New Jersey Dept. of Corrections et al*, Superior Court of New Jersey Law Division-Mercer County, Docket No. MER-L-1586-19. 

Source: npr.org, NJDOC Internal Management Procedure





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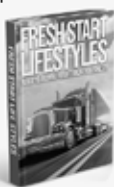
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# Arizona Federal Court Dismisses NAACP's Challenge to Private Prisons as Violating Thirteenth Amendment by Commodifying Prisoners for Profit

**A**N ARIZONA FEDERAL COURT DISMISSED a civil rights complaint brought in June 2020 by the Arizona State Conference of the National Association for the Advancement of Colored People (NAACP) under the novel theory that, by commodifying people for profit, the state's contract with private prison companies created a form of slavery prohibited by the Thirteenth Amendment as well as more conventional challenges based on alleged Eighth and Fourteenth Amendment violations.

Jeffrey Nielsen, Larry Hilgendorf, Terry Brownness, Joseph Bulen, and Brian Boudreaux are Arizona state prisoners being held in privately-operated prisons pursuant to contracts between various private prison companies and the Arizona Department of Corrections, Rehabilitation & Reentry (ADCRR). They and the NAACP filed a class action complaint for themselves and other ADCRR prisoners held in private prisons, alleging the use of prisoners as fungible assets and commodities for profit created of a form of prohibited slavery, constituted cruel and unusual punishment, and violated due process and equal protection rights.

In an order filed March 8, 2021, the court held that the plaintiffs had not alleged any facts showing that those held in private prisons are forced to perform labor in keeping with traditional notions of slavery or involuntary servitude. It rejected the theory that mere confinement in a private prison reduces a prisoner to a commodity in violation of the Thirteenth Amendment.

Likewise, the court held that plaintiffs failed to cite any authority that merely holding prisoners in private prisons violated the Eighth Amendment prohibition against cruel and unusual punishment, even if fewer programs were available to them and the prison staff was not trained to ADCRR standards.

The court rejected the plaintiffs' claims of being denied due process in disciplinary actions in private prisons and the assertion that "structural bias" existed when the entity initiating the disciplinary action has a profit-based motive to keep the subject of the action in prison longer. The court noted

that the disciplinary hearing officer was an ADCRR employee as was the deputy warden who reviews disciplinary appeals and there was no allegation that the ADCRR employees had a profit motive to keep prisoners incarcerated.

The equal protection claim also failed because plaintiffs did not allege discrimination subject to strict review and the fact that they had fewer programs than prisoners in state prisons was not shown to be

unrelated to legitimate governmental objectives. Therefore, the defendants' motion to dismiss was granted. The plaintiffs filed an amended complaint in an effort to save the litigation which was met with another motion to dismiss which is pending as we go to press. No court has held any aspects of government privatization to be unlawful or illegal under the federal constitution. See: *Nielsen v. Shinn*, USDC, Dist. AZ, Case No. 2:20-cv-01182-DLR-JZB. ■

## Fifth Circuit Holds Confessed Medical Malpractice Does Not Insulate Prison Medical Providers From Finding of Deliberate Indifference

by Matt Clarke

**O**N AUGUST 11, 2021, THE UNITED States Court of Appeals for the Fifth Circuit held that a confession of medical malpractice by prison health care providers does not prevent a district court from finding deliberate indifference. In affirming the district court's denial of defendants' motion for summary judgment, the court also emphasize that giving a prisoner some treatment that is ineffective also does not prevent a finding of deliberate indifference.

Laree Spikes was incarcerated at the Rayburn Correctional Center in Angie, Louisiana, when he injured himself while lifting weights, causing a lasting sharp pain in his hip and right groin area and an inability to move his right leg. Unable to walk, he declared a medical emergency and arrived at the infirmary in a wheelchair. There he was seen by Nurse Paula Stringer.

Stringer assessed the injury as a pulled muscle in the right groin area and, in accordance with the standing orders of Dr. Casey McVea, the prison's medical director, ordered an analgesic balm, ibuprofen and ice for Spikes.

Spikes returned to the infirmary in a wheelchair five days later, complaining of continued, intense and spreading pain and no relief from the treatments. Stringer ordered ibuprofen and a muscle rub.

Spikes was back again the next day. Another nurse documented that he was wheelchair-bound, could not walk, and had intense pain radiating from his right hip to his right knee. She discussed the case with McVea, and he ordered continuing the muscle rub and ibuprofen treatment, a bottom-bunk assignment, access to crutches for a week, and a low-priority doctor's appointment.

Eight days later, Spikes saw Nurse Robin Bowman on sick call. She noted his complaints and observed possible swelling on his hip and increased pain when she pressed on the hip, but did not significantly change his treatment.

Spikes declared a medical emergency the next day and again saw Bowman, but she did not change his treatment. Later that day, after declaring another emergency, Spikes saw Nurse Lesley Wheat. She documented his condition, then filed a disciplinary report against him for coming to the infirmary for a complaint that had already been addressed. Spikes was found guilty.

Spikes finally saw McVea about three weeks later. McVea ordered an x-ray using a readily available x-ray machine. It showed a fractured right hip, so he was transferred to a hospital. It was necessary to refracture

the improperly healed hip prior to open reduction surgery.

Spikes filed a federal civil rights lawsuit under 42 U.S.C. § 1983 against McVea and four nurses. Defendants filed a motion for summary judgment which was denied as to the preoperative claims. Defendants appealed.

The Fifth Circuit held that, although an inability to move a leg is indicative of a broken bone, not muscle strain, Stringer's initial misdiagnosis was not deliberately indifferent. However, when Spikes returned five days later and subsequently, it should

have been obvious that he did not have a muscle strain because the treatments were not working. Further, Stringer failed to properly document his condition and McVea failed to change his treatment or appointment priority despite reviewing the nurses' assessments. Therefore, a jury could infer deliberate indifference to Spike's serious medical needs. Defendants' admission of malpractice did not preclude a finding of deliberate indifference, so the trial court's denial of summary judgment was affirmed. See: *Spikes v. McVea*, 8 F.4th 428 (2021).

According to a report in *theadvocate*.

*com*, Dr. McVea died of COVID, most likely contracted at Raymond Laborde Correctional Center in Avoyelles Parish, Louisiana, in April 2020. On September 14, 2021, the appeals court granted the defendants petition for rehearing and noted "...the recent death of the doctor makes it all the more important that the inquiry of qualified immunity not rest on the collective action of the medical staff, but on the role of each participant." The judgement was vacated and remanded for further proceedings. See: *Spikes v. McVea*, 2021 U.S. App. Lexis 27612. ■

## \$23,000 Settlement Against Pennsylvania Dental Healthcare Company for Inadequate Dental Care

**C**HARLES TALBERT SETTLED WITH CORRECTIONAL DENTAL ASSOCIATES (CDA) and Dental Practitioner Dr. Schneider for \$23,000 in a lawsuit brought by him for inadequate dental treatment while housed in the Philadelphia Department of Prisons (PDP).

While being held in the PDP, Talbert requested extensive dental work to repair his damaged and decaying teeth. He stated in his recent suit that CDA, Schneider, and other dentists (Dr. Young and Dr. Patel) were aware of his need for anesthesia during treatment due to his innate fear of needles. This phobia he stated was well documented on requests, sick call slips, grievances, and previous lawsuits. Nonetheless, CDA dentists ignored Talbert's phobia and attempted to proceed with his dental surgery without anesthesia.

Talbert claimed that this was deliberate and malicious. He stated that CDA dentists violated his civil rights by not consulting with his previous physician concerning his condition and phobia, continuing with a standard of care that did not meet prevailing practices in the dental community, and failing to properly evaluate which teeth needed extraction and which did not.

He also stated that the dentists were retaliating against him for previous grievances and lawsuits he has filed. They ignored his medical needs as established by past professionals and deprived him of pain medication and antibiotics prescribed to him by other physicians. Talbert said this willful misconduct was performed specifically to cause him pain and suffering.

Talbert claimed that these actions violated established practices of dental professionals outside the prison setting, departmental policies and procedures of the PDP, the United States Constitution's First Amendment prohibition against retaliation for exercising his freedom of speech, and its Fourteenth Amendment guarantee to equal protection.

CDA entered into a settlement agreement with Talbert on July 20, 2021. The prison healthcare provider agreed to pay Talbert \$23,000 in exchange for a dismissal of all defendants except Schneider and a release of all claims surrounding his

dental care at any time prior to July 29, 2019. United States District Court Judge Mark Kearney for the Eastern District of Pennsylvania said the \$23,000 was payable within 90 days or Talbert would be free to renew his claims against all parties. See: *Talbert v. Correctional Dental Associates et al*, USDC, E. Dist. PA, Case No. 2:18-cv-05112-MAK. ■



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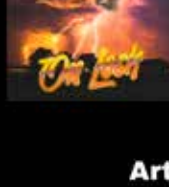
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## News in Brief

**CALIFORNIA:** A GUARD AT SAN QUENTIN State Prison and one of two outside co-conspirators were arraigned on September 8, 2021, on federal charges they smuggled cellphones to an unnamed prisoner on death row at the California lockup. According to a statement by the U.S. Department of Justice, the condemned man had a relationship with the other co-conspirator, 45-year-old Tanisa Smith-Symes of Las Vegas, who was arraigned the following day. The guard, 37-year-old Keith Christopher of Pittsburg, California, allegedly accepted a \$500 bribe for each of at least 25 cellphones he smuggled into work with him and passed to the prisoner. Christopher got the cash and phones from 32-year-old Isaiah Wells of Tracy, California, the other indicted co-conspirator, who served as a go-between for Smith-Symes. Once her boyfriend inside the prison received the contraband, he allegedly resold the phones to other prisoners for up to \$900 each.

**California:** A prison store supervisor at California's High Desert State Prison was arrested on September 19, 2021, after he allegedly shot another off-duty prison employee in nearby Susanville. The suspect, 63-year-old Kenneth Hunter, was placed on leave and charged with felony attempted homicide, according to a report by the *Sacramento Bee*. A post on the Facebook page of the Susanville Police Department said the unnamed victim was in stable condition and that "the shooting was domestic violence-related." A bomb threat the following day put the prison on lockdown, but it was not determined if the two incidents were related, according to Dana Simas, spokeswoman for the California Department of Corrections and Rehabilitation (CDCR). The lockdown was lifted the same day, after an investigation failed to find any evidence of a bomb. CDCR officials were seeking information that might help identify who called in the threat.

**Colorado:** Wearing nothing but his underwear, a man who was filmed sexually abusing a horse was apprehended in a creek near the jail from which he escaped in Durango, Colorado, on September 22, 2021. According to a report by the *New York Daily News*, 25-year-old Jonah Barrett-Lesko had been locked up after he was caught on surveillance video assaulting the horse in its stall at the La Plata County Fairgrounds in June 2021. After making bail, he was picked

up again on trespassing charges related to a series of robberies in which a car was broken into and six bicycles went missing. He pleaded guilty in August 2021 to felony burglary and was awaiting sentencing when he escaped, shedding his jail uniform and leading Durango Police on a 26-minute pursuit before he was recaptured. He now faces additional charges of felony escape.

**Florida:** An investigative report by the Internal Affairs (IA) division of the Lee County Sheriff's Office (LCSO) was released on September 15, 2021, detailing how a guard fired from the county lockup in Ft. Myers, Florida, told a prisoner he looked like George Floyd and asked him to say, "I can't breathe." The guard, former LCSO Deputy 1st Class Rodney Payne, was immediately reprimanded by a supervisor, according to a report by the Fort Myers *News-Press*. Floyd, a 46-year-old Black man, died on May 25, 2020, after former Minneapolis Police Department Officer Derek Chauvin knelt on his neck for over nine minutes, prompting Floyd to speak the words that Payne asked to be repeated in the July 2021 incident. One of several other prisoners who overheard him filed a complaint. Payne was then investigated by IA and admitted his improper conduct. He was fired on August 26, 2021.

**Georgia:** In Atlanta on August 29, 2021, a federal prison guard was beaten and robbed of his dog at gunpoint in his own home—while dressed as a woman. According to a report by local TV station WAGA, the off-duty guard for the federal Bureau of Prisons, who did not identify himself to the media, said he stopped his vehicle to pick up another man he thought he recognized. The rider turned out to be a stranger, but the two men struck up a conversation, and the guard invited the man to his home. After excusing himself to use the bathroom, the guest emerged brandishing a pistol and began beating his host, who, though dressed in feminine attire, managed to escape and alert neighbors who called police. Meanwhile the gunman robbed his home and stole his pitbull puppy, Buddy. Atlanta police said the robber was last spotted leaving the apartment complex carrying a pink-and-black bag with Buddy inside.

**Hawaii:** Seven Hawaii prisoners had to be treated for drug overdoses in what the state Department of Public Safety (HIDPS) confirmed was a "mass casualty incident" on

September 16, 2021. According to a report by local TV stations KGMB and KHNL, two of the prisoners were still in serious condition the next day, though all had by then returned to Halawa prison in Honolulu. After prison staff called 911 to report the ill prisoners, HIDPS dispatched a truck equipped to test for hazardous materials. Meanwhile, at the hospital where the prisoners were taken for treatment, they were diagnosed with "drug intoxication." Sources speculated that the prisoners had gotten high from licking letters mailed to them laced with "spice"—synthetic cannabinoids. Guards were dispatched to search the prison for the contraband, which Kat Brady, coordinator of the local Community Alliance on Prisons, called "a huge problem."

**Indonesia:** A fire tore through an overcrowded prison near the Indonesian capital of Jakarta on September 8, 2021, killing at least 41 prisoners. Another 81 prisoners suffered injuries attributed to the blaze, according to a report by the Minneapolis *Star-Tribune*, including eight with severe burns and nine treated at a prison clinic. The remaining 64 were moved to a mosque in the prison compound to be observed for symptoms of smoke inhalation. The dead included a convicted guerrilla and a murder convict. However most of those who succumbed were serving time for drug convictions, including a South African man and another who was Portuguese. When the fire erupted in the prison's C block, its 19 cells were stuffed with over three times its design capacity of 40 prisoners, according to the Ministry of Law and Human Rights, which added that 15 guards on the block were uninjured. As of July 2021, the country of 273 million people held 268,610 prisoners in facilities with a capacity of just 132,107.

**Israel:** On September 19, 2021, the last two prisoners were recaptured out of a group of six who escaped Gilboa prison in Israel almost two weeks earlier. According to *CNN*, the group that broke out of the prison on September 6, 2021, included Zakaria Zubeidi, a "commander in the militant wing of the Palestinian political party Fatah." The other five reportedly belonged to Islamic Jihad, which issued a statement calling the escape a "severe slap to the Israeli army and the entire system in Israel." The prison sits near the West Bank town of Jenin, where two of the fugitives, Ayham Nayef Kamamji, 35, and Monadel Yacoub Nafe'at, 26, were the

last of the group to surrender, along with two alleged accomplices who helped hide them. That was eight days after Zubeidi, 45, and fellow escapee Mohammed Qassem Ardah, 39, were cornered in a truck stop in northern Israel by police who had been tipped off by an Israeli-Arab man in a dune buggy with whom the duo tried to hitch a ride. A day earlier, the other two escapees, Mahmoud Abdullah Ardah, 46, and Yaqoub Mahmoud Qadri, 49, were captured after they were spotted rummaging trash cans for food in Nazareth by Arab residents, who reported them to the police.

**Italy:** Using a gun likely smuggled via drone aircraft, an Italian prisoner shot through the bars of neighboring cells in a high-security lockup outside of Rome on September 19, 2021. According to a report by the *Guardian*, the unnamed 28-year-old prisoner, who has ties to the Neopolitan mafia, targeted three fellow prisoners with whom he had argued, but no one was injured in the attack. He shot into their cells after trying and failing to unlock their doors with keys he had stolen at gunpoint from a guard, who had let him out of his own cell to shower. The prisoner then used a contraband cellphone to contact his attorney, who convinced him to surrender himself and his weapon. Officials said they assumed the gun had been delivered by drone. Italian prisons operate on average at 120 percent of design capacity, making them the most overcrowded in the European Union. Protests over lockdowns to combat the spread of COVID-19 have led to violent beatings of some prisoners by guards.

**Kentucky:** After power went out at the Kentucky Correctional Institution for Women on August 25, 2021, four of six units housing the facility's 683 prisoners remained without cooling for six days, despite excessive late-summer heat, because state prison officials said the \$82,500 cost to install generators was "too high." According to Louisville radio station WFPL, three days had already passed after the outage began when that conclusion was reached by Gunvant Shah, the chief engineer for the state Department of Corrections (KY-DOC). It then took another three days for the decision to be revisited and generators installed—though not before the prison administration building got the first one. At least one prisoner required treatment for exposure to excessive heat, her fellow prisoners reported. The facility's main power was

not fully restored for another week, 13 days after the initial outage occurred. KYDOC spokesperson Lisa Lamb blamed the delay on a shortage of necessary supplies resulting from widespread power outages caused by Hurricane Ida, a powerful Category 4 storm that the passed through the region after roaring ashore at Louisiana's Gulf Coast on August 29, 2021.

**Louisiana:** A teacher contracted by the Louisiana Department of Public Safety and Corrections was arrested on September 13, 2021, on charges he smuggled cellphones, cigarettes and alcohol to prisoners at Dixon Correctional Institute in Jackson. According to the *Houston Chronicle*, 61-year-old Mark Shamburger was charged with introduction of contraband into a penal institution and malfeasance in office. He reportedly confessed to investigators before he was taken into custody. Prior to that, he worked under contract for the state Special School District to teach at the prison. If convicted on both counts, he faces up to 15 years in prison.

**Michigan:** A guard at the Calhoun County Jail in Battle Creek, Michigan, was arrested on October 1, 2021, and charged with assault and battery for punching a restrained prisoner. According to a report by Kalamazoo TV station WWMT, the guard, Sgt. Jeffrey Worden, had by then resigned. The sheriff's office released jail surveillance video of the incident, which happened on September 6, 2021. The footage shows the former guard enter a cell where Keir Watson, who was being detained on a parole violation, had been placed in a five-point restraint chair to prevent him from harming himself. Watson managed to free one of his hands, which Worden attempted to restrain again. A scuffle ensued, during which Watson spit in Worden's face. At that point the guard

punched the detainee several times. Sheriff Steve Hinkley said Watson was uninjured and had been returned to prison. A March 2019 post on his office's Facebook page had congratulated Worden on 20 years of service.

**Mississippi:** A manhunt that began when a prisoner escaped a privately-managed Mississippi lockup on September 10, 2021, ended four days later with his capture 900 miles away in Ohio. According to the Mississippi *Clarion Ledger*, U.S. Marshals who nabbed 33-year-old Garnett Hughes found he was still sporting a handcuff worn when he eluded two guards from the East Mississippi Correctional Facility in Lauderdale County, who were escorting him to the funeral of his mother, 54-year-old Dorothy Mae Hughes, in Belzoni. The prison is operated for the state Department of Corrections (MSDOC) by Utah-based Management & Training Corporation, which runs 20 prisons in eight states. At the time of his escape, Hughes was serving a pair of life sentences earned with 2014 convictions for kidnapping and sexual battery. He had previously made two other escapes in June and November of 2014, but he was recaptured on both occasions. MSDOC also announced the

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arrest of his girlfriend, 51-year-old Yvette Mendoza, on charges she abetted his most recent escape.

**Missouri:** A former jail nurse charged with poisoning her husband and burning his corpse was indicted by a grand jury in Cole County, Missouri, on September 22, 2021, on additional charges of having sex with a prisoner at the Jefferson City Correctional Center (JCCC) when she worked there. According to the local *News Tribune*, 43-year-old Amy Murray also now faces one count of first-degree sexual abuse and three counts of offender abuse, one for each time she allegedly had sex at the lockup in September 2018 with prisoner Eugene Claypool. He is serving a life sentence for a fatal stabbing in 2000. The following month, October 2018, Murray stopped working at JCCC. Then, in December, her husband, Joshua Murray, was found dead in the couple's home after a fire. She was arrested and charged with his murder in February 2019, after an autopsy determined he had also been poisoned with antifreeze and cellphone records indicated she had been home just a half-hour before the blaze. Investigators also began looking into her relationship with Claypool, to whom she allegedly outlined in a January 2019 phone call a plan to hire defense counsel to secure Claypool's release so they could marry. Corizon Health, the private firm which provides healthcare at JCCC, said Murray had been fired, though it didn't say when.

**Montana:** The Montana Department of Corrections (MTDOC) announced on October 6, 2021, that two prisoners who died the month before at Montana State Prison (MSP) in Deer Lodge committed suicide. According to a report by the *Montana Free Press*, Edward Bailey, 40, was serving a 20-year term for aggravated assault and criminal endangerment when he was discovered on September 20; and Jerry B. Cramer, 47, was serving a life sentence for homicide when he was found on September 28. In a statement, nonprofit advocacy group Disability Rights Montana said that "suicide and self-harm is always preventable," adding that the number of suicides at MSP "is cause for alarm." Two other MTDOC prisoner deaths in 2021 resulted from self-harm. But Shaun Duncan Morrison, 39, did not intend to commit suicide, a coroner ruled after his May 2021

death. The following month, 50-year-old Lisa Ann Nester died by hanging, but that also has not been confirmed a suicide. In addition to those four deaths, MTDOC reported 13 others in the first nine months of 2021.

**New Jersey:** A former federal prisoner is returning behind bars after a federal judge sentenced him to a 43-month term on September 13, 2021, for using drone aircraft to deliver contraband to the Federal Correctional Institution at Fort Dix, New Jersey. According to a report by the *Cherry Hill Courier Post*, 30-year-old Jason "Juice" Arteaga-Loayza used a pair of accomplices to make drone drops of cellphones, accessories and drugs, as well as weight loss supplements and even eyeglasses, beginning a month after he was released from the lockup in September 2018. The scheme continued until June 2019, using drones with taped-over lights flown into the prison at night by the other two men—Adrian Goolcharran and Nicolo Denichilo—to fulfill orders for the contraband arranged by a fourth co-conspirator, Johansel Moranta, who was imprisoned inside. Goolcharran and Denichilo are awaiting trial for their roles in the plot.

**Nigeria:** All but 54 of 294 prisoners held in a Nigerian prison escaped when it was attacked by an unknown group of heavily armed men on September 12, 2021. The gunmen destroyed three sides of the perimeter fence and overwhelmed a staff of 35 guards at the prison, a "medium-security custodial centre in Kabba, Kogi state," according to Nigerian Correctional Service spokesman Francis Enobore, as quoted in a report by *al Jazeera*. He said two guards were killed in the attack on the 13-year-old prison, which was operating at 147 percent of its design capacity of 200. Only 70 of its prisoners had been convicted of crimes. The remaining 224 were pre-trial detainees. Human rights groups say pre-trial detention in the country often lasts for years.

**North Carolina:** When water service was cut off in Danbury, North Carolina, on August 22, 2021, it also left about 100 prisoners unable to wash themselves or flush toilets at the Stokes County Jail. As reported by the *Winston-Salem Journal*, one man even used an empty potato chip bag to clear a clogged toilet, according to Angela Frazier, the mother of a jail prisoner. Acting County Manager Shannon Shaver said "the entire Town of Danbury was out of water"

for about three hours after the jail's storage tanks ran so low that its water service had to be cut off. Stokes County Sheriff's Chief Deputy Eric Cone said the problem had recurred three or four times over the preceding several months. He and his staff worked quickly, he said, to deliver bottled water to prisoners while a county crew repaired a broken service line.

**North Dakota:** After two prisoners being held for the North Dakota Department of Corrections in the Wash County Jail overpowered a pair of guards and escaped, an investigative report released in September 2021 concluded that the county needed to do nothing more than improve training for its dispatchers. As reported by the *Grand Forks Herald*, one of the prisoners, 29-year-old Bo Carrier, was recaptured and sentenced to a two-year prison term on July 8, 2021, for his role in the breakout. His fellow escapee, 30-year-old Karlin Dahl, was also recaptured and is awaiting trial on similar charges arising from the incident on May 28, 2021. That's when the two men overpowered a guard and tried to take her keys. They failed, but they locked her in the cell they shared. They then overpowered a second guard and tried but failed to lock him in an office. When they yelled for someone to open the door, a 911 dispatcher working for the County Emergency Management Department did so, letting the two escape.

**Ohio:** A guard at the Columbiana County Jail in Lisbon, Ohio, was arrested on October 7, 2021, and charged with smuggling drugs into the lockup. Sheriff Brian McLaughlin told Cleveland TV station WJW that his deputies and the jail's warden found suspected crack cocaine on the guard, 53-year-old Keith McCoy, along with what was believed to be methamphetamine and suboxone. McCoy now faces a third-degree felony charge of conveyance into a detention facility. A preliminary hearing was scheduled for October 14, 2021.

**Oklahoma:** An administrator at an Oklahoma county jail wanted for helping himself to cash confiscated from prisoners was captured and arrested on August 31, 2021. According to a report by Oklahoma City TV station KFOR, the now-fired administrator for the Pawnee County Jail, John Paul Thompson, had been on the run since a warrant was issued four days earlier for his arrest. He was charged with two felony embezzlement counts after a recently released prisoner showed up to claim \$800 taken from

him at booking, and jail officials discovered the money had never been deposited in the jail trust account. When Thompson was questioned, he turned in an envelope he claimed had been misplaced which contained \$800, but in different denominations of bills than what had been taken from the released prisoner. That led to a search of Thompson's car, which turned up an empty cash envelope, and an audit of the trust account that came up \$400 short. Thompson was then fired and the charges filed against him. A ten-year veteran law enforcement officer, he had worked for the Pawnee County Sheriff's Office since January 2021.

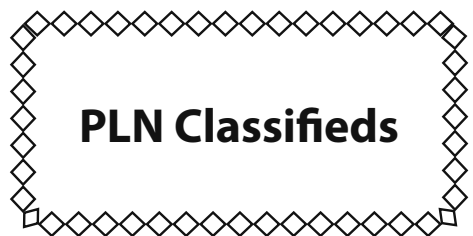
**Oklahoma:** A prisoner at Lawton Correctional Facility was murdered and his cellmate admitted killing him on September 6, 2021, just a week after a half-dozen other prisoners were injured in multiple stabbings at the sprawling prison, which is operated for the Oklahoma Department of Corrections

by the GEO Group, Inc., a Florida-based private prison giant. Oklahoma City TV station KFOR identified the dead man as murder convict Riley Walker. His confessed killer, Aaron Stone, was serving a sentence for rape, sodomy, robbery and kidnapping. Prison officials said the incident was unrelated to a rash of stabbings on September 1, 2021, which put five unnamed prisoners in the hospital. A sixth prisoner, also unnamed, had to be flown to Oklahoma University Hospital for treatment after that attack.

**Pennsylvania:** A woman caught smoking banana peels at the jail in Clearfield County, Pennsylvania, tried to slip out of court by admitting to a separate parole violation on September 13, 2021. But according to the *Clearfield Progress*, Revocation Court President Judge Fredric J. Ammerman told the public defender representing Danielle B. Aughenbaugh, "Not so fast." As it turned out, jail warden David Kessler had alerted the judge to the banana-peel smoking incident,

as well as another in which the 37-year-old prisoner hid another prisoner's urine in a toothpaste tube that she then stuffed into a body cavity in order to fool a pregnancy test. When the jail nurse became suspicious and ordered Aughenbaugh to repeat the procedure while being watched, she tested negative for pregnancy and admitted the lie was part of a scheme to get methadone treatment offered to pregnant prisoners. In addition to more drying banana peels and a jerry-rigged electric lighter, fermenting fruit was also found in her cell. The judge delayed her hearing for a month in order to learn what other contraband she may have.

**Peru:** On September 11, 2021, the world's longest-held political prisoner died. Abimael Guzmán, the founder of the Communist Party of Peru-SL, known as *Sendero Luminoso*—"the Shining Path"—spent 29 years in total isolation after his 1992 capture before his death at the National Penitentiary



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## News In Brief (cont.)

Institute. He was 86. Under the leadership of “Comrade Gonzalo,” as he was known, the Shining Path declared war on Peru’s government in 1980, waging a widespread guerrilla war in which it came close to seizing state power. The groups capacity declined significantly after Guzman’s capture campaign that eventually claimed 30,000 lives over the next two decades, until the 2012 capture of his successor, Florindo Eleuterio Flores Hala, also known as “Comrade Artemio,” which precipitated the group’s decline. Another 30,000 deaths were blamed on an anti-terror campaign the government launched in response to the communist insurgency.

**South Africa:** A 30-year-old convicted murderer accused of killing a warden at the prison where he was being held appeared briefly in a South African court on August 18, 2021. According to the *Fourways Review*, the case against Nigel Marais was then postponed eight days for what National Prosecuting Authority spokesperson Phindile

Mjonondwane called “further investigation.” Marais received his most recent charge after the discovery of the corpse of Warden Eunice Moloko at the Leeuwkop Correctional Service Centre where she worked on August 10, 2021. That is also where Marais was serving an 18-year term for murder and attempted murder convictions received in 2014 and 2015.

**South Carolina:** On September 22, 2021, ten prisoners were charged for a rebellion that broke out 18 days earlier at the Alvin S. Glen Detention Center in Columbia, South Carolina. Along with prisoners JuJuan Council and Anthony Blakney, who were charged the day of disturbance, that brought the total number charged to twelve, according to local TV station WIS. All of the men face counts of first-degree assault and battery, as well as kidnapping and rioting. Two of them, Devonte Spell and Elijah Webb, have also been charged with unlawful escape for breaking the locks on their cell doors and releasing the others in their housing unit. A pair of deputies from the Richland County Sheriff’s Department

(RCSD) responding to the disturbance were surrounded by the men, who struck them with chairs, trash cans and other furnishings. A RCSD Special Response Team then moved in and retook control, but not before the 50-bed housing unit was largely destroyed. The two injured deputies were treated at a hospital and are recovering at home. The other eight prisoners charged were identified as Roy Harley, Dontez O. Brown, Iric Bolden, Cameron C. Williams, Denzell McMillan, Derrick Rice, Willie Singleton and Darius Whitener.

**South Dakota:** According to a report published on September 2, 2021, by Sioux Falls TV stations KFSY and KDLT, a custom desk ordered by South Dakota Gov. Kristi Noem (R) from the state prison factory has run \$3,000 over budget because of materials cost increases she refused to pay and other changes she ordered. Growing in length from 80 to 100 inches, the now-\$9,000 desk included brass embossing, a gun drawer, leather drawer inserts and a footrest, as well as a state map embossed on top. Part of the cost increase was also blamed on the

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skyrocketing price of the black walnut. It was made by Pheasantland Industries, the state prison workshop. State Attorney General Jason Ravnsborg (R) told *The Daily Beast* that he was “actively reviewing (the) concerns.” Noem, who has since become embroiled in charges of nepotism—for allegedly abusing her position to help her daughter obtain an appraiser’s license—locked horns with the attorney general earlier in 2021 after he pleaded no contest to misdemeanor charges from an auto crash in a which a man died. He then refused Noem’s demands that he resign. A member of the Correction Commission, state Sen. Troy Heinart (D), said it was “troubling that the Governor needs a \$9,000 desk when quite a few South Dakotans don’t have a \$9,000 car.”

**Utah:** On August 27, 2021, a Utah Department of Corrections (UTDOC) guard and two co-conspirators were charged with smuggling drugs into the Utah State Prison (UTSP), where he worked. According to Salt Lake City TV station KSL, the guard, 45-year-old Byron Curt Stoddard, was taken into custody on August 24, 2021, after UTDOC investigators, acting on a tip, trailed him on a drug pickup and apprehended him with methamphetamine, fentanyl and suboxone. He then admitted that he was on his way back to UTSP to deliver the drugs to prisoner Paul William Munster, 46, who was one of those also charged in the scheme. The other, 24-year-old Cella Cherrie Pasilas, allegedly paid Stoddard \$1,000—traced

on a cash app—for each of two “drops” he successfully completed before he was caught. Stoddard also admitted the meth was for his own use, while Munster allegedly distributed the other drugs to fellow prisoners through the Soldiers of Aryan Culture, a white supremacist prison gang.

**Washington:** One of two men arrested on September 9, 2021—for violent crimes committed with other members of a nationwide biker gang—was working as a guard at the Washington State Penitentiary. According to the *Walla Walla Union Bulletin*, 40-year-old Dustin Wendelin was picked up on an indictment issued by a grand jury

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in Spalding County, Georgia. He and the other man arrested, 29-year-old Charles Montgomery, allegedly led a local Washington chapter of "Pagan's 1-precenters," a gang of bikers known for bombings, shootings, assaults and homicides. Both men were charged with aggravated assault, aggravated battery and violations of Georgia's Street Gang Terrorism and Prevention Act, after they were apprehended by deputies from the Umatilla Sheriff's Office, who called their arrests "the first step into a joint investiga-

tion" of the gang's West Coast activities. Montgomery's extradition status was not known, but Wendelin was on his way to Georgia, with a final courtroom shout-out to a fiancé he said he loved "more than life itself."

**West Virginia:** Four years after the fatal 2017 beating of a prisoner at the U.S. Penitentiary in Hazelton, West Virginia (USP-Hazelton), Acting U.S. Attorney Randolph J. Bernard announced the indictment of another prisoner for the crime. As Pittsburgh TV station KDKA reported, 34-year-old Joenell L. Rice is charged with voluntary manslaughter and assault in the

death of the other prisoner, identified as "D.G." If convicted, Rice could face an additional prison term of up to 25 years on the charges. The estate of another prisoner killed at the penitentiary that same year, Khaalid Sharif Frederick, filed suit against the federal Bureau of Prisons in March 2020, alleging that staff negligence was ultimately responsible for his fatal stabbing. Three other convicted men were killed at USP-Hazelton in 2018, including its most famous prisoner, gangster informant James "Whitey" Bulger, who was murdered by fellow prisoners within hours of his arrival at the lockup. 🗞

## Criminal Justice Resources

### ***Amnesty International***

Campaigns for the worldwide abolition of the death penalty. Publishes information on torture, gun violence, counter-terrorism, refugees' rights and other human rights issues. No legal services are provided. Reports on the U.S. and other countries are available online at: [www.amnesty.org](http://www.amnesty.org).

### ***Black and Pink***

Black and Pink is an open family of lesbian, gay, bisexual, transgender and queer prisoners and "free world" allies who support each other. A national organization, Black and Pink reaches thousands of prisoners across the country and provides a free monthly newspaper of prisoner-generated content, a free (non-sexual) pen-pal program and connections with anti-prison movement organizing. Contact: Black and Pink, 6223 Maple St. #4600, Omaha, NE 68104 (531) 600-9089. [www.blackandpink.org](http://www.blackandpink.org)

### ***Center for Health Justice***

Formerly CorrectHELP. Provides information related to HIV in prison – contact them if you are not receiving proper HIV medication or are denied access to programs due to your HIV status. Contact: CHJ, 900 Avila Street, Suite 301, Los Angeles, CA 90012 (213) 229-0985; HIV Hotline: (213) 229-0985 (collect calls from prisoners OK). [www.centerforhealthjustice.org](http://www.centerforhealthjustice.org)

### ***Centurion Ministries***

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### ***Critical Resistance***

Seeks to build an international movement to abolish the Prison Industrial Complex, with offices in California, New York, and Portland, Oregon. Publishes The Abolitionist newsletter. Contact: Critical Resistance, 1904 Franklin Street #504, Oakland, CA 94612 (510) 444-0484. [www.criticalresistance.org](http://www.criticalresistance.org)

### ***FAMM***

FAMM (Families Against Mandatory Minimums) advocates against mandatory minimum sentencing laws with an emphasis on federal laws, and works to "shift resources from excessive incarceration to law enforcement and other programs proven to reduce crime and recidivism." Contact: FAMM, 1100 H Street, NW #1000, Washington, DC 20005 (202) 822-6700. [www.famm.org](http://www.famm.org)

### ***The Fortune Society***

Provides post-release services and programs for prisoners in the New York City area and occasionally publishes Fortune News, a free publication for prisoners that deals with criminal justice issues, primarily in New York. Contact: The Fortune Society, 29-76 Northern Blvd., Long Island City, NY 11101 (212) 691-7554. [www.fortunesociety.org](http://www.fortunesociety.org)

### ***Innocence Project***

Provides advocacy for wrongfully convicted prisoners whose cases involve DNA evidence and are at the post-conviction appeal stage. Maintains an online list of state-by-state innocence projects. Contact: Innocence Project, 40 Worth St., Suite 701, New York, NY 10013 (212) 364-5340. [www.innocenceproject.org](http://www.innocenceproject.org)

### ***Just Detention International***

Formerly Stop Prisoner Rape, JDI seeks to end sexual violence against prisoners. Provides resources for imprisoned and released rape survivors and activists for almost every state. Contact: JDI, 3325 Wilshire Blvd. #340, Los Angeles, CA 90010 (213) 384-1400. [www.justdetention.org](http://www.justdetention.org)

### ***Justice Denied***

Although no longer publishing a print magazine, Justice Denied continues to provide the most comprehensive coverage of wrongful convictions

and how and why they occur. Their content is available online, which includes all back issues of the Justice Denied magazine and a database of more than 4,500 wrongfully convicted people. Contact: Justice Denied, P.O. Box 66291, Seattle, WA 98166. [www.justicedenied.org](http://www.justicedenied.org)

### ***National CURE***

Citizens United for Rehabilitation of Errants (CURE) is a national organization with state and special interest chapters (such as federal prisoners and sex offenders) that advocates for rehabilitative opportunities for prisoners and less reliance on incarceration. Publishes the CURE Newsletter, \$2 annual membership for prisoners. Contact: CURE, P.O. Box 2310, Washington, DC 20013-2310 (202) 789-2126. [www.curenational.org](http://www.curenational.org)

### ***National Resource Center on Children and Families of the Incarcerated***

Primarily provides research, fact sheets and a program directory related to families of prisoners, parenting, children of prisoners, prison visitation, mothers and fathers in prison, etc. Contact: NRC-CFI at Rutgers-Camden, 405-7 Cooper St. Room, 103, Camden, NJ 08102 (856) 225-2718. <https://nrcfi.camden.rutgers.edu>

### ***November Coalition***

Advocates against the war on drugs and previously published the Razor Wire, a bi-annual newsletter on drug war-related issues, releasing drug war prisoners and restoring civil rights. No longer published, back issues are available online. Contact: November Coalition, 282 West Astor, Colville, WA 99114 (509) 680-4679. [www.november.org](http://www.november.org)

### ***Prison Activist Resource Center***

PARC is a prison abolitionist group committed to exposing and challenging all forms of institutionalized racism, sexism, able-ism, heterosexism and classism, specifically within the Prison Industrial Complex. PARC produces a free resource directory for prisoners and supports activists working to expose and end the abuses of the Prison Industrial Complex and mass incarceration. Contact: PARC, P.O. Box 70447, Oakland, CA 94612 (510) 893-4648. [www.prisonactivist.org](http://www.prisonactivist.org)



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**Merriam-Webster's Dictionary of Law**, 634 pages. **\$19.95.** Includes definitions for more than 10,000 legal words and phrases, plus pronunciations, supplementary notes and special sections on the judicial system, historic laws and selected important cases. Great reference for jail-house lawyers who need to learn legal terminology. 2018

**The Best 500+ Non Profit Organizations for Prisoners and Their Families**, 5th edition, 170 pages. **\$19.99.** The only comprehensive, up-to-date book of non-profit organizations specifically for prisoners and their families. Cross referenced by state, organization name and subject area. Find what you want fast! 2020

**Criminal Law: A Desk Reference**, by Paul Bergman, Nolo Press, 456 pages. **\$44.99.** The book offers clear, plain English explanations of the law accompanied by real-world illustrations. 1101

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**Jailhouse Lawyers: Prisoners Defending Prisoners v. the U.S.A.**, by Mumia Abu-Jamal, 286 pages. **\$16.95.** In Jailhouse Lawyers, Prison Legal News columnist, award-winning journalist and death-row prisoner Mumia Abu-Jamal presents the stories and reflections of fellow prisoners-turned advocates who have learned to use the court system to represent other prisoners—many uneducated or illiterate—and in some cases, to win their freedom. 1073

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**Disciplinary Self-Help Litigation Manual**, by Daniel Manville, 355 pages. **\$49.95.** By the co-author of the *Prisoners' Self-Help Litigation Manual*, this book provides detailed information about prisoners' rights in disciplinary hearings and how to enforce those rights in court. Includes state-by-state case law on prison disciplinary issues. This is the third book published by PLN Publishing. 2017

**The Habeas Citebook: Prosecutorial Misconduct**, by Alissa Hull, 300 pages. **\$59.95.** This book is designed to help *pro se* litigants identify and raise viable claims for habeas corpus relief based on prosecutorial misconduct. Contains hundreds of useful case citations from all 50 states and on the federal level. 2023



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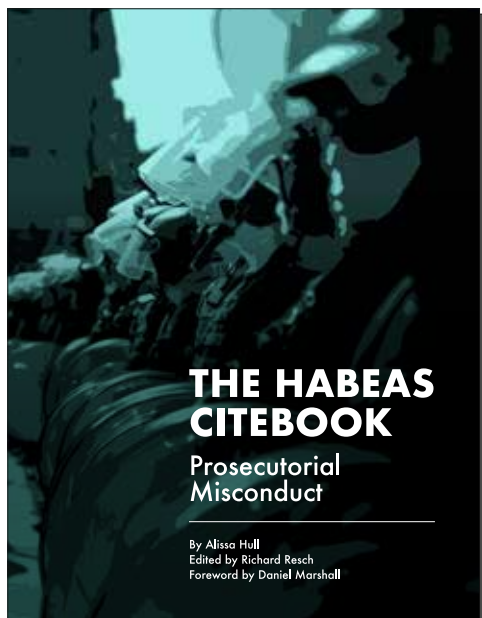
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# The Habeas Citebook: Prosecutorial Misconduct

By Alissa Hull

Edited by Richard Resch

*The Habeas Citebook: Prosecutorial Misconduct* is part of the series of books by Prison Legal News Publishing designed to help pro se prisoner litigants and their attorneys identify, raise and litigate viable claims for potential habeas corpus relief. This easy-to-use book is an essential resource for anyone with a potential claim based upon prosecutorial

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*The Habeas Citebook: Prosecutorial Misconduct is an excellent resource for anyone seriously interested in making a claim of prosecutorial misconduct to their conviction. The book explains complex procedural and substantive issues concerning prosecutorial misconduct in a way that will enable you to identify and argue potentially meritorious claims. The deck is already stacked against prisoners who represent themselves in habeas. This book will help you level the playing field in your quest for justice.*

—Brandon Sample, Esq., Federal criminal defense lawyer, author, and criminal justice reform activist

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