

EXHIBIT 76

TO

DECLARATION OF KATHERINE CHAMBERLAIN
IN SUPPORT OF PLAINTIFF'S MOTION FOR
PARTIAL SUMMARY JUDGMENT ON CLAIMS FOR
DECLARATORY AND INJUNCTIVE RELIEF

PRISON

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Federal Sex Offender Civil Commitment Process Under Fire

by Derek Gilna

Among other provisions, the Adam Walsh Child Protection and Safety Act of 2006 allows the federal government to indefinitely detain “sexually dangerous” offenders through a civil commitment process, which requires mandatory court hearings after such offenders have been certified by the U.S. Department of Justice (DOJ) as eligible for commitment. The Adam Walsh Act was named for the kidnapped and murdered son of *America’s Most Wanted* host John Walsh. [See: *PLN*, June 1996, p.12].

Under 18 U.S.C. § 4248, the federal government must obtain a “Certification of a Sexually Dangerous Person” before it can proceed in a civil commitment action.

Under § 4247(a)(5), a “sexually dangerous person” is defined as one who has engaged or attempted to engage in sexually violent conduct or child molestation, and who is “sexually dangerous to others” or suffers from a serious mental illness, abnormality or disorder, as a result of which he would have “serious difficulty in refraining from sexually violent conduct or child molestation if released.”

To order civil commitment, a federal district court must find at an evidentiary hearing (no jury trial is required) that the government has met its burden of proof by clear and convincing evidence that an offender is a sexually dangerous person. If so, he may be confined in a suitable facility for mental health treatment until it is determined that he is no longer a danger to others. 18 U.S.C. § 4248(d). The standard of “clear and convincing evidence” is lower than the “beyond a reasonable doubt” standard required in criminal prosecutions, and when certifying prisoners for civil commitment the DOJ can consider conduct that did not result in an arrest, prosecution or conviction. In fact, offenders can be certified for civil commitment even if they have no prior criminal record of sex offenses.

According to investigative reporting by *USA Today*, the DOJ has certified 136 federal prisoners over the past six years but only 15 have been civilly committed following court hearings. The “Justice Department has either lost or dropped its cases against 61 of the 136 men” who have been certified since 2006. Of the prisoners certified as eligible for civil commitment who were eventually freed, some had been detained for more than four years pending a hearing.

“Things take time,” stated former U.S. Attorney George Holding. “These men are accused of being a threat to society, and the system has to play itself out.”

Often, though, offenders certified by the DOJ are ultimately determined not to be a threat to society deserving of civil commitment. Ironically, one of the prisoners who was released because he did not meet the civil commitment criteria was Graydon Comstock. His case previously had been appealed to the U.S. Supreme Court, which upheld the constitutionality of the federal civil commitment process. See: *United States v. Comstock*, 130 S.Ct. 1949 (2010) [*PLN*, July 2011, p.31; Dec. 2010, p.44]. Comstock was freed in November 2011.

In addition to the federal government, around 20 states have civil commitment statutes for sex offenders. Notably, civil commitment is not imposed for past crimes, as prisoners have been convicted and sentenced for prior offenses before being certified for civil commitment proceedings. Indefinite civil commitment is instead intended to prevent crimes they might commit in the future – a disturbing concept reminiscent of the “thought police” from Orwell’s novel *1984* or the movie *Minority Report*.

While civil commitment is not supposed to be a form of punishment, the DOJ’s civil commitment unit is located within the federal prison complex in Butner, North Carolina – and prison by any other name is still prison. “Detainees are not prisoners, yet we are treated just like if not worse than criminals convicted of crimes,” observed Gerald Timms, who was certified for civil commitment.

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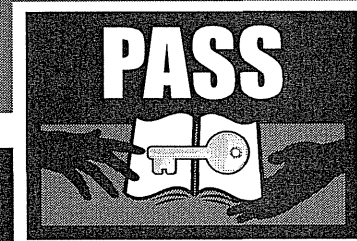
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Sex Offender Law Problems (cont.)

Unsurprisingly, the DOJ has released no public statements concerning its singular lack of success in civilly committing prisoners the department has certified as sexually dangerous. Of the certified offenders who have had commitment hearings thus far, 15 have been committed and 17 ordered freed; thus, the DOJ has a less-than-impressive 47% success rate in cases that result in hearings – not counting other cases that the DOJ has voluntarily dismissed. Nor have DOJ officials issued any explanations regarding the defects and delays in a process that has kept offenders – who have usually finished their prison sentences – incarcerated for many years while awaiting civil commitment hearings.

Some outside observers, including the U.S. Court of Appeals for the Fourth Circuit, have described the lengthy delays in civil commitment proceedings as “troubling” (though not troubling enough to constitute a due process violation, according to the appellate court). See: *United States v. Timms*, 664 F.3d 436 (4th Cir. 2012).

Fred Berlin, Director of the Sexual Behaviors Consultation Unit at Johns Hopkins Hospital, stated in reference to the DOJ’s civil commitment process, “If it’s going to be done, it has to be done in a just and fair manner.” However, an examination of hearing transcripts and court pleadings in cases where federal prisoners facing civil commitment have eventually won their freedom reveals problems indicative of a systemic lack of justice and fairness.

Government experts, including many Bureau of Prisons (BOP) psychologists, almost always find that prisoners certified under the Adam Walsh Act are sexually dangerous – but such certification typically does not occur until offenders are close to completing their sentences and nearing release. These delays result in extending prisoners’ terms of incarceration when, had they been certified earlier, they presumably could have been receiving sex offender treatment while serving their prison sentences.

Conversely, most private (non-government) psychologists hired by defense attorneys find that offenders certified by the DOJ as sexually dangerous do not require indefinite civil commitment. Private psychologists appear in court transcripts

to be more objective, thorough and nuanced in their observations and findings than their BOP counterparts. Although readily acknowledging that prisoners who face civil commitment possess some measure of dysfunction in matters of a sexual nature, almost none of the private psychologists agreed with the DOJ’s conclusions that such offenders were dangerous enough to warrant continued confinement after serving their prison sentences.

Increasingly, federal judges are agreeing with the findings of private psychologists and defense experts in civil commitment cases, which has put the DOJ in the unusual position of losing more contested hearings than it wins. Courts have repeatedly found that the federal government failed to meet its burden of proof that prisoners certified for civil commitment are sexually dangerous or have a high risk of reoffending, as required by § 4248.

It is uncontroverted that many federal prisoners have been convicted of serious sex-related crimes. But the broadness of some federal criminal statutes – which, for example, make simple possession (or downloading) of child pornography a crime that results in a lengthy sentence – means that numerous prisoners are not guilty of a “hands-on” offense such as sexual assault or rape. That, and the fact that most of the crimes occurred years before and offenders have usually completed their prison sentences, make judges reluctant to order indefinite civil confinement.

Many of the federal prisoners certified by the DOJ for the civil commitment process end up in the Commitment and Treatment Program at Federal Correctional Institution (FCI) Butner in North Carolina. This includes both offenders sent to Butner by the BOP and others who have volunteered for sex offender treatment programs offered at the facility. Under the skewed reality of life behind bars, some prisoners volunteer for the programs in order to avoid harassment, physical violence and even rape in other federal prisons due to the nature of their crimes.

Thus, prisoners may exaggerate their sexual deviancies to obtain a transfer to FCI Butner, which is perceived to be a safer environment for sex offenders. Ironically this puts them at greater risk of being “Adam Walshed,” or certified for civil commitment, after they complete their

Sex Offender Law Problems (cont.)

sentences. Prisoners at Butner and other facilities have also discovered that statements they made to gain admittance to a sex offender treatment program (SOTP), and issues they discuss in treatment, are not treated as confidential and can be used against them in civil commitment hearings.

Further, the quality and thoroughness of reports prepared by BOP psychologists that the DOJ relies upon to prove its case in civil commitment proceedings are sometimes questionable. It appears that the government feels obligated to proceed in cases where proof may be less than substantial, perhaps due to perceived public hostility toward sex offenders and media coverage of heinous sex crimes. Judges in civil commitment proceedings, though, have shown a willingness to carefully sift through the facts before rendering decisions based on applicable legal standards.

According to records in two cases discussed below, federal district courts declined to impose civil commitment and ordered the defendants freed under strict conditions of supervised release or probation. The DOJ simply could not present enough proof to justify the courts finding otherwise. In one case the judge noted that the defendant had not committed a “hands-on” crime in decades, had undergone extensive treatment and was at an

age where reoffending was unlikely. In the other case, the district court cast doubt on psychological tests used by the BOP in the initial screening process to determine whether an offender should be certified for civil commitment.

Responding to such judicial criticism of the BOP’s certification methodology, BOP spokesman Chris Burke said that prisoners are only certified as sexually dangerous after “careful assessments by mental health professionals.” However, the BOP reportedly suffers from a shortage of experienced psychologists, especially those qualified in the area of civil commitment. Often unable to attract sufficient experienced mental health staff, the BOP maintains a psychology predoctoral internship program in an effort to find potential candidates to hire.

Anthony Jimenez, a psychologist who ran the BOP’s civil commitment program from 2007 to 2008, acknowledged the inadequacy of the BOP’s expertise in this area and said that some prison psychologists had no experience in performing civil commitment certifications. “It was rushed, and initially,” he stated, “I believe, quality probably suffered.”

Jimenez also admitted that public pressure sometimes entered into the certification process. Although noting that the BOP consulted with staff attorneys before certifying an offender as sexually dangerous, he conceded that some prisoners were certified even though the evaluation might not have held up in court. According to Jimenez, “It’s not a willy-nilly, ‘this guy looks like a bad guy’ process. If we thought someone was really dangerous but there wasn’t a strong legal case, we might very well still push it for the public interest. Hopefully justice is served in the end.”

This admission comes as no surprise to defendants and their supporters who

have claimed the government delays cases it doesn’t think it will win, just to keep prisoners incarcerated for as long as possible. More recently, though, the DOJ has begun voluntarily dismissing civil commitment cases – including 40 of the 136 cases brought since 2006. When questioned, DOJ spokesman Charles Miller said the dismissals were due to “the totality of circumstances ... age, health status, change of circumstances, supervised release terms, family support and the opinions of all of the forensic experts.”

One private psychologist, Amy Phenix, offered her own analysis of the DOJ’s difficulty in making proper psychological determinations in civil commitment cases, noting that they “just didn’t have the same expertise” as outside mental health professionals. Which is an interesting statement considering that Phenix had helped train some of the government experts involved in the civil commitment certification process. “There were differences of opinion, and in some cases it was left up to the U.S. Attorney to make decisions about what to do,” she added.

Cases that have resulted in favorable rulings for the defendants serve as a chilling reminder of the power of the DOJ to arbitrarily deprive prisoners of their freedom for years after they have completed their sentences, by keeping them confined pending civil commitment hearings. The case of federal prisoner Sean Robert Francis, including the outcome of his § 4248 hearing before Judge Terrence W. Boyle, a federal judge in the Eastern District of North Carolina, is instructive.

In Francis’ case, a DOJ expert said he had testified in 150 to 200 trials involving sexually violent predators and sexually dangerous persons, and had been asked to render opinions about whether offenders certified by the government met the criteria under § 4248 “fifteen or sixteen times.”

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Of those 15 or 16 cases, he concluded that "nine or ten" met the criteria for sexual dangerousness. The expert stated that Francis had been "convicted of crimes of a sexual nature, of obscene phone calls on multiple occasions ... which involved the use of force or the threatened use of force ... [and there were] 'multiple ... offenses [which] involved specific threats of rape or murder....'"

Judge Boyle noted that "None of these convictions were hands-on crimes ... none of the threats were made in physically present context. They were all telephone threats." The government expert agreed that Francis' offenses were limited to threats made over the phone. "And you think that that established the type of predicate that is contemplated by child molestation or serious sexual crimes?" the court inquired. The expert indicated that was his "understanding" of the law.

The DOJ expert said that in this case, "several of the victims were identifiable victims and [Francis] had personal knowledge of and made specific threats that could certainly be ... perceived by the victims as real, material threats for their safety..." which satisfied the first part of

the required criteria under § 4248 because Francis was guilty of "threatened use of force."

The court then asked the expert to address the second part of the criteria, regarding whether Francis suffered from a serious mental illness, abnormality or disorder. The government expert stated that Francis' repeated pattern of making obscene telephone calls showed he had such a condition, based upon his self-confessions and various criminal investigations.

Judge Boyle acknowledged Francis' penchant for obscene phone calls but stated, "[H]ere you have a person whose criminal history, if any, is all reliant on his own self-confession during therapy, when he had no foreseeable expectation that he would be Adam Walshed and detained civilly." The court then addressed one of the major weaknesses of many civil commitment proceedings – the fact that some sex offenders confess to crimes they did not commit in order to be accepted into a treatment program. "If you don't admit that you're a sexual predator or sexual deviant, they don't want you in the program because the program's only for people who admit it."

Under cross examination by Francis'

attorney, the same DOJ expert acknowledged that previous mental examinations performed at other prison medical facilities failed to find sufficient evidence that would require Francis to be certified as a sexually dangerous offender.

The defense expert attacked the very basis of the prosecution's case – the appropriateness of the civil commitment certification process. He stated that "there's no tool, no actuarial or statistical risk assessment tool that would be appropriate in this particular case with this type of [hands-off] offenses ... for which Mr. Francis has been adjudicated.... There's no contact-based offenses." He then argued that the "Static-99R" test generally relied upon in such cases was invalid because "It violates the most fundamental assumption of test use.... So it's not appropriate in this case with Mr. Sean Francis to use any actuarial tool. It's misleading at its most charitable."

At the conclusion of the hearing, Judge Boyle found the DOJ had failed to meet its burden of proof that Francis had "engaged in or attempted to engage in sexually violent conduct or child molestation" and suffered "from a serious mental illness, abnormality, or disorder as a result

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Sex Offender Law Problems (cont.)

of which he would have serious difficulty in refraining from sexually violent conduct or child molestation if released.” The court noted Francis’ history of making obscene phone calls but said it was not persuaded by the government’s expert witness, and instead adopted the findings of the defense expert. The BOP was thus ordered “to release the Respondent to the custody of the appropriate United States Probation Office.” The DOJ appealed the court’s ruling. See: *United States v. Francis*, U.S.D.C. (E.D. N.C.), Case No. 5:10-HC-2013-BO; 2012 WL 174590 (Jan. 20, 2012).

Although most prisoners certified by the DOJ for civil commitment have been convicted of some form of sex-related crime, the certification process falters in the area of determining their probability of reoffending. Notably, the tests used in the certification process provide data related to the likelihood of recidivism by groups of offenders with similar characteristics, but not necessarily the *individual* probability of reoffending for the person being tested. Further, widely-varying scores given by psychologists who administer the same tests indicate that the process is far from an exact science.

As one appellate court put it, “The question of whether a person is ‘sexually dangerous’ is ‘by no means an easy one,’ and ‘there is no crystal ball that an examining expert or court might consult to predict conclusively whether a past offender will recidivate.’” See: *United States v. Shields*, 649 F.3d 78, 89 (1st Cir. 2011).

Most experts agree that released sex offenders are rarely convicted of another sex crime. For example, a 2003 study by the Bureau of Justice Statistics found that

only 5.3% of sex offenders committed another sex-related offense within three years after their release from prison. Other studies dating from the 1980s maintain that many of the psychological methods used to predict who may be a dangerous offender can not be substantiated by any recognized scientific method. Despite that fact, psychologists have spent years sifting through the records of thousands of sex offenders to develop tests to determine which are likely to reoffend. Those tests, however, have been subject to criticism.

A Hawaii federal district court, after reviewing the government’s evidence and making specific findings as to the quality of the diagnostic tests used, found in favor of prisoner Jed Abregana at a civil commitment hearing. Abregana had a history of sex-related crimes that included exposing his genitals to a 12-year-old boy in a movie theater in 2000. That charge was dismissed without prejudice, but in 2001 he was arrested by U.S. postal inspectors for possession of child pornography. He pleaded guilty and was sentenced to 44 months in prison followed by three years of supervised release.

Abregana was transferred to FCI Butner but expelled from the SOTP program, and was released from BOP custody in 2004. He was rearrested for violations of his conditions of release, re-released, and subsequently rearrested for lewd emails. He was certified as a “sexually dangerous person” just prior to his completion of a new prison sentence in 2007.

DOJ experts used many of the same tests utilized in Francis’ case to contend that Abregana met the criteria for civil commitment under § 4248, including the Static-99 test, the Rapid Risk Assessment for Sexual Offense Recidivism (RRASOR) and the Minnesota Sex Offender Screening Tool-Revised (MnSOST-R). According to the court, “RRASOR consists of four items concerning a person’s prior sex offenses, his age, whether he has had a male victim, and whether he has had a victim outside of his family ... Static-99 is a brief actuarial instrument designed to estimate the probability of sexual and violent recidivism among adult males who have been convicted of at least one sexual offense against a child or non-consenting adult.... The MnSOST-R was developed in Minnesota to provide for a formal and uniform process to identify high-risk offenders at the time of their release from prison....”

The government and defense experts came up with widely-varied scores on the

tests, which led the judge to comment that “the difference among the experts [was] reflective of the difficulty of psychiatric diagnosis.” As the U.S. Supreme Court stated in *Addington v. Texas*, 441 U.S. 418, 99 S.Ct. 1804, 1811 (1979), “Psychiatric diagnosis ... is to a large extent based on medical ‘impressions’ drawn from subjective analysis and filtered through the experience of the diagnostician ... [which] makes it very difficult for the expert physician to offer definite conclusions about any particular patient.”

The district court further noted that while Abregana had committed a sex-related crime, “neither of the other [non-government] experts, Dr. Rosell and Dr. Barbaree, consider Abregana to suffer from a serious mental disorder.... The U.S. Supreme Court precedent makes clear that the ‘serious difficulty’ language does not require total or complete lack of control, but does require that it must be difficult, if not impossible, for the person to control his dangerous behavior. See *Kansas v. Crane*, 534 U.S. 407, 411 (2002) (citing *Kansas v. Hendricks*, 521 U.S. 346, 358 (1997)).... These are difficult questions that require clearer and more convincing proof than is available in the circumstances before the Court.” Abregana was therefore ordered released. See: *United States v. Abregana*, 574 F.Supp.2d 1145 (D.Hawaii 2008).

The DOJ’s case against another federal prisoner, Markis Revland, also collapsed for lack of “clear and convincing evidence.” According to the district court, Revland’s “only convictions, which conceivably could be labeled as somehow involving child molestation, were two incidents of indecent exposure,” both in 1999, one of which involved public urination. “The government does not suggest that [this] incident involved ‘exploitation’ of minors, ... [and] the government did not prove that respondent engaged in conduct of a sexual nature with them ... or touched other children.”

The DOJ relied heavily on “self-reported” incidents from Revland when he was enrolled in the SOTP program at FCI-Butner, where he admitted to 149 incidents of “hands-on” child sexual abuse. The district court, however, “having considered the matter carefully ... concludes that the government has failed to prove” that any of those incidents actually occurred.

“The court finds that respondent invented the 149 incidents because he was desperate to remain in the SOTP at

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FCI-Butner. Respondent testified, quite convincingly, that he had been beaten and raped at knifepoint by fellow inmates while incarcerated at the federal prison in Leavenworth, Kansas; that he feared for his life if he remained at Leavenworth; that he sought and obtained admission to FCI-Butner's SOTP in order to be transferred away from Leavenworth; that once in the SOTP he was encouraged by SOTP staff to 'get it all out,' i.e., 'confess' everything; and that he felt compelled to make up a long list of sex offenses, lest he be deemed 'uncooperative' and returned to the institution from which he had come."

Revland "would be the Charles Manson of child molesters if even a small portion of the 149 incidents had actually happened," the court wrote, quoting one of the experts in the case, adding that Revland had "no documented history of ever committ[ing] a 'hands-on' sexual offense" and that "the government offered no evidence to independently verify that any of these incidents occurred or that any of them – even one – ever resulted in investigation or prosecution." Consequently, the DOJ's petition for civil commitment was denied. See: *United States v. Revland*, U.S.D.C. (E.D. N.C.), Case No. 5:06-HC-02212; 2011 WL 6749814 (Dec. 23, 2011).

In January 2012, Judge Terrence W. Boyle ruled against the DOJ in a civil commitment hearing for prisoner Jeffrey Neuhauser, who had a history of sex-related offenses. The DOJ contended that Neuhauser suffered from a mental disorder of "hebephilia" – a primary sexual preference for adolescents undergoing puberty. Judge Boyle rejected the

government's argument. "Although hebephilia has been proposed to be included as a mental disorder in the revision of the DSM [Diagnostic and Statistical Manual of Mental Disorders], it has been rejected as a proper mental disorder by numerous psychologists..." he stated. "The Court finds that it would be inappropriate to predicate civil commitment on a diagnosis that a large number of clinical psychologists believe is not a diagnosis at all, at least for forensic purposes."

The DOJ's own expert had admitted that hebephilia was controversial. Regardless, the district court held that even if hebephilia was considered a legitimate diagnosis, the DOJ had still failed to prove that Neuhauser was at high risk of reoffending. He was therefore ordered freed on supervised release with conditions that included polygraph testing and participation in a sex offender treatment program. See: *United States v. Neuhauser*, U.S.D.C. (E.D. N.C.), Case No. 5:07-HC-2101-BO; 2012 WL 174363 (Jan. 20, 2012).

The Eastern District of North Carolina is the epicenter of federal civil commitment cases, since FCI Butner is located in that district. As a result the Fourth Circuit, which has jurisdiction over federal courts in North Carolina, hears numerous appeals of civil commitment decisions (the Supreme Court's *Comstock* opinion originated from a Fourth Circuit ruling).

On January 9,

2012, the Fourth Circuit rejected the government's appeal of an adverse decision in a civil commitment hearing involving prisoner Clyde Hall. Although the Court of Appeals found that Hall had previously engaged in "past acts of child molestation" in the 1980s and 90s, and suffered from "a serious mental illness, abnormality, or disorder," it agreed with the district court's finding that the DOJ had failed to prove "by clear and convincing evidence, that Hall, as a result of these disorders, 'would have serious difficulty in refraining from ... child molestation if released.'"

The appellate court noted that the government and defense experts in the case had "arrived at conflicting opinions," but affirmed the lower court's decision to credit the testimony of the defense expert and Hall, who testified in his own behalf. One contributing factor cited by the Fourth Circuit was that Hall had spent 28 months in the community after completing a sex offender treatment program and had not committed another sex crime during that time. See: *United States v. Hall*, 664 F.3d 456 (4th Cir. 2012).

Although it appears from the cases cited above that many judges are justifiably skeptical of the federal civil commitment

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Sex Offender Law Problems (cont.)

process, that has not dissuaded the DOJ from continuing to certify prisoners as sexually dangerous who may or may not eventually be found eligible for civil commitment under § 4248, including those who have committed “hands-off” sex offenses. Judge Boyle complained during a court hearing in 2011 about the lengthy, indefinite civil commitment process once a prisoner is certified by the DOJ. “There’s no horizon. It’s just darkness,” he said.

Another issue that has yet to be addressed by the DOJ is preparing offenders awaiting civil commitment hearings for their eventual release back into the community. Such prisoners are often prevented from participating in educational and rehabilitative programs available to those in the general prison population. As a result, offenders whose civil commitment cases are ultimately dismissed, or who prevail at their court hearings, are unprepared in terms of their post-release employment, housing and treatment requirements.

Clearly the entire federal civil commitment process is in need of serious improvement. If the government intends to civilly commit certain offenders after they have completed their prison sentences, not for what they have done but for what they might do in the future, then changes are necessary to ensure that our justice system lives up to its name.

The DOJ should seek to certify only those convicted sex offenders who meet the applicable criteria and are likely to reoffend. If prisoners require sex offender treatment, they should receive it while serving their prison terms; the DOJ should not wait until they have almost finished their sentences before certifying them for civil commitment proceedings. The civil commitment process needs to be expeditious, to ensure it is not used as a means to improperly detain offenders after they complete their prison sentences. Further, the certification process should be based on objective, scientific methodology that evaluates the individual dangerousness and probability of reoffense of the person being tested.

As of March 2012, 59 federal prisoners were awaiting civil commitment hearings. The DOJ has since argued in its appeal to the Fourth Circuit in Sean Francis’ case that the courts should approve civil commitment for offenders who engage in “hands-off” non-contact crimes

— such as making obscene phone calls, exhibitionism and, presumably, soliciting sex from law enforcement officers posing as minors on the Internet. This would, of course, greatly increase the potential pool of federal prisoners eligible for civil commitment proceedings.

The Fourth Circuit rejected the DOJ’s argument on July 16, 2012, finding that the district court had “appropriately considered the evidence as a whole using the framework provided in the Act and concluded that Francis was not sexually dangerous to others, within the meaning of the Act, because the government failed to meet its burden of proof regarding this required component for civil commitment under the Act.” The district

court’s judgment in favor of Francis was therefore affirmed. See: *United States v. Francis*, U.S. Court of Appeals for the Fourth Circuit, Case No. 12-1205; 2012 WL 2877668.

Despite yet another adverse ruling, the DOJ will most likely continue to certify offenders for civil commitment whether they meet the necessary criteria or not, in order to keep them in prison for as long as possible. That, apparently, is what passes for “justice” in the federal civil commitment process. ■

Sources: www.usatoday.com, www.newsobserver.com, www.raleighpublicrecord.org, <http://lforensicpsychologist.blogspot.com>, www.nacdl.org, www.bjs.ojp.usdoj.gov

Ethics Complaint Against Former Oregon Prison Official Dismissed

As previously reported in *PLN*, Michael Taaffe, 56, retired from his \$91,020-per-year position with the Oregon Department of Corrections (ODOC) in March 2011. He had been employed as an assistant administrator with the ODOC’s Health Services Division, and served on a three-member panel in 2009 that recommended Correctional Health Partners (CHP) as a contractor to manage the prison system’s medical care. CHP was awarded the contract, worth approximately \$1.2 million annually.

Three days before his retirement Taaffe went to work for CHP, which resulted in an ethics complaint filed against him. Under Oregon state law, public employees are prohibited from having a “direct beneficial financial interest” in a contract awarded by an agency with the employee’s participation. This prohibition “continues for two years after the employee leaves public service.” [See: *PLN*, Feb. 2012, p.46].

Although Taaffe was not solely responsible for granting the contract to CHP, he worked closely with the company while employed by the ODOC. “Michael Taaffe did work directly with CHP, as did many other staff in Health Services,” state prison officials noted. “His role was to analyze CHP reports and to track DOC costs based on those reports.” Moreover, after Taaffe went to work for CHP, ODOC director Max Williams acknowledged that “some of the contractor’s employees are embedded with DOC Health Services

staff in our offices, and Mr. Taaffe is one of those.”

In an August 19, 2011 report, an investigator for the Oregon Government Ethics Commission found cause to proceed with a full investigation. “Information for this preliminary review appears to indicate that Mr. Taaffe may have had a direct beneficial financial interest in a public contract in which he participated in the authorization of while acting in his former official capacity as a public official representing DOC,” the report stated. “Information also appears to indicate that Mr. Taaffe may have been met with conflicts of interest while participating in official actions, decisions or recommendations that could or would have been to his private pecuniary benefit and may have failed to comply with disclosure requirements ... and may have used or attempted to use his official position to obtain prohibited financial benefits.”

On February 24, 2012, however, the Ethics Commission unanimously voted to dismiss the complaint against Taaffe after finding that the evidence against him was “insufficient to infer a violation of ORS Chapter 244 or warrant further investigation.” Taaffe did not testify before the Commission, and no other explanation was provided for the dismissal of the complaint. ■

Sources: *Oregon Government Ethics Commission*, *The Oregonian*, *Statesman Journal*



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From the Editor

by Paul Wright

When *Prison Legal News* published its first issue in May 1990, it was less than one month after Washington state became the first in the nation to enact a civil commitment law for sex offenders. *PLN* has reported on this issue ever since as such laws have spread around the country, and as the court system has for the most part duly upheld civil commitment statutes in a results-oriented effort to imprison people based on crimes they *might* commit in the future.

When the federal government first announced plans to hold suspected terrorists and “enemy combatants” at Guantanamo Bay without charge or trial for essentially the rest of their lives, the mainstream media largely ignored the fact that the U.S. has been detaining citizens – mostly sex offenders – on a similar basis since 1990.

As this month’s cover story indicates, once the mechanism for repression is put in place it needs to be used, and having a civil commitment law creates a need to commit people whether they meet the applicable criteria or not. The federal civil commitment process has received relatively little attention compared to that of various states, and to date there has been a dearth of litigation challenging the conditions of the DOJ’s civil commitment program, which operates in a relative shroud of secrecy.

Like other aspects of the government’s repressive penal machinery over the past three decades, the federal civil commitment program continues to grow. To their credit at least some members of the federal judiciary have been skeptical and, as the cover story notes, have declined to commit many of the defendants whose cases result in hearings. Unlike, say, Minnesota’s civil commitment program; to date, not a single person has been deemed eligible for release since the program was enacted in 1994. The only 24 people released from Minnesota’s civil commitment facility left in body bags after they died.

The good news is that a majority of states (30) have resisted enacting civil commitment laws. Several years ago, the Human Rights Defense Center was among a number of organizations that worked to stop the Vermont legislature from adopting a civil commitment statute. The bad news is that none of the 20 states

and the federal government that use civil commitment have recognized it for the expensive failure that it is, and maintain their programs despite enormous societal, fiscal and human costs.

As reported in this issue of *PLN*, we recently settled our lawsuit against the Sacramento County jail, which had censored *PLN* under the pretext that our publication is bound with staples and has address labels. The case was hard-fought but we prevailed, obtaining a preliminary injunction and then a consent decree, damages and attorney fees thanks to excellent legal representation from the San Francisco-based law firm of Rosen, Bien, Galvan & Grunfeld LLP, and our in-house litigation director Lance Weber and staff attorney Alissa Hull. We are grateful to our legal team for winning the case and ensuring that the 2,000+ prisoners in the Sacramento County jail system can now receive *PLN* and other publications with staples and address labels.

As part of the overall decimation of civil liberties and free speech in the U.S., efforts at censoring publications like *Prison Legal News*, and mail to and from prisoners and detainees in general, are

increasing. We have had to dedicate a significant portion of our meager resources to combat these efforts at unlawful censorship. Despite the win in Sacramento, we still have censorship cases pending against the state prison systems in Florida and New York, and against jails in Oregon, Arizona, Louisiana and Michigan. We are strongly committed to ensuring that prisoners can receive *PLN* and the books we distribute.

In the latter regard, we have added a number of new titles to our book list, including several on criminal law and procedure which many *PLN* readers had requested. Please review our book catalog on pages 53 and 54 for the latest additions. We will be running reviews of the new books in upcoming issues of *PLN*.

If you can make a donation to help support our news reporting, litigation and advocacy efforts, please do so. Every donation, no matter how small, helps; the cost of a subscription to *PLN* does not cover all of our operating costs. Donations are tax deductible for those who pay taxes.

Please enjoy this issue of *PLN*, and encourage others to subscribe. ■

Maryland Women Prisoners Sew Commemorative 1812 Flags

In July 2011, prisoners at the Maryland Correctional Institution for Women in Jessup were busy sewing 1812-style flags to be flown at Maryland public buildings.

The plan was to replace the state’s old flags with the 1812-style flags, which have 15 stars and 15 stripes, in time for the bicentennial of the War of 1812. The women prisoners engaged in that task are employed with Maryland Correctional Enterprises (MCE).

According to MCE public relations officer Renata Seergae, “The goal is to train [prisoners] ... so when they are released they don’t wind up back in here.” According to Seergae, the women who work in the sewing program produce approximately 700 state and U.S. flags a year, and are paid between \$1.25 and \$3.85 per hour.

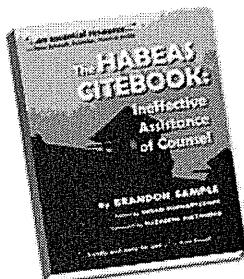
Prisoners who were interviewed indicated they were proud of their work.

One, Julia Applegate, said she had been sewing flags for three years and enjoyed the fact that they would be flown in front of Maryland state buildings.

Another, Natasha Fowlkes, was responsible for supervising and training the other prisoners. She said she had no prior sewing experience before she came to prison, but now appreciates the technical beauty inherent in flags. She mentioned that she hoped to be a “professional flag lady” one day.

There are, however, relatively few freeworld businesses that manufacture flags. While prison industry programs purportedly teach prisoners job skills to assist with their reentry to society following their release, the MCE’s flag program appears to benefit the state – which receives low-cost flags – more than the women prisoners who produce them. ■

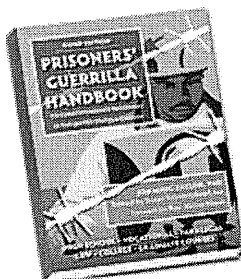
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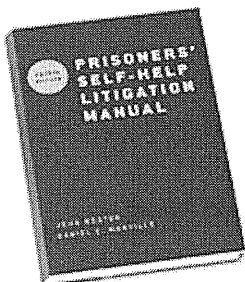
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Hawaii Audit Finds Offenders Rarely Pay Restitution Owed

Thirteen years after the Hawaii Office of the Auditor issued a report critical of the state judiciary's efforts to collect restitution payments from offenders, only a small fraction of tens of millions of dollars in restitution has been collected, which has left crime victims upset at what they perceive as a continuing injustice.

According to a series of articles published in the *Star-Advertiser* in June 2011, Hawaii had approximately 6,000 prisoners, 1,800 parolees and 20,000 people on probation or other court-ordered supervision who collectively owed around \$25.5 million in restitution as of June 30, 2010. Prisoners and parolees were responsible for \$15 million of that amount, of which at least \$800,000 has been collected – though an “antiquated” computer management system has prevented officials from tracking the actual collection rate.

Restitution is based on a victim's losses, but the amount an offender is ordered to pay depends on his or her financial resources and ability to make payments, which can be as little as \$10 a month. Because ex-offenders are often unemployed and have few assets, however,

even that small amount may go unpaid. And while probation officers have the authority to revoke probation for non-payment of restitution, such sanctions are rarely imposed.

Rather, probation officials tend to work with probationers to help them complete drug or anger management programs, find jobs, make progress in their rehabilitative efforts and become productive citizens. A major public safety goal is to help offenders reintegrate into society without committing future crimes, and that goal supersedes restitution payments. Additionally, if probationers are incarcerated for failing to pay restitution, they still would be unable to pay while sitting in prison or jail.

Prisoners who owe restitution have 10 percent of their wages collected by the Hawaii Department of Public Safety. As prison wages are just 25 cents per hour, that does not amount to much. Legislation signed into law on June 21, 2012 (SB 2776) will increase the percentage collected for restitution payments to 25 percent “of the total of all moneys earned, new deposits, and credits to the inmate's individual account.” For parolees, typically 10 to 20 percent of their wages are collected by parole officers for restitution payments.

Stakeholders involved in the restitution issue fall into three general groups: 1) victim advocates, 2) those concerned with offender reintegration and 3) those in charge of overseeing collection efforts. A fourth group – the offenders who owe restitution – typically have no voice in the matter.

To victim advocates, the criminal justice system is not placing enough emphasis on justice for victims. Pamela Ferguson-Brey, executive director of the Crime Victim Compensation Commission, said the system should be “more victim-driven.”

“There's not enough concern about the impact of the crime, the financial, physical and emotional impact on the victim, and how we are going to make sure they become whole again,” she stated.

The majority of victims have not received full restitution; according to the Crime Victim Compensation Commission, only 22% of the prisoners and parolees the Commission has monitored since 2003 have paid the full amount of restitution owed.

Deputy public defender Susan Arnett has a different perspective on the restitution issue. She noted that her office's clients are often indigent and unable to

find employment due to the stigma of their criminal convictions.

“I honestly don't think the problem is people out there with a significant ability to pay who aren't paying,” she said. In her view, the idea that the courts should be functioning as a collection agency working on behalf of victims, without taking into account the larger problem of ex-offenders having difficulty finding jobs, is “a little too simplistic.”

As mentioned above, probation officials seek a middle ground, trying to balance the goal of reintegrating offenders into the community with the goal of collecting court-ordered restitution. Probation officials have noted that by finding employers willing to hire ex-prisoners, both goals can be achieved.

On the administrative side, the inability of Hawaii's existing computer management system to generate accurate statistical reports makes it nearly impossible to assess the success or failure of restitution collection efforts. According to Susan Howley, public policy director of the National Center for Victims of Crime, Hawaii, like other states, needs to do a better job of monitoring restitution.

“Until you start tracking what's outstanding, it's hard to get agencies to focus their attention on the problem, and see the scope of the problem,” Howley observed. “The judge's sentence, the recognition that the defendant should pay, is often disregarded with no consequences, and that causes crime victims to lose faith in the criminal justice system.”

Ferguson-Brey agreed, stating, “Many victims feel betrayed.” At the same time, though, she acknowledged that very few offenders have adequate assets at their disposal to pay the restitution they owe.

Responding to a 1998 state audit that was critical of the restitution collection process, Hawaii's judiciary established the position of victims assistance coordinator to address the concerns of victims. Noreen Kishimoto, who has occupied that position for around a decade, estimates that she receives 200 to 300 calls a year from victims, many of whom are frustrated by nonpayment of restitution.

Kishimoto's role, however, is limited. She follows up on complaints about restitution with calls to probation officers, who in turn contact the offenders. She also sends out 500-600 delinquency notices each year directly to offenders when their

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payments are 120 days overdue. Roughly one-third of those who receive the notices eventually comply, she said.

When victims question why they are not receiving higher amounts of restitution, or why the payments decrease, all Kishimoto can do is explain that the payments are based on an offender's ability to pay, which fluctuates.

Victims can also turn to the Crime Victim Compensation Commission for monetary compensation. Established in 1967, the Commission awards from \$600,000 to more than \$1 million annually to victims of violent crime.

Civil lawsuits are another option for crime victims seeking compensation. While it's relatively easy under Hawaii state law to get a civil judgment for the amount of outstanding restitution, enforcing the judgment is an entirely different matter. In fact it's extremely difficult because attorneys are rarely willing to take such cases; the amount of restitution is usually very small, thus many lawyers feel it's not worth their time and effort.

Plus there's the fact that most offenders have few assets or income to satisfy a civil judgment – which goes back to the need for offenders to receive resources and services to help them obtain stable employment. Indeed, if victims' advocates truly want to ensure that victims receive the restitution they are owed, then they should support programs that reintegrate ex-prisoners into the community and help them find jobs. ■

Sources: *Star-Advertiser*, www.capitol.hawaii.gov

Prisoner Lacked Standing to Challenge Georgia's Failure to Send Absentee Ballot to Jail

The Eleventh Circuit Court of Appeals held on February 2, 2012 that a former Georgia jail prisoner lacked standing to complain that state and local officials had failed to mail his absentee ballot to the jail, which prevented him from voting.

In anticipation of the November 4, 2008 presidential election, staff at the DeKalb County Jail held voter registration drives and encouraged prisoners to register to vote and apply for absentee ballots. Prisoner Hassan Swann was among those who completed an application for an absentee ballot. He wrote his home address in DeKalb County on the line labeled "address as registered," but left blank the space for "address ballot to be mailed" because he didn't know the jail's address.

On September 29, 2008, Maxine Daniels, DeKalb County's assistant director of registrations and elections, informed jail officials she would not mail absentee ballots to the jail. She said state law prohibited such ballots for non-disabled voters to be mailed to another address within the same county.

Swann's absentee ballot was sent to his registered home address, but he never received it and was thus unable to vote. Jail officials had set up a drop box for relatives to leave prisoners' absentee ballots. Swann said he was unaware of the drop box. He and another prisoner, David A. Hartfield, filed a complaint in federal court arguing

that the state law that prohibited them from receiving a ballot at the jail was unconstitutional. They also alleged due process violations.

The district court granted summary judgment to the defendants, finding no constitutional violation. On appeal the Eleventh Circuit said the district court should have determined if Swann had standing to bring the lawsuit. The appellate court held it did not need to decide if Swann had suffered an injury, because his non-receipt of an absentee ballot was not fairly traceable to the challenged actions of the defendants.

"Swann's lawsuit is based on an imaginary set of facts: an imaginary request to send his ballot to the jail and an imaginary refusal on the ballot clerk's part to send a ballot to him," the Court of Appeals wrote. "Swann asked the ballot clerk to mail Swann's absentee ballot to Swann's house – no other address was given in the application for the ballot – and the clerk says a ballot was sent to Swann's house. Nothing wrongful can arise from those facts."

Swann's contention that even if he had provided the jail's address on his application the ballot would not have been sent to the jail was speculative, the appellate court found. The Eleventh Circuit therefore vacated the district court's judgment and remanded with instructions to dismiss the case for lack of subject matter jurisdiction. See: *Swann v. Secretary, State of Georgia*, 668 F.3d 1285 (11th Cir. 2012). ■



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Federal BOP to Let Prisoners Have MP3 Players

The U.S. Bureau of Prisons (BOP) has announced that it will allow federal prisoners to purchase MP3 music players, which were first tested at Federal Prison Camp Alderson, a women's facility in West Virginia. The policy change, expected to be implemented throughout the BOP system in 2012, was hailed as a "positive step" by prisoners' rights groups.

Various studies have indicated that keeping prisoners occupied with positive leisure-time activities is to everyone's benefit. David Fathi, director of the American Civil Liberties Union's National Prison Project, stated that providing prisoners with access to music "allows for an important connection [to life on the outside] that assists with their eventual re-entry" to society.

Initial reaction was mixed, however, with Republican U.S. Senator Chuck Grassley, who serves on the Senate Judiciary Committee, saying it was "difficult to see how all of the necessary safeguards can be put into place to stop prisoners from using MP3 players as bargaining chips or other malicious devices.... It appears to be a risky endeavor and raises a lot of questions that need to be answered."

Senator Grassley did not provide details as to what could be risky or what questions should be answered. Similarly, the president of the Council of Prison Locals, Dale Deshotel, indicated that unionized prison employees had reservations about the program, though he didn't specify what those concerns were.

The MP3 players will not be connected to the Internet, but instead will download approved songs through the BOP's secure computer system, TRULINCS, which has filtering software and records all emails and services accessed by prisoners. MP3 players will be sold in prison commissaries and prisoners can load them with songs from a playlist of about one million titles, stated BOP spokeswoman Traci Billingsley.

According to Billingsley, after startup expenses are paid, revenue from the MP3 sales will go to the BOP's Inmate Trust Fund, which pays for recreational services for prisoners. "The MP3 program is intended to help inmates deal with issues such as idleness, stress and boredom associated with incarceration," she said. MP3 players sold to prisoners at FPC Alderson during the testing period cost around \$70,

plus \$.80 to \$1.55 per song.

The MP3 devices that will be made available to federal prisoners will be supplied by Advanced Technologies Group, Inc., which has a two-year, \$5.15 million contract with the BOP. Certain songs will not be allowed, including those with explicit, obscene or racist lyrics.

MP3 players and music downloads are also available in several state prison

systems, such as Michigan, Alaska, Idaho, Mississippi, Ohio and Oklahoma, and are provided through Access Corrections, a division of Keefe Group. Prisoners can buy MP3 players from the commissary and then load them with songs through special kiosks. ■

Sources: *USA Today*, www.correctionsone.com, www.keefegroup.com

\$975,000 Award to Former Prisoner Who Gave Birth in Seattle, Washington Jail

A federal jury in Washington State has awarded \$975,000 to a mentally ill woman who gave birth in a cell at the King County Correctional Facility (KCCF). The jury found both the county and jail staff liable on federal constitutional and state law negligence claims.

Imka Pope was sleeping in a city bus shelter when she was arrested for criminal trespass on November 15, 1997 and booked into KCCF. It was immediately apparent that she was not only pregnant, but also suffering from mental illness. Her initial jail assessment disclosed she was exhibiting such illogical and disorganized thought processes that staff were unable to communicate with her or determine her name.

Several KCCF staff members screened Pope. Jail employee Vicki Shumaker performed an intake screening, registered nurse (RN) Sean Dumas performed a medical screening and RN James Ilika conducted a psychological intake screening. None of them noted on their respective forms that Pope was pregnant, nor did they refer her for additional evaluation or treatment.

The day after her arrest, RN Paul Jerksey saw Pope for a "psychiatric housing initial assessment." He noted that she was mentally ill and talked to herself "constantly." Following that assessment Pope was placed in an isolation cell, where she neglected her personal hygiene and refused to leave. Jail employees observed that she "decompensated" but provided no care other than having medical and security staff check on her periodically.

Guard Todd McComas conducted fifteen-minute checks on Pope on November 21, 1997. She informed him that she was pregnant and going into labor. "McComas walked away without even telling

Ms. Pope that he would get help for her, and he did nothing for her until after she had given birth alone in her cell," according to an amended complaint in a lawsuit filed on Pope's behalf.

The county's own jail-practices expert concluded that KCCF staff "probably did this because they believe she's just mentally ill, she's just pretending to have a baby."

The lawsuit was not filed until 2007, but because Pope was incompetent or disabled to such a degree that she could not understand the nature of the legal claims, the statute of limitations was tolled.

On February 3, 2012, a U.S. District Court jury found that Pope's right to adequate medical treatment had been violated, and McComas, Jerksey, Dumas, guard Doyle Husted and nurse Marieclaire Healy were liable under constitutional or negligence claims. McComas and Husted were also held liable on a claim of outrage, while Ilika was found not liable. King County was held liable for failing to adequately train and supervise staff at the jail.

The jury awarded \$850,000 in compensatory damages for pain, suffering and emotional distress, plus punitive damages of \$50,000 against McComas and \$75,000 against Husted, for a total of \$975,000. The awards will be paid from the county's risk-management fund.

Pope was homeless and had been living in California, but her attorneys brought her to Seattle prior to the trial. Before the verdict was entered, she was begging for change. See: *Pope v. McComas*, U.S.D.C. (W.D. Wash.), Case No. 2:07-cv-01191-RSM. ■

Additional sources: *Seattle Times*, *Huffington Post*

California Pays \$295,000 to Settle Religious Discrimination Lawsuit by Sikh Barred from Employment as Prison Guard

In August 2011, the California Department of Corrections and Rehabilitation (CDCR) settled a religious discrimination suit filed by Trilochan Oberoi, a Sikh, who was barred from becoming a prison guard because he refused to shave his beard, which was required by his religion.

In exchange for dismissal of the lawsuit, the CDCR agreed to pay Oberoi \$295,000 and hire him as a manager in a \$61,000-a-year job in the department's Regulation and Policy Management Branch.

Under the terms of the settlement agreement, prison officials admitted no liability and did not have to change their policy requiring most male employees to be free of facial hair so they can be fitted with gas masks.

In March 2005, Oberoi, 59, applied for a position as a guard at Folsom State Prison. Roughly one year later he reported for a pre-employment examination where he was to be fitted for a gas mask. Since 2004, CDCR policy has required gas masks to fit tightly to protect guards from tear gas and pepper spray used when responding to disturbances.

When he appeared for his examination, however, Oberoi was not clean-shaven and thus could not be fitted with a gas mask. Consequently, the CDCR refused to hire him.

"The wearing of the beard, keeping hair, is part of my religion," Oberoi said. In 2009 he filed a complaint in Sacramento County Superior Court alleging religious discrimination. He

argued that, insofar as the CDCR had adopted a grooming policy that allowed employees with certain medical conditions to wear beards up to one inch in length, it should make similar allowances for Sikhs, Muslims, Orthodox Jews and others whose religion requires that they keep their facial hair.

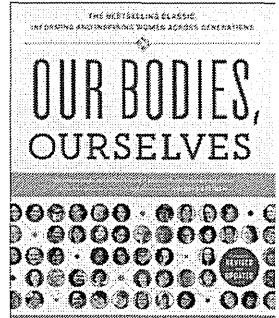
"Why should those who cannot shave for religious reasons be treated differently from those who cannot shave for medical reasons?" asked a group of organizations, including the ACLU of Northern California, Asian Law Caucus, Council on American Islamic Relations-California, Sikh Coalition, Asian American Bar Association and Bay Area Association of Muslim Lawyers, in a letter sent to Attorney General Kamala Harris.

In June 2011, the superior court denied the CDCR's motion for summary judgment and allowed Oberoi's claims of disparate treatment and disparate impact to proceed. The settlement agreement followed two months later, on August 10, 2011, after state officials learned that the U.S. Department of Justice's Civil Rights Division was investigating the way the CDCR was handling the case. Oberoi was represented by the San Francisco law firm of Dhillon & Smith. See: *Oberoi v. Department of Corrections and Rehabilitation*, Sacramento County Superior Court (CA), Case No. 34-2009-00054595. ■

Additional sources: *Associated Press*, www.msnbc.msn.com, www.abclocal.go.com



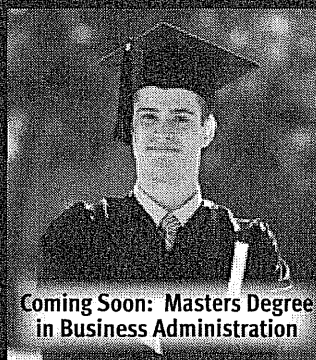
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California Supreme Court Restricts Lifer Parole Challenges

In its second review in three years of a lstate prisoner's habeas corpus petition seeking review of an adverse parole decision, on December 29, 2011 the California Supreme Court again reversed the Fourth District Court of Appeal, Div. 1, which had ordered a new hearing after finding that the Board of Parole's decision to deny parole was not supported by "some evidence."

Richard Shaputis was sentenced to 17 years to life for second-degree murder in the 1987 shooting death of his wife. He was found suitable for parole in 2006, after a state appellate court ordered a new parole hearing with restrictions on the Board of Paroles' (Board) exercise of discretion. Former Governor Arnold Schwarzenegger reversed the Board, which was subsequently overturned by the appellate court. On the state's petition for review, the California Supreme Court reversed, thus upholding the Governor's decision. See: *In re Shaputis*, 44 Cal.4th 1241, 190 P.3d 573 (Cal. 2008) (*Shaputis I*) [*PLN*, April 2009, p.30].

Shaputis had a new Board hearing in 2009, wherein he was denied parole. The appellate court, finding no evidence in the record to support the Board's decision, again granted his habeas petition and ordered the Board to conduct yet another hearing. The California Supreme Court granted the state's petition for review of this latest appellate ruling and again reversed – leaving Shaputis, 75 years old and medically infirm, to wait three years for another parole hearing.

The unanimous Supreme Court made several significant holdings in its December 29, 2011 ruling. The Court asserted that while Shaputis' decision to not speak to either the Board's psychologist or the Board itself could not *per se* be held against him, the absence of such information and testimony could not be used as a shield to prevent the Board, in rendering an unsuitability decision, from relying on older evidence in the record.

The Supreme Court emphatically held that a candidate for parole can not evade the Board's inquiry into his current dangerousness by hiring a private psychologist to prepare a favorable report, while refusing to cooperate with a Board psychologist who might issue adverse findings. Ironically, Shaputis hired a private expert only after he had asked the Board for a new psych evaluation and they responded that he didn't need one. Thus, his

use of a private psychologist was neither evasive nor manipulative. The Court clarified that the Board is not bound by the most recent evidence in the record (e.g., a current psych evaluation) and may, upon finding reason to discredit newer reports, rely on older ones.

The Supreme Court further settled an ongoing complaint in recent California lifer habeas petitions regarding the Board's use of the parole denial factor "lack of insight" subsequent to the Court's 2008 ruling in *Shaputis I*, which had crafted that language. Lifers thereafter found that their parole denials were routinely being grounded in the talismanic factor "lack of insight," notwithstanding that the Board's regulations do not mention that term.

The Court explained that the concept of "lack of insight" fits within the Board's existing regulatory factors of "past and present attitude toward the crime" and "understands the nature and magnitude of the offense." The Supreme Court stated that "the regulatory suitability and unsuitability factors are not intended to function as comprehensive objective standards." Observing that "a finding on insight is no more subjective or conclusory than a finding on the inmate's 'past and present mental state,'" the Court wrote that "the inmate's insight into not just the commitment offense, but also his or her other antisocial behavior, is a proper consideration."

Reaffirming the "some evidence" standard of judicial review of lifer parole decisions that it established in *In re Rosenkrantz*, 29 Cal.4th 616, 59 P.3d 174 (Cal. 2002) [*PLN*, July 2003, p.30], and followed in *In re Lawrence*, 44 Cal.4th 1181, 190 P.3d 535 (Cal. 2008) [*PLN*, April 2009, p.30], the Supreme Court emphasized that the proper role of the judiciary in such matters was limited to reviewing whether the Board's decision was arbitrary, capricious or procedurally defective. The question of *which* evidence the Board (or Governor) relied upon, or the credibility of that evidence, or the weight given to the evidence, was solely the function of the executive branch and beyond the scope of judicial reevaluation.

Thus, the existence of a mere "modicum" of evidence in the record is sufficient to bar the judiciary from reviewing the merits of parole decisions by the executive branch. Moreover, the Court explained, judicial deference to the executive branch permitted such a "modicum" to be present

anywhere within the entire record before the Board (or the Governor) – not just within the evidence expressly cited in the parole decision statement.

Reviewing the record that had been before the Board in Shaputis' 2009 parole hearing, the Supreme Court found (as it did in *Shaputis I*) that the record still provided the requisite "some evidence" to support the Board's finding of parole unsuitability. The Court held that the Board had acted well within its discretion to reject the conclusions of the private psychologist hired by Shaputis, where the Board found those conclusions to be inconsistent with the record. Likewise, the Court determined that the Board had acted within its discretion to give little credibility to Shaputis' prepared written statement of remorse and insight after he declined to speak at his parole hearing.

To guide future judicial reviews of parole decisions, after noting that California Courts of Appeal had been "confused" about the proper scope of review, the Supreme Court set forth five "relevant considerations":

1. The essential question in deciding whether to grant parole is whether the prisoner currently poses a threat to public safety.

2. That question is posed first to the Board and then to the Governor, who draw their answers from the entire record, including the facts of the offense, the prisoner's progress during incarceration and the insight he or she has achieved into past behavior.

3. The prisoner has a right to decline to participate in psychological evaluation and in the parole hearing itself. That decision may not be held against the prisoner. Equally, however, it may not limit the Board or the Governor in their evaluation of all the evidence.

4. Judicial review is conducted under the highly deferential "some evidence" standard. The executive decision of the Board or the Governor is to be upheld unless it is arbitrary or procedurally flawed. The court must review the entire record to determine whether a modicum of evidence supports the parole suitability decision.

5. The reviewing court does not ask whether the prisoner is currently dangerous. That question is reserved for the executive branch. Rather, the court considers whether there is a rational nexus between the evidence and the ultimate determination

of current dangerousness. The court is not empowered to reweigh the evidence.

In summary, with this second decision in *Shaputis*' case the California Supreme Court has elevated "lack of insight" into a central factor for the Board to consider when determining parole suitability. The Court also substantially reduced the "wig-

gle room" for California courts to review challenges to lifer parole denials, except those without a "modicum" of supporting evidence anywhere in the record.

Pending its resolution of this case, the Supreme Court had granted "review and hold" on four other appellate rulings in lifer parole challenges (*In re Macias*,

S189107; *In re Adamar*, S190226; *In re Loveless*, S190625; and *In re Russo*, S193197). Following its decision, the Court remanded those cases for reconsideration consistent with this ruling. See: *In re Shaputis*, 53 Cal.4th 192, 265 P.3d 253 (Cal. 2011) (*Shaputis II*), rehearing denied. ¶

CA Court of Appeal: Documents Identifying Suppliers of Execution Drug are Public Records

On December 20, 2011, a California Court of Appeal held that the California Department of Corrections and Rehabilitation (CDCR) may not withhold the names of pharmaceutical companies and other sources from which it sought to acquire a drug used in the state's lethal injection protocol, when a request for that information is made pursuant to the California Public Records Act (CPRA), Government Code § 6250 *et seq.*

In October 2010, the American Civil Liberties Union of Northern California (ACLU) submitted a CPRA request for documents related to the CDCR's acquisition and use of sodium thiopental, the first of three drugs administered to condemned prisoners when they are executed. The CDCR declined to turn over the requested records and the ACLU filed a petition for writ of mandamus in San Francisco Superior Court.

In February 2011, relying on its perception of a "potential problem with boycott and business interests," the Superior Court allowed the CDCR to withhold, among other information, the names of pharmaceutical companies and other businesses and individuals the CDCR had contacted in order to acquire sodium thiopental.

The ACLU appealed, and the 1st District Court of Appeal found that "the

passionate nature of the death penalty debate ... heightens public interest" in the requested documents and "justifies non-disclosure only to the extent [the CDCR] may show that disclosure of that information would pose a potential security threat of some sort" to the pharmaceutical companies or other entities from which the CDCR tried to obtain the drug.

On the merits, the Court of Appeal held that no evidence in the record supported the trial court's determination that the requested records would pose a potential security threat. With respect to the possibility of an economic boycott of the companies involved, the appellate court noted that the CDCR had explicitly disassociated itself from that argument, and thus concluded that the Superior Court's ruling was "based, at least in part, on a judicially perceived threat not credited by CDCR." See: *ACLU v. Superior Court*, 202 Cal. App.4th 55, 134 Cal. Rptr.3d 472 (Cal. App. 1 Dist. 2011).

States have

been scrambling to find new supplies of execution drugs after the overseas companies that produce them have increasingly banned them for use in lethal injections. [See: *PLN*, June 2011, p.1]. Several states are turning to different execution protocols, including Arizona, Ohio, South Dakota, Idaho, Texas and Washington. On July 18, 2012, Texas used a single dose of pentobarbital to execute prisoner Yokamorn Hearn, 33. Other states, such as Missouri, have switched to a different drug – propofol – for lethal injections. ¶

Additional sources: *Metropolitan News-Enterprise*, www.timesonline.com, www.abcnews.go.com

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Florida Town Rallies to Stop CCA Immigration Detention Facility

by David M. Reutter

Residents in a South Florida community near a proposed 1,500-bed privately-operated immigration detention center waged a successful yearlong opposition campaign that culminated in the cancellation of the project in June 2012.

Corrections Corporation of America (CCA) purchased a 24-acre plot in the town of Southwest Ranches 15 years ago, with the intention of eventually building a prison or detention facility on the property. The land was located just outside the city of Pembroke Pines near an existing state women's prison, and Immigration and Customs Enforcement (ICE) preliminarily selected the site for a detention center in 2010. ICE contracts with CCA to operate 13 facilities nationwide that hold immigration detainees.

Documents filed in Broward County by Southwest Ranches officials described ICE's intention. "ICE requires approximately 1,500 to 2,000 new detention beds to meet local demand in the Miami Metropolitan area. Ideally, this demand would be met by one 1,000-1,500 bed facility, with the capacity to expand to 2,000 beds."

The proposed CCA-run facility, the Southwest Ranches Detention Center, would be almost three times the size of the Krome Detention Center in Miami, making it the largest such facility in South Florida. CCA said the \$75 million prison would create 300 "stable, well-paying local jobs and careers," and would be "community friendly."

Residents in Pembroke Pines, however, didn't buy the company's PR pitch. "We are concerned about an increase in crime, and increases in traffic," said Ryann Greenberg, a member of Residents Against SW Ranches ICE Detention Center, who noted the facility would be located near residential areas and several schools.

Residents envisioned seeing armed guards watching busloads of prisoners and escapees prowling local neighborhoods. They also were concerned about the negative impact on property values, liability issues and the burden on the city's public services as a result of the proposed detention center.

Greenberg and other citizens opposed to the CCA facility formed a Facebook page, staged public protests, put up "no prison" signs, distributed fliers, filed

public records requests, circulated a petition and packed city hall to express their concerns.

At the behest of the U.S. Department of Homeland Security, local officials were encouraged to say little about the immigration detention center project. "The less we say, the better off we will be," Southwest Ranches attorney Keith Poliakoff said in an email to town leaders. Southwest Ranches stood to benefit financially from the CCA facility — the company indicated it would pay the town \$1.5 million a year, including \$350,000 in property taxes.

A contract signed with Southwest Ranches in 2005 gave CCA the right to build whatever it wanted on the property it owned. "Legally, this facility can be built today as of right," said Poliakoff. "If the owner came in for a building permit to develop the site tomorrow, the town would legally have to issue the permit and construction could immediately commence."

There were reportedly 27 public hearings on the matter before the contract was signed, though they apparently were not well publicized, as local residents were caught off guard when CCA and ICE began moving ahead with the detention center. Protestors attended an October 2011 hearing on Pembroke Pine's contract with Southwest Ranches to provide water, sewer, fire and emergency medical services for the proposed CCA facility.

"We want them to rescind the contract so it doesn't include water and fire/EMS services for the detention center," Greenberg said. "If this detention center doesn't have water and sewer, it can't exist. In the agreement, [the contract language specifies], 'the willingness to provide these services,' and Pembroke Pines residents are not willing to provide this service, because we don't want [the facility] near our homes, schools or even our community."

U.S. Representative Debbie Wasserman entered the fray by issuing a letter in support of the proposed detention center, but criticized town officials for their silence on the issue. Broward County's property appraiser, Lori Parrish, also issued a statement about the property owned by CCA in Southwest Ranches.

Parrish cited potential tax evasion by the company. CCA had purchased the

land for \$5 million while it was appraised at \$3 million, resulting in a property tax bill of approximately \$60,000. However, CCA was only paying \$3,000 because it used a loophole in Florida law that allows agricultural tax exemptions when cows are on the property. CCA leased the land for \$10 a year to the Green Glades Cattle Co., a business owned by property developer Ron Bergeron, who had sold the property to CCA. The company's use of Bergeron's "rent-a-cow" business let it exploit the tax loophole.

"They don't make money on the lease. It's not to have the property make money on [the agricultural exemption]. In my opinion, it's tax avoidance," said Parrish.

County appraiser photos from December 2010 showed no cows on the site, but CCA spokesman Steve Owen attributed that to rotation of the cows from property to property. The tax exemption applies even if cows are on the land for only one day per year.

Beyond the property tax issue, the fight against the CCA detention center heated up in early 2011 as residents petitioned city officials in Pembroke Pines to take action against the facility. "They're selling our towns to lobbyists and special interests," said Greenberg.

They were joined by other activists, including the Florida Immigrant Coalition (FLIC), which was at the forefront of the issue and organized meetings and protests, set up a website (www.ccagoaway.org) and advocated against the proposed immigration detention center. They also learned that ICE had not conducted an environmental impact study when selecting the Southwest Ranches site.

"Some residents wanted to push the message that criminals were coming into their community and that they would lose their safety, but the facts showed that the enemy was CCA and that the detainees were victims of a profit-driven system that puts their health, safety, their very lives at risk so CCA could make more money," FLIC stated.

The city commissioners for Pembroke Pines listened, and on March 7, 2012 voted to withdraw from their agreement with Southwest Ranches to provide water, sewer, fire and emergency medical services to the proposed CCA facility, despite having received conflicting legal opinions as

to whether they were obligated to honor the contract.

CCA filed a federal lawsuit against Pembroke Pines the very next day, arguing that the city was interfering with the company's plans to build the detention center. See: *CCA v. City of Pembroke Pines*, U.S.D.C. (S.D. Fla.), Case No. 0:12-cv-60427-WJZ.

The city in turn sued CCA in state court, seeking a declaratory judgment as to whether it was within its rights to withdraw from the agreement with Southwest Ranches, which included a nine-month termination for convenience provision. Further, CCA was not a party to that contract, which expressly disclaimed third-party beneficiaries. See: *City of Pembroke Pines v. CCA*, Circuit Court of the 17th Judicial Circuit for Broward County (FL), Case No. 12-7337.

Officials in Southwest Ranches and Pembroke Pines also engaged in a series of conflict resolution discussions, though little progress was made, with the former accusing the latter of breach of contract. "If you provide water and sewer to CCA, then this issue will go away," Southwest Ranches Mayor Jeff Nelson said to city commissioners for Pembroke Pines.

Ultimately, though, it was the federal government that decided the issue. On June 15, 2012, ICE announced it no longer needed a detention center in the area, effectively killing the proposed CCA prison. "ICE has reevaluated its need for an additional detention facility in South Florida and has decided that it will no longer pursue a facility in the Town of Southwest Ranches," the agency said in a written statement.

"It's a great day!" exclaimed Pembroke Pines resident Heidi Jones. "We're just very, very grateful. It was a very long fight. It's been a yearlong battle and there was always doubt [that we'd win.] I just knew there had to be some voice of reason somewhere and we just had to keep throwing everything at it we could."

"Having ICE walk away from this detention center is definitely a step in the right direction," added Kathy Bird, an organizer for the Florida Immigrant Coalition. "This shows that our government is listening to us, finally. That's at least how I feel today."

Despite CCA's claims of being "community friendly," it is still proceeding with its lawsuit against Pembroke Pines, which has spent at least \$125,000 in legal fees in connection with the proposed immigra-

tion detention center.

According to Pembroke Pines commissioner Angelo Castillo, defending against the suit is part of the price the city has to pay for standing up against CCA. "The cost of doing the business of government can't be an excuse for government not to do its job," he said. "We are doing the job we're supposed to do." ■

Sources: *Tampa Tribune*, www.floridaindependent.com, www.local10.com, www.cicagoaway.org, www.noprisonswr.org, www.sun-sentinel.com, *Miami Herald*

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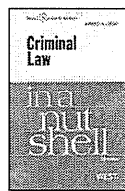
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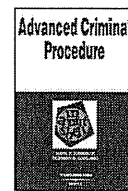
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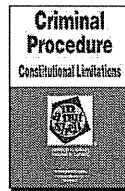
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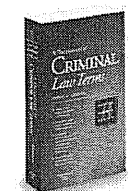
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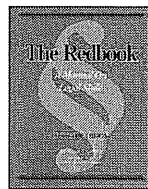
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PLN Settles Censorship Suit Against Sacramento County, California Jail

On July 17, 2012, *Prison Legal News* settled a lawsuit against Sacramento County, California and Sheriff Scott R. Jones for \$300,000 plus policy changes in the county's jail system.

The suit was filed in federal court in April 2011 after Sacramento County jail staff refused to deliver PLN's monthly publication to prisoners and failed to notify PLN of that censorship in violation of the First and Fourteenth Amendments to the U.S. Constitution. The publications were rejected because they included small staples (used to hold the magazine together) and had mailing labels or stickers, which jail officials said posed a security risk.

The federal court granted PLN's motion for a preliminary injunction on March 7, 2012, with U.S. District Court Judge John A. Mendez finding that the jail's censorship of publications sent to prisoners was "an exaggerated response to any security concerns posed by PLN."

The court further held that PLN had "demonstrated a likelihood of success on the merits of its First Amendment claim," and that the defendants' "policies and practices including refusing to deliver PLN publications and mailings to prisoners because they contained staples and/or a mailing label are not supported by a legitimate penological interest and do not leave open alternative means for PLN to exercise its First Amendment rights."

A settlement agreement followed four months later.

In addition to the \$300,000 payment to PLN for damages and attorney fees, the jail agreed to change its mail policies to allow prisoners to receive publications that have staples or mailing labels, provided that staff may remove the staples and labels. The jail also will supply "adequate written notice and an administrative review process" to PLN and other publishers when any publication, correspondence or documents sent to prisoners are rejected. Finally, the county agreed to purchase four 5-year subscriptions to PLN for each jail library.

The settlement, in the form of a consent decree, specifies "that providing prisoners with access to reading materials promotes positive contact with the communities into which prisoners will eventually be released and is therefore consistent with

the Defendants' public safety mission."

"We are pleased that Sacramento County has agreed to adopt lawful mail policies for its jails and stop engaging in unconstitutional censorship," said PLN editor Paul Wright. "But we would have been more pleased had the jail not censored our publication to begin with, which necessitated our filing a lawsuit to protect our First Amendment rights."

"There has been an unfortunate trend recently for local jails to adopt all kinds of restrictions on reading materials," added Ernest Galvan, one of the attorneys who represented PLN. "Reading materials are

not a threat to safety. On the contrary, access to a wide range of reading materials helps people learn that there are lawful non-violent ways to solve the problems that they will inevitably face when they return to the community."

PLN was represented by attorneys Sanford Jay Rosen, Ernest Galvan, Kenneth Walczak and Blake Thompson of Rosen, Bien, Galvan & Grunfeld LLP, a San Francisco law firm, and by Human Rights Defense Center chief counsel Lance Weber. See: *Prison Legal News v. County of Sacramento*, U.S.D.C. (E.D. Cal.), Case No. 2:11-cv-00907. ■

U.S. Supreme Court Holds AG Rules Required Before SORNA Sex Offender Law is Applied Retroactively

by Derek Gilna

On January 23, 2012 the U.S. Supreme Court, in a 7-2 decision written by Justice Stephen Breyer, reversed the Third Circuit Court of Appeals, which had held that the federal Sex Offender Registration and Notification Act (Act) applied retroactively even in the absence of a rule by the U.S. Attorney General setting forth specifics as to registration requirements for previously-adjudicated sex offenders.

The Supreme Court found in favor of plaintiff Billy Joe Reynolds, who had challenged federal district and appellate court decisions that he had violated the Act, which requires people convicted of certain sex crimes to give state governments information such as their names and current addresses for registration purposes.

The Act also states that "[t]he Attorney General shall have the authority to specify the applicability of the [registration] requirements ... to sex offenders convicted before the enactment of this chapter...," § 16913(d). According to the Court, "In our view, these provisions, read together, mean that the Act's registration requirements do not apply to pre-Act offenders until the Attorney General specifies that they do apply."

The Act became law on July 27, 2006, and on February 28, 2007 the U.S. Attor-

ney General promulgated an Interim Rule which indicated that the Act applied to "sex offenders convicted of the offense for which registration is required prior to the enactment" of the law. 72 Fed.Reg. 8897 (codified at 28 CFR § 72.3). Additional rules were promulgated by the Attorney General in 2008, 2010 and 2011, but the case before the Court concerned the time period between July 27, 2006 and February 28, 2007.

Reynolds was a pre-Act offender who was indicted after moving from Missouri, where he was registered as a sex offender, to Pennsylvania, where he did not register. He filed a motion to dismiss the indictment, claiming that the Interim Rule was invalid because it violated both the Constitution's "non-delegation" doctrine and the Administrative Procedure Act's requirement for "good cause" to promulgate a rule without "notice and comment," as the Attorney General admittedly had done. Reynolds argued that since the Interim Rule was invalid, he must be treated as a "pre-Act offender who traveled interstate and violated the Act's registration requirements before the Attorney General specified their applicability."

The district court rejected Reynold's challenge to the Interim Rule but the Third Circuit did not reach the merits of that argument on appeal, rather focusing

on its view that the Act's registration requirements applied to pre-Act offenders like Reynolds from the date of the law's enactment without the issuance of any rules by the Attorney General. Under that reasoning, any defects regarding the Interim Rule would be immaterial.

The Supreme Court noted a conflict between the various Circuits regarding

when the Act could be applied retroactively, and observed that the government's legal arguments "overstated the need for instantaneous registration of pre-Act offenders...." The Court concluded "that the Act's registration requirements do not apply to pre-Act offenders until the Attorney General so specifies." The Third Circuit's ruling to the contrary was

accordingly reversed and remanded for further proceedings.

Justice Scalia, joined by Justice Ginsberg, dissented, finding the Attorney General's power to immediately enforce the Act was "little more than a formalized version of the time-honored practice of prosecutorial discretion." See: *Reynolds v. United States*, 132 S.Ct. 975 (2012). ■

New Mexico Sheriff Sentenced for Selling County Property on eBay

On July 20, 2011, former Santa Fe County, New Mexico Sheriff Greg Solano, 47, pleaded guilty to five counts of third-degree fraud for selling county property on eBay and keeping the proceeds. The property, which was reportedly worth over \$75,000, included everything from cell phone chargers, printer cartridges and blank CDs to bulletproof vests, holsters and other law enforcement equipment.

Originally charged with 252 counts of embezzlement and fraud, and facing up to 100 years in prison, Solano entered into a plea bargain to reduce his maximum potential sentence to eight years.

"Solano was elected to protect and serve, not steal and profit," said special prosecutor Matt Chandler. "In an era where public trust has become the topic of the day, I believe it is time to send a message that gross misconduct by public officials will be strictly punished, and I believe an eight-year prison sentence will send that message."

Solano, free on \$25,000 bail, said financial problems, including back mortgage payments, led him to embezzle from the county. However, there were also allegations that he was gambling at casinos in Nevada and New Mexico. Solano resigned in November 2010 after admitting to his misconduct; he had

served as sheriff since 2002.

In September 2011, Solano was sentenced to 120 days in the Santa Fe County jail and four years of probation. He will also have to pay \$25,000 in restitution, though he was not required to repay the \$64,200 cost of an audit conducted by the county to determine the extent of the fraud. At his sentencing hearing he said,

"I was desperate, and I was stupid."

Solano was released from jail in October 2011 after serving 6 weeks of his three-month sentence, which was reduced for good behavior. He spent his jail time in protective custody. ■

Sources: *Reuters*, www.correctionsone.com, *Santa Fe New Mexican*, www.kob.com

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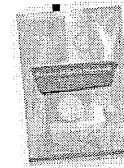
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Eleventh Circuit Upholds Florida DOC's Ban on Pen Pal Solicitations

by David M. Reutter

The Florida Department of Corrections (FDOC) may ban all pen pal solicitations between pen pal services and Florida prisoners, the Eleventh Circuit Court of Appeals held on December 22, 2011. The appellate decision affirms a federal district court's January 2011 summary judgment order that found the FDOC's Pen Pal Solicitation Rule, F.A.C. Chapter 33-210.101(9), does not violate the First or Fourteenth Amendments. [See: *PLN*, Oct. 2011, p.11].

The challenge to the FDOC's pen pal rule was brought by Joy Perry, who operates Freedom through Christ Prison Ministry and Prison Pen Pals, and by WriteAPrisoner.com (WAP). Each service solicits pen pals for prisoners and non-prisoners by providing them with a list of pen pals or placing pen pal ads online. WAP charges a fee to put prisoners' ads for pen pals on its website; it also provides other services for prisoners, such as access to educational programs, an online résumé posting service and a program that grants scholarships to prisoners' children or victims of crimes. Perry does not charge any fees for her pen pal services.

The FDOC said it enacted its ban on pen pal solicitation to prevent prisoners from using pen pal services to defraud people. "Although the FDOC does not cite any specific instances of fraud within Florida, the district court found the testimony of a former FDOC employee and anecdotal evidence from newspaper reports throughout the country persuasive evidence of this fraudulent activity," the Eleventh Circuit wrote.

That finding proved to be dispositive, as the court applied a "rational basis review." The Court of Appeals acknowledged that ordinarily outgoing prison mail is reviewed under the higher standard set forth in *Procunier v. Martinez*, 416 U.S. 396 (1974). But James Upchurch, Chief of Security Operations for the FDOC, had submitted an affidavit that stated "outgoing correspondence poses a direct threat to internal prison security because pen pals might give money to prisoners who will then use it to bribe officials and order hits on other inmates"; thus, the four-prong test of *Turner v. Safely*, 482 U.S. 78 (1987) applied rather than *Martinez*.

The Eleventh Circuit found that requiring prisoners to obtain "pen pals through personal associates and not pen pal compa-

nies" was rationally related to the legitimate penological interests of protecting the public from fraud and ensuring internal prison security. An alternative for WAP was to advertise its non-pen pal services to prisoners. As for prisoners, they could still correspond with pen pals and use services that provide "one-to-one matching" rather than blanket solicitations or ads for pen pals.

Allowing mail from pen pal services, the appellate court held, would cause a significant increase in the "roughly 50,000 pieces of mail" the FDOC receives daily, requiring it to reassign guards to review the increased volume of correspondence and to "shift inspectors to investigate possible pen pal scams." Finally, the Court

of Appeals found the FDOC's pen pal solicitation ban was not an exaggerated response by prison officials.

After deciding there was no First Amendment violation, the Eleventh Circuit held the plaintiffs had received all the process they were due to challenge the denial of their pen pal advertisements. The district court's summary judgment order was therefore affirmed. See: *Perry v. Secretary, Florida Department of Corrections*, 664 F.3d 1359 (11th Cir. 2011).

Another federal appellate court – the Seventh Circuit – has upheld a similar ban on prisoners' pen pal ads, in Indiana's prison system. [See: *PLN*, May 2012, p.24]. ■

Former Florida Sheriff Cleared in Theft Investigation and PHS Contract Fraud Suit

Following a two-year investigation and a jury verdict in a civil suit, a special prosecutor announced in June 2011 that criminal charges would not be forthcoming against Bill Balkwill, former sheriff of Sarasota County, Florida.

The jury verdict was entered in a lawsuit filed by Prison Health Services (PHS) that alleged Balkwill had improperly awarded a contract to another company to provide medical care for jail prisoners. The criminal investigation focused on Sheriff's Office property that was found in Balkwill's possession months after he retired.

PHS's lawsuit, filed in circuit court, claimed that Balkwill awarded a \$9 million jail medical contract to Armor Correctional Health Services in August 2006 after he received gifts and perks from Armor officials. One of those perks involved a fishing trip on Lake Okeechobee. Armor's CEO and lobbyist also took Balkwill and his wife to expensive dinners prior to the contract being awarded. [See: *PLN*, Dec. 2009, p.22; Jan. 2009, p.36; March 2008, p.44].

In an attempt to prove that Balkwill had communicated with Armor executives before awarding the contract, PHS sought to examine his laptop for emails and other evidence.

The Sheriff's Office began an investigation in April 2009. It found that Balkwill had pressured the department's former Information Technology Director,

Jeff Feathers, to fill out a form claiming the laptop was worth only \$10. The form designated the laptop as junk to be recycled.

The laptop, however, was later found during a search of Balkwill's home; he then "scrubbed" it of certain files before turning it over. He claimed the 11,000 files he deleted were personal photographs and files that contained national security information, though the judge in PHS's lawsuit held that Balkwill had destroyed the files despite a court order not to tamper with the computer. Former Armor CEO Doyle Moore had also deleted files from his laptop before surrendering it as evidence in the case.

"The destruction of files subject to production and inspection, both by Balkwill and Moore, cannot be excused," the court wrote. "The deletions were intentional and must be viewed as attempts to thwart discovery."

PHS had hoped to find communications between Armor's CEO and Balkwill, his "good friend." A Florida Department of Law Enforcement forensic review of Balkwill's laptop revealed nine emails pertaining to the disputed jail medical contract; most of the deleted messages and files could not be recovered.

During the search of Balkwill's home, investigators also found a leather office chair with an engraved eagle and three pistols. The \$650 chair had been purchased

with a Sheriff's Office credit card. Sarasota County prosecutors rejected potential theft charges related to the chair, advising detectives that it "did not rise to the level worthy of criminal prosecution."

Two of the guns belonged to the Sheriff's Office prior to Balkwill writing a check to buy them for \$200, which was far below their market value. As to the purchase of the guns, Sheriff's Captain Jeff Bell wrote, "This seemingly skirts the application of criminal laws but certainly gives rise to ethical concerns."

Detectives believed that Balkwill's possession of the laptop constituted criminal theft, as the \$2,600 computer would normally be replaced after five years but Balkwill had it valued at \$10 and slated for recycling before he took it home. Sarasota County prosecutors recused themselves

due to a conflict of interest, as they had worked with the former sheriff during his eight years in office.

A special prosecutor, Wayne Chalu, was assigned to the case. In a ten-page memo issued in June 2011, Chalu announced that no charges would be filed because as sheriff, Balkwill had the authority to decide when Sheriff's Office property should be destroyed. Chalu also determined that Balkwill had a "legitimate concern" that confidential files on his laptop would become public before he could destroy them. Thus, he did not face any criminal prosecution.

Previously, in November 2010, the jury in PHS's civil lawsuit held that the county and Balkwill had done nothing wrong when awarding the jail medical contract to Armor. The jurors found that

the Sheriff's Office had exercised its "honest discretion in awarding the jail contract to Armor, Balkwill was not improperly or corruptly influenced by Armor in awarding the contract, Balkwill did not act arbitrarily and capriciously in awarding the jail contract and Armor did not use unfair methods of competition or trade." See: *Prison Health Services v. Balkwill*, Circuit Court of the 12th Judicial District for Sarasota County (FL), Case No. 2007-CA-10652 NC.

Armor CEO Bruce Teal reportedly cried when the jury ruled against PHS and in Armor's favor following the hard-fought litigation. Balkwill did not testify during the trial. ■

Sources: www.heraldtribune.com, www.yoursun.com

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Pro Se Virginia Prisoner Settles Religious Exercise Suit

Virginia state prisoner Rashid Qawi Al-Amin, proceeding pro se, reached a settlement with prison officials that requires them to purchase Islamic reading materials, CDs and DVDs for the prison chaplain's library. The state also agreed to pay him \$2,000.

Al-Amin, a prisoner at Greensville Correctional Center (GCC), filed a lawsuit under the Religious Land Use and Institutionalized Persons Act (RLUIPA) in 2004. In 2005, U.S. District Court Judge Raymond A. Jackson dismissed the case on procedural grounds, but it was reinstated by the Fourth Circuit Court of Appeals two years later. See: *Al-Amin v. Shear*, 218 Fed.Appx. 270 (4th Cir. 2007).

Judge Jackson dismissed the suit again in 2008, citing a lack of merit. The Fourth Circuit again reversed. See: *Al-Amin v. Shear*, 325 Fed.Appx. 190 (4th Cir. 2009). Al-Amin rejected an offer of counsel, and discovery ensued over the next two years. When Jackson set the matter for trial he asked the parties to try to settle the case.

The May 2011 settlement agreement requires prison officials to "purchase up to \$2,500" of "new library materials which have been selected by the Muslim Chaplain Services as being appropriate and adequate to assist Muslim inmates in the study of their religion." Al-Amin was allowed to submit a list of proposed materials to be purchased for the library.

The settlement also requires prison officials to "hire and maintain a Muslim inmate" to work in the prison chaplain's library at GCC. The duties of the Muslim Chaplain's clerks will include performing "an annual inventory of the Muslim contents of the Chaplain's library." Further, prison officials will implement a process that allows prisoners to make donations to the library.

When he first arrived in prison, Al-Amin was known as Donald Tracey Jones. Shortly after he began serving a 52-year sentence for a drug-related murder, he converted to Islam and changed his name. Prison officials refused to acknowledge his Muslim name. The settlement changes that policy, and requires prison officials to amend their records "to permit Plaintiff to use the name Rashid Qawi Al-Amin in conjunction with his offender number to access services and property generally available to inmates."

In addition to posting notices on

GCC bulletin boards that list approved religions, plus "a statement that there shall be no discrimination by staff or prisoners based on their religious beliefs or practices," prison officials must also include Muslim prisoners in the preparation of religious meals. Finally, the state agreed to pay Al-Amin \$2,000 to cover the costs he incurred in litigating the case.

A prison chaplain's association was not pleased with the outcome. "That's a terrible settlement. It sets a very bad

precedent," said Gary Friedman, communications director for the American Correctional Chaplains Association. "Public funds should not be used to purchase sectarian materials."

Prison officials and the state Attorney General's Office had no comment on the terms of the settlement agreement. See: *Al-Amin v. Johnson*, U.S.D.C. (E.D. Vir.), Case No. 2:04-cv-00346-RAJ-FBS. ■

Additional source: www.hamptonroads.com

\$50 Million in Grants Targets HIV in the Criminal Justice System

The National Institute on Drug Abuse (NIDA), a division of the National Institutes of Health, is awarding almost \$50 million in grants to fund research projects that target HIV among prisoners, parolees and probationers.

The grants will be distributed over a five-year period to 12 research teams, which will conduct studies in locations that include the Los Angeles County Jail; the jail system in Cook County, Illinois; Rikers Island in New York; prisons in North Carolina, Illinois, Texas, Wisconsin and Rhode Island; and jails in the District of Columbia.

"These important and wide reaching research grants will focus on identifying individuals with HIV within the criminal justice system and linking them to highly active antiretroviral therapy (HAART) during periods of incarceration and after community re-entry," stated NIDA Director Dr. Nora D. Volkow. "We hope this effort will lead to decreased HIV/AIDS-related illness and death among those in the criminal justice system, as well as decrease HIV transmission in the community at-large, making an important impact on public health."

Illinois will receive \$7 million in grants. Researchers from the University of Illinois at Chicago will focus on prisoners in the Cook County Jail and more than two dozen state prisons.

The researchers plan three phases. The first will allocate money to implement HIV testing for all prisoners upon their entry into the prison system, unless they refuse. That policy change conforms to recommended guidelines from the Centers for Disease Control and Prevention, and will hopefully reduce the number of prisoners

who are unaware of their HIV status.

Researchers will also examine whether linking prisoners to HIV care via telemedicine results in better treatment. "Prisoners have typically been managed by prison physicians who are generalists, not sub-specialists, so they don't really have access to specialist care," said Dr. Jeremy Young, one of the lead researchers. Telemedicine will connect prisoners with medical specialists and save the cost of having doctors drive across the state to see HIV+ prisoners.

While telemedicine may be better than no medical treatment, it should be noted that patients in the freeworld, under the community standard of care, see doctors in person and not via long-distance telemedicine video.

The third part of the NIDA-funded project in Illinois will track HIV+ prisoners after they are released. "In the past, prisoners have gotten two weeks of meds and an appointment [for follow-up care] in the city," said Dr. Young. "The problem is, when prisoners go out into the community, many of them start taking drugs and hanging out with old friends, and they don't show up for appointments and get lost in the follow-up."

Additional case managers will be hired with the NIDA grant; they will contact newly-released prisoners and connect them with mental health services, drug counseling and the state's AIDS Drug Assistance Program.

Researchers at the University of North Carolina will use the grant funding to study whether prisoners contract HIV while incarcerated or if they mainly enter the prison system with pre-existing infections. "I think HIV spreading in

prison is so blown out of proportion," stated UNC School of Medicine professor David Wohl.

It is estimated that one in seven people who are HIV+ passes through the

criminal justice system each year, which presents an opportunity for interdiction and treatment. Approximately 2 percent of prisoners have HIV – which is around six times higher than the infection rate in

the general population. [See: *PLN*, July 2010, pp.28, 43].

Sources: *Sun Times*, www.nih.gov, www.dailymail.com

\$3.5 Million Settlement in Teen's Death at New York Juvenile Facility

A \$3.5 million settlement has been reached in a lawsuit over the death of a juvenile offender who was restrained by two staffers at the Tryon Boys Residential Center in Fulton County, New York.

The suit claimed that the civil rights of Darryl Anthony Thompson, 15, were violated as a result of excessive force used by Tryon employees in November 2006. The incident that led to Thompson's death began after he was denied recreation and engaged in a shouting match with Tryon aide John P. Johnson. After being pushed by Thompson, Johnson and another aide, Robert Murphy, restrained him facedown on the floor.

Johnson put his weight on Thompson's torso and raised his arms behind his back as Murphy sat on his legs. Thompson said he couldn't breathe, but Johnson and Murphy continued to restrain him until he

stopped struggling and was unconscious, according to the complaint. Several minutes elapsed before anyone tried to revive him.

"You have a child lying on the floor that you know is in distress, and you do nothing. It's unforgivable," said Elmer R. Keach III, the attorney who represented Thompson's family in their federal lawsuit.

The medical examiner ruled Thompson's death a homicide because the force that was used on him led to stress that caused a heart arrhythmia. Yet, as typically occurs in prisoners' deaths, Johnson and Murphy did not face criminal charges – though they reportedly no longer work for the state.

A settlement agreement in the suit was finalized in November 2011. Thompson's mother, Anntwanisha Thompson, will receive approximately \$2.28 million

of the settlement, with the rest going to attorney fees and costs. "No amount of money will bring this young man back to life; no amount of money can compensate his loved ones for his absence," Keach remarked. See: *Thompson v. Johnson*, U.S.D.C. (N.D. NY), Case No. 6:08-cv-01241-DNH-ATB.

The Tryon facility was closed in 2010 as part of a statewide effort to downsize juvenile prisons in favor of day treatment centers closer to youths' homes. A 2009 federal investigation found that employees at four New York juvenile facilities, including Tryon, had used force as a primary means of restraining youths, causing serious injuries. [See: *PLN*, Nov. 2011, p.32].

Sources: *Associated Press*, *Times Union*, <http://wvny.com>

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Texas: Helping HIV+ Prisoners Receive Post-Release Meds

by Matt Clarke

When Diana Harris was released from a Texas prison more than a decade ago, she received no information on how to continue her regimen of HIV medication. The prison issued her a 10-day supply of meds and when that ran out she basically ignored the problem for the next two years.

"I didn't want to tell my family that I [was HIV+], so I couldn't ask them for help," said Harris. "I was on my own and didn't really know where I should go to keep myself healthy."

Harris now works to address problems with continuity of care for newly-released Texas prisoners who are HIV+. She is a peer advocate with the AIDS Outreach Center in Fort Worth, and meets with releasees in Tarrant County to help them understand the medical system in the free world.

"Navigating a hospital system is daunting if you have been incarcerated since 19 and never had to deal with it," noted Shannon Hilgart, associate executive director of the AIDS Outreach Center. "Getting into a clinic, getting through the paperwork.... It's a whole new learning process."

Fortunately, the system is vastly improved compared to what was in place when Harris was released from prison.

"We can get same-day approval" for a releasee's HIV meds, said Austin HIV medication program worker Brenda Herndon Johnston. "They have it working without delays so, when the client comes in, we get the process rolling as quickly as possible."

That is good news for prisoners who are released to Austin, Fort Worth and other Texas cities with HIV medication support systems in place. Why, then, did a 2009 study headed by Dr. Jacques Bailleart at the University of Texas Medical Branch at Galveston (UTMB) find that only 17.7 percent of 2,115 HIV+ prisoners had received post-release medication within 30 days of their release from Texas prisons between January 2004 and December 2007? Some medical officials place the blame squarely on the prisoners.

"Once they leave prison, we no longer have any control over what they do," stated Owen Murray, vice president for prisoner health services at UTMB, which provides about 80% of the medical care

in Texas' prison system. "We can't drive to their houses and make sure they go to the clinic. I really think the state is doing everything it can."

Instead of criticism, however, what newly-released HIV+ prisoners need is practical help with obtaining their medication – such as reminders about medical appointments, help with transportation to clinics, and assistance in filling out paperwork and dealing with the health care system bureaucracy.

Janina Davis is the re-entry coordinator for the Texas HIV Medication Program, which provides HIV meds to low-income Texans. She said state officials held a summit to discuss the problem of continuity of HIV medication for released prisoners, and decided to pursue several strategies to connect prison health care

services with services available from various community organizations. While not as effective as the state providing HIV medication to releasees directly, it is a way to make efficient use of existing resources.

"Prisoners receive such good [HIV medicine] regimens in prison that most are released with undetectable viral loads," said Davis. "If they lapse, that is such a waste of what was expensive medication."

Which is all the more reason for prison officials to ensure that HIV+ prisoners receive the resources and support they need to continue their meds once they are released. ■

Sources: *Fort Worth Star-Telegram*, www.thebody.com, www.jama.com

Texas Legislator Uses Prisoner-Made Goods as Gifts for Campaign Contributors

by Matt Clarke

When Republican Texas State Representative Debbie Riddle scheduled her "Riddle Executive Leadership Summit" at the Lanier Theological Library in August 2011, the agenda mentioned several "esteemed discussion leaders," a buffet reception and special gifts for large campaign donors. According to an article in the *Houston Chronicle*, those gifts – which were produced by state prisoners – included heirloom-quality furniture and other items made in Texas Correctional Industries (TCI) programs.

The invitations Riddle sent to her supporters included a request for campaign donations at several "participation levels," ranging from \$1,000 to \$20,000. Each participation level had a corresponding gift, such as prisoner-made replicas of furniture from the Capitol, a hand-tooled leather-topped coffee table with matching chair, a hand-tooled leather duffel bag, a Lone Star flag cutting board, a hand-tooled leather rifle case and a hand-carved rocking horse with leather saddle.

The furniture included hand-carved Capitol benches, constitutional chairs, judge's chairs and desks. "Please note that the donor gifts are exclusive and can-

not be purchased on the open market," the invitation stated. "The descriptions seem inadequate for most of these items, and you will find an enclosure with photographs to show their beauty."

Outside the Texas prison system, the only individuals who can purchase goods made in TCI programs are lawmakers. When questioned about giving gifts to campaign donors that were obtained by virtue of her legislative position, and whether that was uncomfortably close to using an elected office to raise campaign funds, Rep. Riddle demurred.

"It's no different than 'if you donate that you get a T-shirt and a coffee mug,'" she said. "We can purchase these items from the prison system as gifts. We can buy them, but we cannot sell them. I am not selling these any more than I am selling a T-shirt" given to someone who makes a donation.

The difference, of course, is that there is no restriction on who can purchase and then give away T-shirts or mugs. But items produced in TCI programs are not available to the general public and can only be acquired by government agencies and lawmakers.

Riddle was candid about her actions.

"It is not at all uncommon for elected officials, way, way long before I got here, if they have a donor who has been very generous to them, to give them a constitutional chair or a judge's chair [the styles of chairs used in the Capitol] or something like that," she said. "I am an open book. I'm not doing anything different than anyone else has done, except maybe I've been a little less subtle. Maybe I'd be a better politician if I learned how to play tricks."

State Rep. Charlie Green, who chairs the House Administrative Committee, when asked about rules for the purchase of TCI-made items by state legislators, said it was "up to the individual member" so long as they did not resell what they bought. Asked about using such purchases as gifts for campaign contributors, he said he had never heard of that practice before and would not do it personally.

State ethics laws expert Buck Wood, an Austin attorney, added that while there was no specific prohibition against using TCI products as donor gifts, it didn't pass his smell test. "You can't use the prison system as a manufacturer to attract campaign dollars," said Woods. "I'm sure there are instances where as a

token of their appreciation – not necessarily in connection with a fundraiser – that legislators have [given gifts]. I find that very different from what you have described here. This is 'give me money and I will reward you by using my access to prison industry materials to get you things.'"

Rep. Riddle continued to defend her position, saying she could have had the gifts made elsewhere but "this is my way of helping those guys behind bars earn some money. There are some really fine craftsmen that have made bad decisions."

The only problem with that reasoning is that most prisoners employed in TCI

programs receive no pay for their work – a fact that any Texas legislator should know. Thus, all that Riddle accomplished was to exploit the prison slave labor of those "really fine craftsmen" while using her elected office to reward campaign donors with prisoner-made gifts. ■

Source: *Houston Chronicle*

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BOP's RDAP Program Unevenly Administered and Unnecessarily Costly

by Brandon Sample and Derek Gilna

A comprehensive review of the federal Bureau of Prisons' (BOP) Residential Drug Abuse Program (RDAP), enacted by Congress in 1994, indicates that almost 20 years after its creation RDAP has yet to fulfill its full potential and is unnecessarily expensive.

The enactment of 18 U.S.C. § 3621, which authorized RDAP, was originally designed to provide not only substance abuse treatment to a large number of BOP prisoners but also to instill lifestyle changes that would reduce recidivism. The program was formulated by Congress to help decrease the rapidly escalating federal prison population by addressing behaviors that result in prisoners committing new crimes after they are released.

Unfortunately, although a positive initiative, RDAP was not initially embraced by BOP prisoners, who objected to the more difficult aspects of the program. As a result enrollment was low and many prisoners accepted into RDAP failed to complete it.

This low level of participation continued until the BOP elected to follow Congress' legislative mandate in its entirety, specifically § 3621(e)(2), which provides that non-violent prisoners who successfully complete RDAP are eligible for a sentence reduction of "not more than one year." Paragraph (e)(5)(A) of the same statute additionally provides that the program must be "at least 6 months" in duration.

Simply put, any eligible federal prisoner who puts in the time and effort necessary to complete RDAP will receive up to an additional year off their sentence, along with the usual 15% sentence reduction for "good time" plus placement in a halfway house that further reduces time spent in prison – with the latter being subject to availability and BOP policy. For example, a non-violent prisoner with a seventy-eight month (6½ year) sentence could conceivably be released from prison in just under five years if he received the maximum allowable credits, completed the RDAP program and was released to a halfway house for 6 months.

However, the BOP's implementation of RDAP has failed to substantially reduce the federal prison population, which continues to expand. The BOP, like many federal agencies, has the authority

to formulate rules to execute laws enacted by Congress, and there is a set period of time for public comment regarding that process. After the public comment period expires, the rule is incorporated into BOP Program Statements and has the force of law unless specifically abrogated by subsequent Congressional action. Unfortunately the BOP has a history of watering down Congress' legislative intent, as demonstrated by its implementation of both RDAP and the Second Chance Act.

The Second Chance Act was designed to address the growing BOP prison population, now approximately 217,800, by providing funding to programs to help prisoners transition back into society – with the ultimate goal of reducing recidivism. However, the Second Chance Act has not made a dent in the BOP's prison population, which stands at record levels. Further, a recent examination of Department of Justice data indicates that a large amount of the limited funding for the Second Chance Act goes to state and local governments, including corrections and law enforcement agencies, rather than to community-based programs that assist released prisoners. [See: *PLN*, July 2012, p.46].

Further, the Second Chance Act specifies that prisoners may be assigned to a halfway house for up to 12 months – doubling the previous length of a halfway house stay. Yet while the average amount of time prisoners are assigned to halfway houses has reportedly increased, in the vast majority of cases the BOP is not providing a full year of halfway house placement for prisoners nearing release, and federal prison officials have indicated that most prisoners will receive a maximum of six months at a halfway house.

Sadly, it appears that RDAP has also fallen victim to the BOP's practice of implementing rules that may not coincide with Congressional intent. The BOP, via its rule-making authority, has established RDAP as a 9- to 12-month program even though Congress set the minimum duration at six months. BOP Program Statement 5330.11 specifies that RDAP has a "duration of 9 to 12 months," plus a Transitional Drug Abuse Treatment (TDAT) component of up to six months – which all prisoners who successfully

complete RDAP's in-prison program must finish after they are released to a halfway house.

This lengthy and somewhat arbitrary amount of time necessary to complete the RDAP program costs taxpayers millions of dollars a year. Keeping in mind that most community-based substance abuse treatment programs are generally 30 to 60 days in duration, with some extending up to 6 months, an in-prison RDAP program of 9 to 12 months appears to be excessive. It is also expensive.

Based upon an estimated 18,000 prisoners graduating from RDAP each year, and the average cost of incarceration for federal prisoners running about \$28,000 annually (based upon BOP data), requiring an RDAP duration of 9 rather than six months costs approximately \$126 million in additional annual incarceration costs. For a 12-month RDAP program the extra cost is around \$252 million. Lengthening the RDAP duration also limits the number of prisoners who can enroll in the program and reap its benefits.

In the past, the BOP has been criticized for failing to ensure that all eligible prisoners can participate in RDAP; in 2007, for example, only 80% of federal prisoners eligible for RDAP were enrolled in the program. The BOP's Annual Report on Substance Abuse Treatment Programs for Fiscal Year 2008 stated, "Without additional funding, the agency will [be] unable to meet [Congress's goal] of treating 100 percent of eligible" prisoners. [See: *PLN*, Jan. 2010, p.45].

According to the BOP's 2013 budget request, the department intends to expand RDAP to "all eligible inmates" as required by § 3621, assuming it receives funding to do so. Whether the BOP will in fact provide all eligible prisoners with access to RDAP, and whether federal prison officials will administer that program in a more efficient and cost-effective manner in the future, remains to be seen. ■

Sources: *OJP Awards by Solicitation and State, Bureau of Justice Assistance Grants for Fiscal Year 2011 (as of Sept. 30, 2011)*; *Department of Justice, Bureau of Prisons, report on cost of prisoners (Dec. 28, 2011)*; 18 U.S.C. § 3621; *BOP Program Statements 5331.02 and 5330.11*; www.famm.org



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For more information: www.prisonphonejustice.org and www.phonejustice.org

Tenth Circuit Holds Sex Offenders Who Leave U.S. Must Still Register

by Derek Gilna

The Tenth Circuit Court of Appeals held on December 23, 2011 that a Utah sex offender must register in his home state even if he intends to permanently leave the U.S. to live in another country. Kevin Daniel Murphy, convicted of aggravated sexual assault and aggravated sexual abuse of a child, absconded from the Bonneville Community Correction Center in Salt Lake City in 2007 before fleeing to California, Mexico and then to Belize.

Murphy moved to Belize under an assumed name because he erroneously thought that Belize's government would not extradite him. However, he was deported to the United States because he lacked proper immigration papers, and was subsequently prosecuted and convicted in federal court for violating the Sex Offender Registration and Notification Act (SORNA), 48 U.S.C. § 2250. Murphy appealed his conviction and two-year sentence.

The Tenth Circuit found that Murphy's intention to leave the country did not relieve him of his obligation to register. "For [registration] purposes, a sex offender continues to reside in a state even after a change in residence or employment, both of which trigger reporting obligations, even if the offender eventually leaves the state," the appellate court wrote. "Therefore, even if an offender abandons his current residence and job with the intention of moving out of the country, he must update his registration to reflect his new status. Although SORNA does not require sex offenders living abroad to continually return to the United States to update their registrations, Murphy violated SORNA by failing to notify Utah of a change of status—specifically, his escape from Bonneville—that occurred while he was still residing in that state."

Based on the ruling in this case, sex offenders must notify the jurisdiction in which they live and are registered of any change in address or status, which includes permanently moving out of the state or country. According to SORNA, and following the appellate ruling in *United States v. Van Buren*, 599 F.3d 170 (2d Cir. 2010), *cert. denied*, a "permanent abandonment of an abode constitutes a change of residence ... Congress's goal in enacting SORNA was to ensure that sex offenders could not avoid registration

requirements by moving out of state ... the record demonstrates Murphy knowingly violated SORNA by failing to update his registration...."

Judge Carlos F. Lucero dissented, saying that "these facts are not in dispute, but their legal implication is...." He noted that after absconding, Murphy was in Utah "mere hours" while leaving the state on a bus, and that the court must first accept an "absurd premise" that a moving bus constitutes a "home or other place where [an] individual habitually lives" in order to

invoke penalties under SORNA.

"We should look to the statutory definition of the term and begin with the ordinary meaning ... of the term ['resides']," Lucero wrote, citing *Hackwell v. United States*, 491 F.3d 1229 (10th Cir. 2007). He disagreed that *Van Buren* applied and concluded by stating, "Our duty as a court is to apply SORNA's plain language and leave it to Congress to change the statute if it desires to do so." See: *United States v. Murphy*, 664 F.3d 798 (10th Cir. 2011). ■

Florida Reports Indicate Restoration of Civil Rights Reduces Recidivism

by David M. Reutter

Advocates of automatic restoration of civil rights for ex-offenders have long maintained that such a policy helps former prisoners reintegrate into society and therefore reduces recidivism. Two reports by the Florida Parole Commission (FPC), released in 2011 and 2012, lend support to that argument.

Since the end of the Civil War, Florida has banned the restoration of civil rights for ex-felons unless their rights are restored by the state clemency board. Historically, the restoration process has been laborious and prolonged.

Former Florida Governor Charlie Crist pushed for full restoration of rights for offenders after they completed their sentences or terms of supervised release. He greatly streamlined the restoration process in 2007, but also had to compromise.

Objections from Crist's cabinet forced him to exclude certain violent offenders and sex offenders, but the less restrictive process still resulted in over 154,000 ex-felons regaining their rights. [See: *PLN*, Jan. 2009, p.26].

When Governor Rick Scott took office in January 2011, however, he and Attorney General Pam Bondi moved to rescind the Crist policies. They decided that ex-offenders must wait five years without committing another offense and then apply to have their civil rights restored. [See: *PLN*, Sept. 2011, p.28].

As a result of this regression to Jim Crow-era laws, 60,000 ex-felons were

ineligible for restoration of their rights: They were prohibited from voting, holding public office, sitting on a jury and obtaining certain state licenses. Governor Scott's new policy also required studies of those whose rights were restored under the Crist administration.

The first report, issued by the FPC on July 1, 2011, found that 30,672 offenders had their civil rights restored in calendar years 2009 and 2010 combined (including restoration of alien status for a small number of non-citizens). Of those, only 3,406 had committed offenses by May 31, 2011 that resulted in a return to prison or community supervision by the Florida Department of Corrections (FDOC).

This equates to a 11.1% recidivism rate for ex-felons whose rights were restored under Crist's policies, which contrasts with a 2010 FDOC report that found 33.1% of all state prisoners released from 2001 to 2008 reoffended within three years.

Scott and his cabinet have argued that the more restrictive restoration of rights process, including the five-year waiting period, is necessary to protect the public. "It's all window dressing to support an antiquated system of voter suppression," countered Howard Simon, executive director of the ACLU of Florida.

Attorney General Bondi applauded the FPC study. "I am pleased with the Parole Commission's report, which clearly demonstrates their hard work to ensure a smooth and expeditious application process for the

restoration of civil rights," she said.

Of course, under Governor Crist, the "application process" was full restoration of rights for most non-violent offenders that, according to the FPC study, led to a reduction in recidivism rates by almost two-thirds.

The FPC's report on restoration of civil rights for 2010 and 2011 (which

included some overlapping data from the 2009-2010 report), issued on July 1, 2012, had similar findings. Only 5,771 ex-felons had their rights restored in calendar years 2010 and 2011 combined – including a mere 52 people in 2011 under Scott's new policy. During that same period of time 651 reoffended, for a recidivism rate of 11.3%.

Which is a good argument for expanding – not limiting – the restoration of civil rights, if only Governor Scott would pay attention to the recidivism data rather than rely on political rhetoric. ■

Sources: *Herald Tribune*; *Florida Parole Commission, Clemency Action Reports for FY 2009-2010 and 2010-2011*

Tainted Chicken Sickness Hundreds of Prisoners, Staff at Pennsylvania BOP Facility

In late June 2011, around 320 prisoners and employees at USP Canaan in Pennsylvania, north of Philadelphia, became sick due to salmonella poisoning after eating "tainted chicken" used to make fajitas. Four prisoners were ill enough to require treatment at a local emergency room for dehydration.

According to Bureau of Prisons (BOP) spokesperson Lamine N'diaye, the facility's kitchen was closed for cleaning following the outbreak but reopened after a BOP inspector deemed it safe. Neither N'diaye nor Russell Reuthe, USP Canaan's human resource manager, would comment on the food or its source, but Reuthe confirmed it was all "wholesale food, prepared on site."

A Pennsylvania Department of Health official said they were investigating the incident, adding that "we did provide assistance to the facility by taking stool samples and food testing." According to the same official, all of the food in the kitchen was disposed of following the outbreak.

Salmonella is rarely fatal but can be serious if it spreads to the blood stream or the intestines, where it can cause a form of arthritis. The *Associated Press* first learned about the outbreak at USP Canaan from the Seattle-based law firm of Marler Clark, which specializes in cases involving food-borne illnesses. Two attorneys from the firm confirmed that families of multiple prisoners had contacted them to report the outbreak.

USP Canaan houses approximately 1,400 prisoners, and includes a 125-bed minimum-security satellite camp. During the salmonella outbreak, meals for the USP were prepared in the satellite camp's kitchen until the cleanup was complete.

It is not unusual for the BOP to purchase meat such as hamburger and chicken in bulk, then distribute it system-wide to various prisons – indicating that the tainted food may have been sent

to other facilities, too.

According to Christine Cronkright of the Pennsylvania Department of Health, no new illnesses were reported after the initial outbreak at UPS Canaan and 90% of the prisoners who became sick had eaten the chicken fajitas. There were no reports of salmonella outside the facility

or in the greater Philadelphia area.

By July 20, 2011, operations at USP Canaan were back to normal. The U.S. Department of Agriculture is reportedly looking into the incident. ■

Sources: *Associated Press*, www.wayneindependent.com

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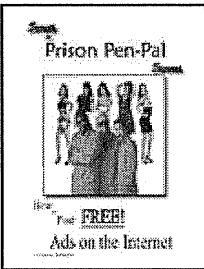
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ACLU Challenges “Jail or Church” Program in Alabama

On September 26, 2011 the American Civil Liberties Union of Alabama (ACLU) sent a cease-and-desist letter to the City of Bay Minette, demanding that city officials “immediately end Operation Restore Our Community (ROC), which requires first-time, non-violent misdemeanor offenders to choose between jail time or attending church once a week for a year.”

While the ACLU said it supported alternative sentencing programs, it condemned Operation ROC because its use of the city’s “police power to mandate and enforce church attendance flagrantly violates the Establishment Clause of the First Amendment to the U.S. Constitution,” as well as Section 3 of the Alabama Constitution.

“The government is not supposed to serve as a conduit for church recruitment,” noted ACLU of Alabama legal director Allison Neal.

The ACLU’s letter addressed three specific points. First, that Operation ROC violates the Establishment Clause’s anti-coercion principle, which prohibits government officials from compelling church attendance or other participation in religious exercise. The letter cited numerous legal precedents which had “consistently held that the government may not condition offenders’ sentencing, probation, parole or release on their refusal or willingness to attend church or engage in other religious exercise.”

The ACLU contended that Operation ROC is coercive, as it presents defendants with a “choice” between “(1) going to jail, paying a fine, and developing a criminal record; or (2) going to church and having the charges eventually dismissed....”

Even Bay Minette’s Chief of Police, Michael E. Rowland, who championed the program, acknowledged that it provided no real option. “It’s an easy choice for me,” he said. “If I was given the choice of going to jail and paying a heavy fine or just going to church, I’d certainly select church.”

The second point of the ACLU’s letter asserted that Operation ROC violates the neutrality principle – another core tenant of the Establishment Clause. Local churches were solicited to participate in the program, and those that agreed “intend to proselytize the offenders and attempt to convert them into devout Christians.” Media reports also indicated that defendants

who participate in Operation ROC would be required to answer questions about the church services they attended.

“These actions (1) favor religion generally and Christianity in particular, (2) convey an impermissible message of religious endorsement, and (3) unconstitutionally entangle the court and police department with religious matters and entities,” the ACLU stated.

Finally, the demand letter urged the city to pursue constitutional alternatives to incarceration. The ACLU said it had advised and assisted government agencies in that regard in the past, and would be willing to help the city develop “law-

ful” sentencing alternatives. The letter concluded with a public records request seeking information related to the city’s development of Operation ROC.

In response, the Bay Minette City Council decided to delay the implementation of the alternative sentencing program, and voted in October 2011 to seek an opinion from the state Attorney General’s Office concerning the constitutionality of Operation ROC. As of mid-July 2012, the Attorney General had not issued an advisory opinion. ■

Sources: *Reuters*; *ACLU letter dated Sept. 26, 2011*; *www.al.com*

“Fusion Centers” Gather Intelligence on U.S. Citizens

by Derek Gilna

Homeland Security-financed agencies called “fusion centers,” ostensibly formed to collect information to prevent 9/11-type terrorist attacks, have expanded their scope of operations to include ordinary street-level crime. The American Civil Liberties Union (ACLU) recently expressed concerns about a fusion center in Cleveland, Ohio, claiming the center’s secrecy and data-mining practices pose a threat to privacy.

“It really is an unprecedented amount of surveillance of Americans,” stated Mike Brickner, communications and public policy director for the ACLU of Ohio. “That’s a very big jump in my mind from where the mission started to where they are now.”

Julia Shearson, executive director of the Cleveland chapter of the Council on American-Islamic Relations, agreed, saying, “at minimum, we join those requesting that fusion centers be held accountable to taxpayers through increased oversight and transparency.”

The Department of Homeland Security describes fusion centers as “focal points within the state and local environment for the receipt, analysis, gathering, and sharing of threat-related information....”

William Schenkelberg, director of the Cleveland-based Northeast Ohio Regional Fusion Center, said the centers arose from the perceived failure of law enforcement agencies, pre-9/11, to share intelligence data. According to Schenkelberg, fusion

centers share criminal trends, tips and information among police agencies which might disclose potential national security threats.

“You get criticized for doing that level of crime analysis,” said Schenkelberg, “but you don’t know who it’s connected to.... We work on a local felony level. We get the region talking together, so that if something does happen, we have that communication.”

The ACLU, however, has countered that the secrecy and data-mining practices of fusion centers, as well as their use of subcontractors with little public accountability, reduces transparency and threatens people’s privacy. For example, some centers have issued bulletins that advocate the surveillance of political activists and racial and religious minorities. Many Islamic organizations have objected to fusion centers collecting information about citizens who are simply exercising their First Amendment rights.

Housed on the ninth floor of the Cleveland police headquarters, the Northeast Ohio Regional Fusion Center was founded in 2008. It now has a full-time staff of six and receives about \$1 million annually in Homeland Security grants. It is among 72 state and regional fusion centers nationwide.

Schenkelberg said the center has had a positive effect on controlling local crimes, including flash mobs. He cited several other fusion center success stories,

such as helping to crack a fake-ID ring with connections to China, obtaining information on criminal Gypsy gangs and assisting with the recovery of stolen firearms.

Schenkelberg claimed that the center does not access private messages or web pages, and collects online information that is available to anyone searching the Internet. He also said the fusion center answers to a governing board of city, county, state and federal officials.

The center revamped its counter-terrorism mission two years ago after criticism from law enforcement officials. "Is it hitting the core of what the mission is, as far as terrorism prevention? I don't think yet it's doing that," Cuyahoga County Sheriff Bob Reid said at the time.

Since 2010, fusion centers have been required by the Department of Homeland Security to follow federal privacy and civil rights policies, though there is little way

to verify such compliance. Further, the centers reportedly partner with the military and with private-sector companies to collect information.

The question remains as to whether the increased surveillance provided by fusion centers results in increased safety, and if so, whether that is accomplished at the expense of further erosion of people's privacy and civil rights.

As noted by the ACLU, "The lack of proper legal limits on the new fusion centers not only threatens to undermine fundamental American values, but also threatens to turn them into wasteful and misdirected bureaucracies that, like our federal security agencies before 9/11, won't succeed in their ultimate mission of stopping terrorism and other crime." ■

Sources: *Cleveland Plain Dealer*, www.dhs.gov, www.neorfc.us, www.wkyc.com, www.acu.org

Kentucky Supreme Court Adopts Mailbox Rule Retrospectively

The Supreme Court of Kentucky, in a modified ruling, adopted the "mailbox rule," allowing notices of appeal in criminal cases to be considered filed when they are placed in the prison's internal mail system.

Joe B. Jones and Michael Allen Hallum, Kentucky state prisoners, each filed a motion for post-conviction relief pursuant to RCr 11.42. Both motions were denied and Jones and Hallum separately filed notices of appeal and motions to proceed *in forma pauperis*. The Court of Appeals dismissed the motions because they and the notices of appeal arrived at the court and were filed more than 30 days after entry of the judgment being appealed, in contravention of RCr 12.04(3).

Both men had placed their pleadings in the prison's internal mail system several days before the 30-day period had expired, but they were not received and filed by the Court of Appeals until after the expiration date had passed. Jones and Hallum appealed to the Kentucky Supreme Court, which consolidated the cases.

While the cases were pending on appeal, the Supreme Court changed RCr 12.04(5) to read, "If an inmate files a notice of appeal in a criminal case, the notice shall be considered filed if its envelope is officially marked as having been deposited in the institution's internal

mail system on or before the last day for filing with sufficient First Class postage prepaid."

Although the rule change would normally apply only prospectively, the Kentucky Supreme Court held that it should apply retrospectively to cases still pending when the rule was modified. Therefore, the decisions of the Court of Appeals were reversed and the cases returned to the trial courts for further proceedings consistent with the opinion. Jones and Hallum were represented by Frankfort Assistant Public Advocate Brandon Neil Jewell. See: *Hallum v. Commonwealth*, 347 S.W.3d 55 (Ky. 2011). ■

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Termination from Drug Treatment Program Fails to State Liberty Interest Claim

The Eighth Circuit Court of Appeals has held that the decision of prison officials to remove a prisoner from a drug treatment program, which made him ineligible for a probated sentence, was insufficient to confer a liberty interest for due process purposes.

Missouri state prisoner Michael Louis Persechini brought a 42 U.S.C. § 1983 action against five officials at the Ozark Correctional Center (OCC), alleging they had violated his federal due process rights by terminating him from a long-term substance abuse treatment program. He sought damages and re-entry into the program. The district court dismissed his suit for failure to state a claim upon which relief could be granted.

After being convicted of second-degree burglary, Persechini was sentenced to fifteen years in prison. Following applicable state law, the court obtained permission from the Missouri Department of Corrections to sentence him as a chronic nonviolent offender with a serious drug addiction to OCC's long-term substance abuse treatment program. Successful completion of the program would make Persechini eligible for probation.

Persechini, however, was subsequently charged with violating a "cardinal rule" of the program. He was found guilty of theft and disobeying an order by taking a new towel from the property room. It was recommended, and approved by prison officials, that he be restricted to his living area for ten days and referred to the Program Review Committee. The Committee terminated Persechini from the substance abuse program, which resulted in his transfer to another facility to serve his 15-year sentence.

On appeal, the Eighth Circuit focused first on the disciplinary hearing. It held that "Persechini does not claim, and could not plausibly claim," that the sanctions of room confinement for ten days and referral to the Committee were hardships that were either atypical or significant. As such, there was "no protected liberty interest in the outcome of this routine disciplinary proceeding."

Turning to the more serious consequences that resulted from the separate action taken by the Program Review Committee, the appellate court noted that the Committee could have imposed "no fewer

than eight alternative recommendations," and that its decision to remove Persechini from the program was "not a mere ministerial action." Nonetheless, the Court of Appeals disagreed that the Committee's decision to impose the most severe sanction – termination from the program – created a plausible liberty interest that caused an atypical and significant hardship, as required under *Sandin v. Conner*, 515 U.S. 472 (1995).

The Eighth Circuit cited precedents that had established there is no protected liberty interest in a sentence reduction that may be granted for completing a substance abuse treatment program, in half-way house placement after completing a drug treatment program, in remaining in a work release program, in participating in drug treatment to qualify for early release, in remaining in a "shock incarceration program," or in participating in a sex offender treatment program.

A state statute mandated that Persechini was ineligible for probation upon his termination from the substance abuse program, thus the appellate court found he did not have a protected liberty interest in the discretionary probated sentence he

could have received had he successfully completed the program.

The Eighth Circuit did "acknowledge that the Supreme Court might conclude it is enough to confer a liberty interest in the Program Review Committee's decision to recommend termination from the program, rather than imposition of a sanction with less dire potential consequences on Persechini's term of incarceration."

However, "Persechini's failure to successfully complete the treatment program and, more importantly, the ensuing execution of his fifteen-year sentence were nonetheless consequences 'within the sentence [initially] imposed,'" the Court of Appeals found. "Thus, like a Bureau of Prisons decision to deny a sentence reduction after an inmate successfully completes its drug treatment program, we conclude that program termination did not confer a liberty interest because it 'mean[t] only that [Persechini] will serve the remainder of his original sentence under typical circumstances.'"

Accordingly, the district court's order dismissing Persechini's suit was affirmed. See: *Persechini v. Callaway*, 651 F.3d 802 (8th Cir. 2011), rehearing denied. ■

California: ADA Protections Again Extended to Disabled State Prisoners Held in County Jails

On January 13, 2012, sixteen months following remand from the Ninth Circuit in the case of *Armstrong v. Schwarzenegger*, U.S. District Court Judge Claudia Wilken issued an order that again extended the protections of the Americans with Disabilities Act (ADA), 42 U.S.C. § 12131 *et seq.*, to disabled state prisoners housed in county jails.

The order requires California officials with responsibility over the state's corrections and parole systems to track and accommodate the needs of disabled state prisoners and parolees (referred to as *Armstrong* class members) who, for various reasons, are held in county jails, and to ensure that those class members have access to a workable grievance procedure. Similar protections had previously been ordered, and largely been in effect, since 1996 with respect to disabled prisoners

housed in state prisons (including segregation units and reception centers). See: *Armstrong v. Wilson*, 124 F.3d 1019 (9th Cir. 1997) [*PLN*, Sept. 1998, p.13].

On any given day, California houses a significant number of state prisoners and parolees facing revocation hearings in county jails – a number that is increasing due to the state's recent "realignment" initiative in response to the U.S. Supreme Court's ruling in *Brown v. Plata*. [See: *PLN*, July 2011, p.1].

In 2009, this included daily averages of 480 prisoners or parolees in the San Mateo County Jail, 1,000 prisoners or parolees in the Sacramento County Jail and 770 individuals in In-Custody Drug Treatment Program placements in jails throughout the state. Approximately 7 percent of this population is deemed to have mobility, sight, hearing and kidney

disabilities covered by *Armstrong*.

In September 2009, the district court held there was sufficient evidence to find that *Armstrong* class members housed in county jails were not receiving the ADA accommodations to which they were entitled, and ordered system-wide relief. See: *Armstrong v. Schwarzenegger*, 261 F.R.D. 173 (N.D. Cal. 2009).

The state appealed the order, and the Ninth Circuit affirmed in part and vacated in part, remanding the case for further proceedings. Specifically, the Ninth Circuit affirmed the district court's finding that the state has the legal responsibility to ensure ADA-compliant conditions for *Armstrong* class members housed in county jails. The Court of Appeals found the record in the case insufficient, however, to justify the system-wide relief ordered by the district court. Finding that "not much more evidence" was needed, the case was remanded for the taking of "such additional evidence as may be necessary." See: *Armstrong v. Schwarzenegger*, 622 F.3d 1058 (9th Cir. 2010) [*PLN*, Nov. 2011, p.28].

On remand, the state no longer disputed that California state prisoners and parolees with mobility, sight, learning and developmental disabilities were not being provided proper ADA accommodations while housed at county jails, that they did not have access to a proper grievance system or that they were suffering as a result. Instead, they primarily argued that, under recent state legislation authorizing the realignment initiative, state parolees, when held in county jails, should no longer be considered members of the *Armstrong* class. The district court rejected this argument, finding that while parolees may be in the simultaneous custody and control of the county and state, they "do not cease being state parolees while they are also county jail inmates." Thus, as before realignment, the state remains obligated to ensure ADA-compliant conditions for the prisoners and parolees they choose to house in county jails.

While its task was simplified by the state's failure to dispute what the district court characterized as "overwhelming and disturbing evidence" that *Armstrong* class members in jails throughout the state were being injured and denied access to programs and services due to failures to accommodate their needs, the court complied with the Ninth Circuit's instructions on remand by making additional findings before re-imposing system-wide relief.

On April 11, 2012, the district court ruled on the state's motion to correct or modify its January 13 order. The court made minor modifications to its previous order but no substantive changes. The district court also denied the state's request to stay its prior order pending another appeal, stating, "Defendants have not demonstrated a likelihood of success in overturning this Court's order finding that system-wide relief is necessary." See: *Armstrong v. Brown*, U.S.D.C. (N.D. Cal.), Case No. C 94-2307 CW; 2012 WL 1222928 (modified order).

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State Awarded Statutory Attorney Fees, Costs for Dismissed Washington PRPs

by Mark Wilson

The Washington State Court of Appeals has held that the state is entitled to statutory attorney fees following the dismissal of a personal restraint petition (PRP).

After pleading guilty to witness tampering and burglary, Gregory Scott Bailey filed a PRP challenging the voluntariness of his plea. The petition was dismissed on October 7, 2010 and five days later the state filed a cost bill, seeking statutory attorney fees of \$200 plus \$206 for preparation of the 103-page response brief – at \$2.00 per page – for a total of \$406. On November 1, 2010, Bailey objected to the cost bill.

The Court of Appeals refused to dismiss Bailey's objection as untimely. Any purported untimeliness was waived because "the State's entitlement to statutory attorney fees in the costs for dismissed PRPs is an issue of first impression," and given "the number of PRPs the court considers each year, a decision on the merits would serve the ends of justice."

Washington law establishes the statutory attorney fee as \$200 for judgments entered by the Court of Appeals. Bailey argued, however, that RCW 10.73.160(2) prohibits such fees because attorney fees are "expenditures to maintain and operate government agencies."

The appellate court agreed that "RCW 10.73.160(2) should ... be understood to disallow inclusion of prosecuting attorney salaries in the costs imposed on an unsuccessful personal restraint petitioner. Such costs are public expenditures made irrespective of specific violations of the law."

The Court of Appeals determined, however, that "statutory attorney fees do not represent prosecuting attorney salaries that are paid irrespective of a particular case and are not intended to recoup 'expenditures to maintain and operate government agencies.'" Therefore, such fees are not prohibited by RCW 10.73.160(2), and the appellate court concluded that "the State is entitled to statutory attorney fees in its award of costs under RAP 14.3(a)."

The Court of Appeals also rejected Bailey's argument that \$2.00 per page was excessive, finding that "under RAP

14.3(b), the amount awarded per page is fixed by the Supreme Court" at \$2.00 per page. See: *In the Matter of the Amount Per Page for Original Documents*, No. 25700-B-367 (Wash. June 16, 1999).

The appellate court further rejected Bailey's argument that the state's 103-page response brief was unreasonably

lengthy. The court found that "the State's response was not excessively long. RAP 10.4(b). The State is entitled to costs of \$2.00 per page for 103 pages," plus the \$200 statutory attorney fee. See: *In re PRP of Gregory Scott Bailey*, 162 Wash. App. 215, 252 P.3d 924 (Wash.App. Div.3 2011).

Fifth Circuit Rules on Prisoner's ADA Claim; Issues Superseding Opinion

On October 14, 2010, the Fifth Circuit Court of Appeals found that Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. § 12132, does not abrogate a state's sovereign immunity when the misconduct complained of does not violate the Fourteenth Amendment. In a May 2011 superseding opinion following rehearing, however, the appellate court did not reach that question, instead finding the plaintiff had failed to adequately plead an ADA claim.

John Hale, a Mississippi state prisoner, filed a pro se federal civil rights action against prison officials under the ADA, 42 U.S.C. §§ 12131-12165, alleging that he was prevented from using community work centers, accessing satellite and regional prison facilities, working in the kitchen or attending school because he suffered from Hepatitis C, post-traumatic stress disorder, chronic depression, intermittent explosive disorder and antisocial personality disorder. The district court dismissed his lawsuit pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii) after finding the defendants were entitled to state sovereign immunity. Hale appealed.

The Fifth Circuit appointed counsel to brief the issue of "whether Title II of the ADA validly abrogates Eleventh Amendment sovereign immunity for claims that violate Title II but are not actual violations of the Fourteenth Amendment." The Court of Appeals held that Congress has the right to abrogate state sovereign immunity, but only if it acts "pursuant to a valid grant of constitutional authority." The ADA "validly abrogates sovereign immunity insofar as it 'creates a private cause of action for damages against the States for conduct that *actually* violates

the Fourteenth Amendment.'" In this case, the parties agreed that "none of the defendants' alleged misconduct violates the Fourteenth Amendment."

The Fifth Circuit noted that the origin of Congress's power to abrogate state sovereign immunity in the ADA was § 5 of the Fourteenth Amendment. However, "Congress's § 5 powers do not extend to creating causes of action for ADA violations that are not 'congruent and proportional' to violations of the Fourteenth Amendment." Although legislation "which deters or remedies constitutional violations can fall within the sweep of Congress's enforcement power even if in the process it prohibits conduct which is not itself unconstitutional," its power under § 5 "is not unlimited."

Hale's claim implicated Title II's intent of enforcing the prohibition on irrational disability discrimination in the Fourteenth Amendment's Equal Protection Clause. "Under that clause, disabled individuals are not a suspect or quasi-suspect classification commanding heightened review of laws discriminating against them." Therefore, such discrimination is constitutionally permissible if "there is a rational relationship between the disparity of treatment and some legitimate government purpose."

In Hale's case there were rational relationships with legitimate purposes, such as protecting the health of a disabled prisoner, avoiding an "undue burden" or preventing a fundamental alteration in a program. Therefore, the exercise of Congress's authority in this case was not congruent and proportional, and state sovereignty was not abrogated by Title II for this type of claim. The judgment of

the district court was affirmed. See: *Hale v. King*, 624 F.3d 178 (5th Cir. 2010).

The U.S. government moved for rehearing as an intervenor, which was granted by the Court of Appeals. On May 26, 2011 the Fifth Circuit issued a superseding opinion that took a different approach to the case, and withdrew its prior decision.

The appellate court first addressed whether Hale had sufficiently pleaded an ADA claim, and held he had not. While Hale may have had an "impairment," that did not necessarily mean he had a disability as that term is defined by the ADA. "It is well established that '[m]erely having an impairment ... does not make one disabled for purposes of the ADA,'" the Court of Appeals wrote. "Hale failed to allege facts from which we can reasonably infer that Hale's medical conditions substantially limited a major life activity."

As Hale had failed to state a violation of Title II of the ADA, the Fifth Circuit vacated "the portions of the district court's decision below that address whether Hale's allegations established violations of the Fourteenth Amendment and whether Title II validly abrogates state sovereign immunity...."

Accordingly, the Court of Appeals reversed the district court and remanded the case to allow Hale an opportunity to

amend his complaint to adequately plead an ADA claim. See: *Hale v. King*, 642 F.3d 492 (5th Cir. 2011). █

Fourth Circuit: Where Offer of Judgment is Silent as to Costs, Prevailing Party Entitled to Recover Attorney's Fees

The Fourth Circuit Court of Appeals has held that "in an action brought under 42 U.S.C. § 1983, an offer of judgment pursuant to Fed.R.Civ.P. 68(a) which makes no mention of costs or attorney's fees cannot be interpreted, after the fact, to have included those costs and fees. Rather, in such a case, the prevailing party is entitled to recover costs and fees pursuant to 42 U.S.C. § 1988."

Brenda Bosley filed suit against law enforcement officials of Mineral County, West Virginia after her estranged husband, Dr. James Bosley, killed himself while the officials, alerted by a complaint from Mrs. Bosley attesting to her husband's instability, were attempting to take him into custody for a psychiatric examination.

After removing the case to federal court, the defendants served on Brenda

Bosley an offer of judgment pursuant to Fed.R.Civ.P. 68(a) for \$30,000 "as full and complete satisfaction of [Bosley's] claim against ... Defendants." After accepting the offer, Bosley moved for attorney's fees; the officials opposed the motion on the ground that their \$30,000 offer was inclusive of attorney's fees and costs.

The district court determined that the settled judicial interpretations of Rule 68 required it to award costs and attorney's fees – over and above the \$30,000 offer of judgment – to Bosley, who was the prevailing party.

The Fourth Circuit affirmed the district court, finding no merit to any of the defendants' arguments to the contrary. See: *Bosley v. Mineral County Commission*, 650 F.3d 408 (4th Cir. 2011). █



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Ninth Circuit Grants Qualified Immunity to California Prison Officials for Denial of Outdoor Exercise During Lengthy Lockdown

On March 17, 2011, the Ninth Circuit Court of Appeals granted qualified immunity to California prison officials who had denied a prisoner outdoor exercise during a 15-month lockdown precipitated by a “particularly violent armed riot ... against staff.”

Steve Joseph Noble IV was incarcerated in Facility “C” at the Substance Abuse Treatment Center at Corcoran State Prison. A former Crip gang member, he was classified as Level IV, the highest security level.

On January 9, 2002, Corcoran staff members were attacked by Crips and other prisoners on the Facility “C” exercise yard. The riot, which included an attempt to kill a prison guard, left more than 20 other officers with injuries. The incident led to a formal declaration of a state of emergency and the imposition of another in a long series of lockdowns at Corcoran.

During that lockdown, prison officials conducted an investigation into the immediate causes of the riot. The investigation ended on January 30, 2002 but was not conclusive. Over the following months, prison officials gradually restored privileges, including visitation in April, modified day room access in June, full day room access in July and, finally, limited outdoor exercise on August 1, 2002. The next day, however, another riot occurred – this time involving Hispanic prisoners. Another lockdown ensued and full exercise privileges were not restored until April 1, 2003.

Noble, who undisputedly was not involved in the January 2002 riot, filed suit pursuant to 42 U.S.C. § 1983, alleging violations of his Eighth Amendment right to outdoor exercise from January 9, 2002 to April 1, 2003, during the lockdowns.

The district court granted qualified immunity to prison officials for the second lockdown period commencing August 1, 2002, but denied it – “counterintuitively,” in the view of the Ninth Circuit – for the period in the immediate aftermath of the riot, faulting the officials for not justifying with “specific facts” the extension of lockdown restrictions following completion of their investigation on January 30, 2002.

The Ninth Circuit reversed and remanded the district court’s order, with

instructions to enter judgment on behalf of the prison officials. Relying principally on *Norwood v. Vance*, 591 F.3d 1062 (9th Cir. 2010), the appellate court held that a prisoner’s right to outdoor exercise during a lockdown imposed in the aftermath of a prison riot was not clearly established in 2002.

“[I]t would not have been clear to a reasonable officer that his or her conduct vis à vis the declaration of an emergency, the lockdown, or the curtailment of use of the exercise yard was unlawful in the

situation he or she confronted,” the Ninth Circuit wrote. “If anything, the record demonstrates that the officials were continuously, prudently, and successfully looking out for the safety, security, and welfare of *all* involved, staff and prisoners alike.” See: *Noble v. Adams*, 636 F.3d 525 (9th Cir. 2011).

The Court of Appeals entered an amended, superseding opinion on August 2, 2011, which did not change the outcome of the ruling. See: *Noble v. Adams*, 646 F.3d 1138 (9th Cir. 2011), *cert. denied*. ■

Tenth Circuit Affirms Denial of Qualified Immunity to Oklahoma Jail Official Who Failed to Follow Prescribed Medical Instructions

On October 14, 2011 the Tenth Circuit Court of Appeals affirmed a district court’s denial of summary judgment, on the ground of qualified immunity, to Payne County, Oklahoma jail administrator Brandon Myers. The appellate court held that a reasonable jury could find that Myers was deliberately indifferent to pretrial detainee John David Palmer’s serious need for medical treatment, in violation of the Due Process Clause of the Fourteenth Amendment. *PLN* readers should note that deliberate indifference claims for pretrial detainees are brought under the Fourteenth Amendment while similar claims involving convicted prisoners are brought under the Eighth Amendment.

In August 2007, while being held pending trial at the Payne County Jail, Palmer suffered from a serious infection commonly known as MRSA. He was transported to an outside doctor, who administered an injection of an antibiotic. The doctor instructed Palmer to return for a follow-up visit in two days, but warned that if he developed a fever or reported increased pain, he should be taken to a hospital immediately. It was undisputed that this information was conveyed to Myers.

Upon his return to the jail, Palmer’s level of pain increased to the point that he was vomiting and crying. He reported this to Myers, along with the outside doctor’s instructions, and requested that he be taken to an emergency room. According

to Palmer, Myers told him to “shut the fuck up or go back to the main jail where you got the disease.”

Palmer was eventually transported to the emergency room, but only after a delay of about a day. He underwent surgery for the MRSA infection and claimed to suffer both nerve damage and scarring. Additionally, he reported incurring over \$24,000 in medical costs.

The Tenth Circuit had little trouble dispensing with Myers’ arguments on appeal that he did not know or appreciate the seriousness of Palmer’s condition and, in particular, did not know that Palmer was suffering from MRSA. As the Court of Appeals put it, “such lay ignorance of medical matters is precisely the reason for the rule ... that noncompliance with the treatment prescribed by medical professionals is one form of deliberate indifference.”

Moreover, the appellate court noted, there was no support for Myers’ argument that a jail official could ignore a prisoner’s complaints of pain merely because those complaints were subjective. See: *Palmer v. Board of Commissioners for Payne County, Oklahoma*, 441 Fed.Appx. 582 (10th Cir. 2011) (unpublished). ■

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First Circuit Holds that Delay in Treating HIV May Constitute Deliberate Indifference

The First Circuit Court of Appeals reversed the grant of summary judgment to a physician assistant at the York County Jail (YJC) in Maine, concluding that a material dispute existed as to whether the physician assistant acted with deliberate indifference to the serious medical needs of an HIV-positive detainee.

In April 2008, Raymond D. Leavitt, a Maine state prisoner, filed suit pursuant to 42 U.S.C. § 1983 and the Americans with Disabilities Act (ADA), seeking injunctive relief and monetary damages against various correctional officials and healthcare providers. He alleged that he was denied HIV treatment for the entirety of his 167-day stay at YJC and for the first 17 months of his incarceration at the Maine State Prison (MSP), where medical care was provided by Correctional Medical Services (CMS).

Leavitt, who had been taking HIV medications before he was incarcerated, claimed that the delay in reinitiating his antiretroviral therapy for HIV resulted in short- and long-term negative conse-

quences to his health.

Initially proceeding pro se, Leavitt eventually obtained the services of an attorney. In March 2010, the district court granted summary judgment in favor of the defendants, finding insufficient evidence that they had acted with deliberate indifference to Leavitt's serious medical needs.

On appeal, Leavitt dropped his ADA claim. With respect to the 17-month delay in reinitiating Leavitt's antiretroviral therapy at MSP, the Court of Appeals noted an acknowledgement by MSP's healthcare providers that "the care [Leavitt] received ultimately fell short of the mark," and the Court therefore urged "[t]hose responsible for the operation of the Maine correctional healthcare system ... [to] focus on the troubling implications of that acknowledgment."

The First Circuit concluded, however, that because the medical department at MSP operates on a clinic model where no particular healthcare provider is charged with following any particular patient, Leavitt could not carry his burden of dem-

onstrating that any individual provider was sufficiently aware of his circumstances to actually draw the inference that he faced a substantial risk of serious harm. Thus, the grant of summary judgment to the MSP and CMS defendants was affirmed.

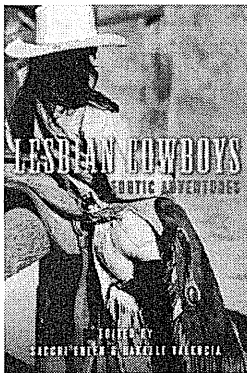
By contrast, with respect to Leavitt's treatment at YJC, the First Circuit observed that physician assistant Alfred Cichon was the president of ARCH, the corporation that provided healthcare services at the jail, and that, as its largest shareholder, a jury could infer that Cichon had a financial incentive to keep treatment costs low. Such an incentive could explain Cichon's "unfortunate" overlooking of a medical report that would have alerted him to the need to "precipitously" refer Leavitt to an infectious disease specialist.

The Court of Appeals therefore reversed the grant of summary judgment in favor of Cichon, and remanded the case for further proceedings. See: *Leavitt v. Correctional Medical Services, Inc.*, 645 F.3d 484 (1st Cir. 2011).



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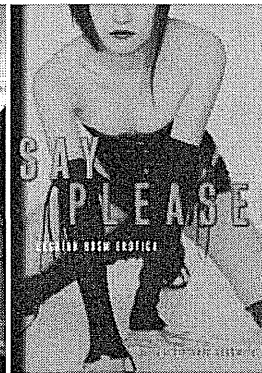
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New York Court of Appeals Holds Sex Offense Does Not Prove Parental Neglect

The New York Court of Appeals, the state's highest court, has held that the fact that a defendant was convicted of a sex offense against a minor, was a level-three registered sex offender and had not received any sex offender treatment was insufficient to prove that he or the mother who allowed him to continue living with her and his minor children were guilty of parental neglect.

In this case brought against an anonymous defendant, a New York father had pleaded guilty to charges related to his having sex with a prostitute under the age of 15. He was released on time served and not required to participate in sex offender treatment. The state Sex Offender Registration Act (SORA) required him to register as an untreated level-three sex offender. He returned home to live with his wife and five children, who were between the ages of four and fourteen.

The Dutchess County Department of Social Services (DSS) filed neglect petitions against both the father and mother pursuant to Article 10 of the Family Court Act. The DSS's theory was that, because the father was an "untreated" sex offender whose crimes involved minors, he was a danger to his children and the mother had "failed to protect the children" from their father by allowing him to live with them.

At a fact-finding hearing, the DSS caseworker testified that he filed the petition based upon the father's SORA registration, without any specific knowledge about the crimes or any evidence that the father had been sexually inappropriate with his own children. The father testified that he had pleaded guilty to the prostitution charge based on the advice of his attorney and alleged that he had sex with the prostitute only after she was 18, but exercised his Fifth Amendment rights when asked whether he had ever had sex with minors. The Family Court drew a negative inference from the father's denial of the crimes and his failure to testify, concluding that both parents had neglected their children. The parents then appealed.

The Appellate Division reversed the Family Court, denied the neglect petitions and dismissed the proceedings, holding that "the mere fact that a designated sex offender resides in the home is not sufficient to establish neglect absent a showing of actual danger to the children." It also

held that "the evidence was insufficient to establish that the father posed an imminent danger to the children." The DSS appealed.

The Court of Appeals upheld the decision of the Appellate Division, rejecting "any presumption that an untreated sex offender residing with his or her children is a neglectful parent," even when the sex offender's victim was a minor. The DSS

had failed to prove that there was an actual danger to the children caused by a parent's failure to exercise a minimum degree of parental care. Since the father had not been shown to pose an actual danger to his children, the neglect petition against the mother for allowing the father to live with his children also failed. See: *In the Matter of Afton C.*, 17 N.Y.3d 1, 950 N.E.2d 101 (N.Y. 2011).

New Jersey Appellate Court Holds Attorneys for Female Prisoners Temporarily Transferred to All-Male Facility May be Entitled to Fees

The Appellate Division of the Superior Court of New Jersey has held that the attorneys who represented a class of female prisoners temporarily transferred to the all-male New Jersey State Prison (NJSP) may qualify for an award of attorney's fees.

The answer will hinge on whether the prisoners are ultimately deemed to be "prevailing parties" in the litigation despite the fact that there was no trial court ruling on the merits of their claims. Instead, the underlying action was dismissed as moot after the female prisoners were transferred back to the Edna Mahan Correctional Facility (EMCF), from which they had been sent to NJSP.

The trial court had denied the prisoners' motion for attorney's fees on the ground that, in its view, there was no factual nexus between their lawsuit and the decision by prison officials to return the women to EMCF. In the court's words, the latter was simply "an operational decision made independent of this suit."

The Appellate Division reversed the denial of the prisoners' motion for attorney's fees and remanded for reconsideration in light of legal principles articulated by the New Jersey Supreme Court in *Mason v. City of Hoboken*, 951 A.2d 1017 (N.J. 2008).

Between March and September 2007, in an effort to alleviate overcrowding at EMCF (the state's sole women's facility), the New Jersey Department of Corrections (DOC) transferred approximately 40 female prisoners to NJSP, a maximum-security men's prison. In December 2007, four of those prisoners filed suit alleging

illegal confinement, discrimination, cruel and unusual punishment, and unconscionable violations of their privacy rights in association with their transfer to NJSP.

Over the objections of the defendant prison officials, the trial court certified the case as a class-action and granted preliminary injunctive relief, ordering the DOC not to send any other women to NJSP. Then, in December 2008, the DOC transferred all of the female prisoners at NJSP back to EMCF. It did so, it claimed, due to a determination that the population at EMCF had dropped sufficiently to allow their return. [See: *PLN*, Jan. 1, 2009, p.46].

The Appellate Division held that the trial court had misapplied the standards in *Mason*. Under the so-called catalyst theory adopted in *Mason*, a plaintiff can be awarded attorney's fees even without a final judgment on the merits, so long as 1) there is a factual causal nexus between the litigation and the relief ultimately achieved, and 2) the relief ultimately secured has a "basis in law."

The Appellate Division found that the "basis in law" prong had been satisfied because the prisoners' litigation was neither frivolous nor harassing. As to the "causal nexus" prong, the trial court erred, the Appellate Division held, in simply accepting the defendant prison officials' self-serving representations that the transfer of the women to NJSP had been intended, from the very outset, to be only "temporary." Rather, this "fact sensitive determination" required an evidentiary hearing for proper resolution of the prisoners' motion for attorney fees.

Further, even if the trial court finds no “causal nexus” that would result in a grant of fees under the catalyst theory, it

“shall then determine whether plaintiffs are otherwise entitled to a partial award of attorneys’ fees for successfully securing

preliminary injunctive relief.” See: *Jones v. Hayman*, 418 N.J.Super. 291, 13 A.3d 416 (N.J.Super.A.D. 2011). █

Single Incident of Deliberate Indifference Insufficient to Establish Policy or Custom

The Eleventh Circuit Court of Appeals has affirmed a district court’s grant of summary judgment on the grounds that the plaintiff’s evidence, which indicated a single case of a constitutional violation, did not prove a private medical provider had a policy, practice or custom of deliberate indifference.

The appellate ruling was entered in a civil rights action that alleged an Eighth Amendment violation for deliberate indifference to the serious medical needs of Henry Craig, who was approached by a police officer in Rome, Georgia on July 4, 2006. Craig had consumed methamphetamine hours earlier, was acting erratically and told the officer to shoot him.

Two other police officers arrived and one used a Taser on Craig. When he fell, a puddle of blood formed on the ground beside his head. He was transported to a hospital and examined. A doctor cleared him to be taken to the Floyd County Jail (FCJ), where he was placed under the care of the jail’s medical provider, Georgia Correctional Health, LLC.

The next day, nurse practitioner Susan Hatfield determined that the dried blood around Craig’s right ear was from a ruptured eardrum. He was coherent and expressed no other complaints about his health. Over the following nine days, Craig received sixteen evaluations by nine different Georgia Correctional Health employees, including nurses, nurse practitioners, a psychologist and a physician.

During some of those evaluations Craig did not complain about his medical condition, but during others he complained about not eating for five days, having urinated only once while in jail, and experiencing severe headaches, neck pain and a lack of hearing in his right ear. He received “acetaminophen, ibuprofen, other pain relievers and muscle relaxants” for the headaches.

Hatfield ordered a tomography scan of Craig’s head on July 13, 2006, which indicated he had air and bleeding in his skull along with several fractures. He was taken to a hospital where he received neurological surgery.

Craig filed a federal civil rights

complaint that alleged three “persistent and widespread practices” to support his deliberate indifference to serious medical needs claim against Georgia Correctional Health. He argued the company had a practice of not referring detainees to physicians, of erroneously relying on hospital clearance forms rather than doing its own diagnostic tests, and of using the least costly means to treat detainees. The district court granted summary judgment to the defendants and Craig appealed.

The Eleventh Circuit held that even if it assumed the practices cited by Craig represented constitutional violations, the evidence he had presented was insufficient to prove a widespread policy or custom by Georgia Correctional Health (the applicable legal standard under *Monell v. Dep’t. of Social Services*, 436 U.S. 658 (1978)). Craig had only addressed issues related to his own medical care and presented

the testimony of Dr. Jimmy Graham, who stated he did not have any knowledge of the FCJ or Georgia Correctional Health. His testimony relied solely on his experiences with other jails.

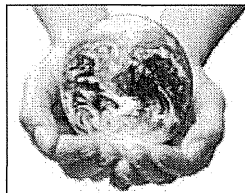
Since a single incident of an alleged constitutional violation was insufficient to prove a custom, policy or practice, the district court’s grant of summary judgment to the defendants was affirmed. See: *Craig v. Floyd County, Georgia*, 643 F.3d 1306 (11th Cir. 2011). █

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Texas Teenager Killed at Private Juvenile Detention Center

by Matt Clarke

On October 10, 2011, 14-year-old Jordan Adams was found unconscious on the floor of his isolation cell at the Granbury Regional Juvenile Justice Center (GRJJC) in Granbury, Texas. A sheet was wrapped around his neck. He died six days later at the Cook Children's Medical Center in Fort Worth without regaining consciousness, after being removed from life support. The cause of his death was manual strangulation.

The GRJJC is a 96-bed facility that houses juvenile offenders from various Texas counties; it is operated by 4M Granbury Youth Services, a for-profit company. Jordan's death at GRJJC was the first of a juvenile prisoner in Texas since 2003, according to Lisa Capers, deputy executive director and general counsel of the Texas Juvenile Probation Commission (TJPC). The TJPC and local police launched investigations.

"The sheet was around his neck," noted Granbury Police Captain Alan Hines. "We are investigating to determine whether this was an accident or there needs to be criminal charges for homicide."

The mystery is how someone could kill a child held in a locked isolation cell. Tanya Hernandez, 37, Jordan's mother, struggled with that question. "We've heard several different stories," she said. "I don't know what to believe at this point."

According to Hernandez, a "juvenile director" told her that Jordan had been engaging in the "choking game," a dangerous attempt to get high through oxygen deprivation.

"I'd never, ever heard of kids doing that, but now I hear that all over the United States, kids have been doing this," said Hernandez, who believes that Jordan's fragile mental condition might have made him susceptible to participating in the choking game.

"I'm just speculating, but I believe someone had talked him into doing that and Jordan had no idea of the consequences," she said. "The doctor told us all the ligaments and his main artery in his neck were so damaged that we don't really know if it was actually a game or if the [other] boy actually [purposely] did it. Everything on his neck was torn except his spinal cord. He must have pulled so hard."

But asphyxiation to get high is not the only explanation GRJJC officials have provided for Jordan's death. The first reason given to Hernandez, the press and

the TJPC was that Jordan was involved in a game of tug-of-war with another juvenile in a neighboring cell. According to that version of events, prisoners who grow bored with being locked in isolation cells combat the boredom by passing a sheet under their door and the door of a neighboring cell, then playing tug-of-war with the sheet. Under this theory, Jordan played tug-of-war with another prisoner but, for some inexplicable reason, wrapped the sheet around his neck so that his neighbor inadvertently choked him to death.

GRJJC facility administrator Ted Cooley stated he had never heard of prisoners playing tug-of-war and that such behavior would be strictly prohibited. He said structural changes were being discussed that would prevent similar incidents from occurring in the future.

Not only should such games be prohibited, they also should be known to GRJJC staff. Sheets passed between two neighboring cell doors would have to pass along the hallway, and guards are supposed to walk through the hallways when periodically checking the isolation cells. However, TJPC records indicate that GRJJC has a history of failing to comply with routine cell monitoring requirements.

A May 2011 compliance audit at GRJJC reported a failure to make the mandatory once-every-fifteen-minute cell checks in four of the 10 medical isolation cases reviewed. A failure to make required ten-minute checks of four juveniles who were determined to be moderate suicide risks also was noted. The state compliance officers further found that GRJJC logs indicated violations of routine cell checks.

Similar findings had been noted in a 2008 state inspection, when around half of the required cell checks were not performed. Additionally, a state inspection in 2009 reported "numerous unsanitary and unhealthy living conditions" at GRJJC.

Slacking by GRJJC staff may extend beyond cell checks and hygiene issues. In June 2011, the facility was cited for failing to promptly report a detainee's allegation of staff sexual abuse. Further, almost 200 complaints and serious incidents have been reported at GRJJC from late 2007 through October 2011, including assaults, physical abuse and suicide attempts.

Jordan had been diagnosed with

attention-deficit, hyperactivity and mood disorders. He had spent 10 days at the GRJJC earlier in 2011 after pulling a knife during a fight with his 17-year-old brother.

"They told him if he didn't get into any trouble for six months, they would drop the charge," said Hernandez. "It was kind of brothers being brothers that got out of hand."

But Jordan didn't make it through six months without getting into trouble. He was returned to the GRJJC after hitting another boy on a school bus – an incident that was captured on video tape.

Hernandez tried to get professional help for her son. He had been a mental health patient for six years and she had convinced GRJJC officials to transfer him to a mental health facility. The transfer was scheduled for October 13, 2011 – three days after Jordan was found unconscious in his cell.

This tragic incident underscores how inappropriate it is for private companies to manage detention facilities. For-profit corporations are primarily concerned about profit, not about the wellbeing of the prisoners under their custody and control. One way to increase profits is to cut personnel, which reduces payroll costs. When staffing levels decline, however, routine tasks, such as cell checks are delayed or ignored – sometimes with fatal results.

"The only way they can make a profit is to decrease the salary or staff or reduce services," noted Ana Correa, director of the Texas Criminal Justice Coalition.

In January 2012, an unidentified 14-year-old juvenile at GRJJC pleaded guilty to the equivalent of criminally negligent homicide in connection with Jordan's death. No details were reported as to the nature of the charge or how Jordan had died.

Jordan's father, Kenneth Grant, who was incarcerated in a Texas state prison unit at the time of his son's death, has since filed a federal lawsuit against GRJJC, 4M Granbury Youth Services and other defendants. The case remains pending. See: *Grant v. Granbury Regional Juvenile Justice Center*, U.S.D.C. (N.D. Tex.), Case No. 4:12-cv-00357-A. ■

Sources: *Fort Worth Star-Telegram*, www.ktxs.com, *Reuters*

Ninth Circuit Holds BOP Individual RDAP Determinations Not Subject to Judicial Review

Individualized decisions related to the Federal Bureau of Prisons' (BOP) Residential Drug Abuse Program (RDAP) are not subject to judicial review under the Administrative Procedure Act (APA), the U.S. Court of Appeals for the Ninth Circuit has held.

Philip T. Reeb sought habeas relief after he was expelled from the RDAP at FCI Sheridan in Oregon in 2008 for "exhibiting disruptive behavior in group counseling sessions on several occasions." In response to Reeb's petition, the government argued that the district court lacked jurisdiction to hear his claims because 18 U.S.C. § 3625 bars judicial review under the APA of "any determination, decision, or order under 18 U.S.C. §§ 3621-3625."

The district court disagreed that it lacked jurisdiction, but nonetheless found no error in the BOP's decision to remove Reeb from the RDAP. Reeb appealed and the government reasserted its jurisdictional argument before the Ninth Circuit.

Finding "no ambiguity" in § 3625, the Court of Appeals determined that "any substantive decision by the BOP to admit a particular prisoner into RDAP, or to grant or deny a sentence reduction for completion of the program is not reviewable by the district court." Further, the appellate court wrote, "the BOP's substantive decisions to remove particular inmates from the RDAP program are likewise not subject to judicial review." Reeb attempted to get around § 3625 by arguing that the BOP had violated its own program statement when expelling him from the RDAP, but the Ninth Circuit flatly rejected that argument: "A habeas claim cannot be sustained solely upon the BOP's purported violation of its own program statement because noncompliance with a BOP program statement is not a violation of federal law."

While § 3625 bars review of individualized determinations under the APA, the Court of Appeals noted that "judicial review remains available for allegations that BOP action is contrary to established federal law, violates the United States Constitution, or exceeds its statutory authority." See: *Reeb v. Thomas*, 636 F.3d 1224 (9th Cir. 2011).

Previously, the Ninth Circuit had held that the BOP's categorical exclusion from the RDAP of prisoners convicted of offenses involving possession, carrying or use of

firearms violated the APA, as the BOP had failed to adequately explain its rationale for excluding such offenders from the program. See: *Arrington v. Daniels*, 516 F.3d 1106 (9th Cir. 2008) [*PLN*, June 2009, p.44].

Arrington, however, involved a general exclusionary rule, not an individualized determination to remove a prisoner from the RDAP as in Reeb's case. Breaking

with the *Arrington* ruling, the Third and Eighth Circuits held in 2009 that the BOP did not violate the APA by categorically excluding from the RDAP's early release provision certain prisoners whose sentences included firearms enhancements. See: *Gardner v. Grandolsky*, 585 F.3d 786 (3d Cir. 2009) and *Gatewood v. Outlaw*, 560 F.3d 843 (8th Cir. 2009). ■

No Good Time for Time Spent in State Custody before Imposition of Federal Sentence

Good conduct time (GCT) may not be awarded to a federal prisoner for time spent in state custody before receiving his federal sentence, the U.S. Court of Appeals for the Ninth Circuit has held.

Russell Schleining was arrested in 2003 for burglary and attempted burglary. At the time of his arrest, he was discovered with a firearm. He was sentenced to ten years in state prison on the burglary charges; while serving his state sentence, Schleining was indicted in federal court for being a felon in possession of a firearm.

He pleaded guilty to the firearms charge, received his federal time and was returned to state custody for completion of his state sentence. After finishing his state time, Schleining was transferred to the custody of the Bureau of Prisons (BOP) to begin his federal sentence.

While at FCI Sheridan, Schleining complained to the BOP that he had been improperly denied good conduct time for the time he spent in state custody before receiving his federal sentence. He eventually filed a habeas corpus petition over the matter, which was denied. Schleining appealed.

Affirming the judgment of the district court, the Ninth Circuit held that "a prisoner can receive GCT only on time served on his federal sentence, and his federal sentence does not 'commence' until after he has been sentenced in federal court." As such, the appellate court concluded, "Schleining [was] not eligible for GCT credit for the 21 months he spent in state custody—serving a state sentence—before imposition of his federal sentence." See: *Schleining v. Thomas*, 642 F.3d 1242 (9th Cir. 2011), cert. denied. ■



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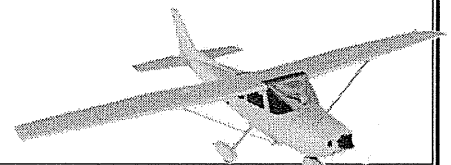
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Washington State Court of Appeals Holds Payments to Class II Prison Workers Are “Wages” for Time-Loss Compensation Calculations

by Matt Clarke

On April 13, 2011, a Washington state Court of Appeals held that money paid to Class II prison workers counted as “wages” for purposes of calculating time-loss compensation.

James B. Hill, a former Washington state prisoner, was injured while performing a Class II prison job for which he was paid \$0.85 per hour. After his release from prison, Hill applied for time-loss compensation from the Washington State Department of Labor and Industries (L&I). L&I allowed compensation, calculating that Hill worked 7.5 hours per day for six days a week at \$0.85 per hour.

Hill appealed the order to the Board of Industrial Insurance Appeals, claiming that the money paid to Class II prison workers was a gratuity, not wages. The Department of Corrections (DOC) answered interrogatories stating that it did not pay wages to prisoners and did not report the gratuities to the Internal Revenue Service (IRS). Therefore, Hill moved for summary judgment. L&I filed a cross-motion for summary judgment and the DOC filed a brief supporting L&I.

The industrial appeals judge (IAJ) denied Hill’s motion and granted summary judgment to L&I. Hill unsuccessfully petitioned the Board for review of the IAJ’s decision. He then appealed the Board’s order in superior court. The superior court granted L&I’s motion for summary judgment, and Hill again appealed.

The Court of Appeals conducted a de novo review. It noted that statutory law required L&I to base time-loss compensation on the monthly wages the worker was receiving at the time of the injury, disallowing gratuities not reported to the IRS (former RCW 51.08.178). The appellate court also noted that the legislature classified money paid to prisoners for their Class II labor as a “gratuity” (RCW 72.09.100(2)(e)).

Further, if Hill’s wages could not be reasonably and fairly determined for any reason, L&I would be required to calculate a monthly wage based upon “the usual wage paid other employees engaged in like or similar occupations where the wages are fixed.”

The Court of Appeals looked to L&I regulations to determine whether Hill’s payments were a gratuity. It determined

that the money the DOC paid to Hill was for his labor and therefore qualified as wages, not a gratuity. The Court rejected Hill’s argument that the payments could not be wages as they were lower than the minimum wage set by law. The appellate court noted the fact that the legislature had specifically exempted prisoners from the Washington state minimum wage act (RCW 49.46.010(5)(k)), which would create problems in calculating time-loss compensation, but assumed the legislature

had to be aware of the problem and had failed to correct it because lawmakers decided that compensation based on prison wages was fair and reasonable.

Therefore, the Court of Appeals affirmed the trial court’s grant of summary judgment to L&I. The Washington Supreme Court declined to hear Hill’s appeal in September 2011. See: *Hill v. Department of Labor and Industries*, 161 Wash.App. 286, 253 P.3d 430 (Wash.App. Div.2 2011), review denied. ■

Georgia Court Clerk Liable for Failure to Inform Prison Officials of Sentence Reduction

The Georgia Supreme Court has held that a court clerk is not entitled to official immunity in a lawsuit claiming negligent performance of a ministerial duty. At the heart of the case was the clerk’s failure to inform prison officials about a court order that reduced a prisoner’s sentence.

Calvin McGee filed suit against Juanita Hicks and Geneva Blanton, in their respective capacities as clerk of the Superior Court of Fulton County and an employee of that office, for negligence for failing to perform their ministerial duty under OCGA § 42-5-50(a), which requires the court clerk to notify the commissioner of the Department of Corrections within 30 working days following receipt of a prisoner’s sentence.

The trial judge had signed a one-page “amended order” that changed McGee’s sentence to provide for a May 27, 2001 maximum release date rather than a previously-ordered release date of June 27, 2003. Blanton received the order on July 20, 2000; she placed it in processing to be filed and took no other action. McGee was not released from prison until March 2003 – 22 months after his amended release date.

Blanton and Hicks moved to dismiss the claim against them in their individual capacity, which was denied by the trial court. The Court of Appeals affirmed. The trial court subsequently granted their motion for summary judgment on the basis that they were entitled to official immunity because the court order contained

no language that it was a reduction or modification of sentence, was not accompanied by a final disposition form and did not instruct the clerk to notify prison officials of a sentence reduction.

McGee appealed, the Court of Appeals reversed and the Georgia Supreme Court granted certiorari on two questions. As to the first, the Supreme Court held the appellate court had correctly found the trial court erred in deciding that Blanton and Hicks did not breach the ministerial duty imposed upon them by OCGA § 42-5-50(a).

The Supreme Court disagreed that the trial court’s order was a “type of non-sentencing order,” as the record directly contradicted a finding that it did not contain language that reduced or modified a sentence. Additionally, state law does not excuse the clerk from completing ministerial duties merely because the judge did not include a final disposition form or specifically order the clerk to take action.

“The amended order unambiguously involved a criminal defendant’s sentence whether or not appellants recognized it as such,” the Supreme Court wrote. The lack of that recognition may evidence “negligent performance of the simple, absolute, and definite act” required by OCGA § 42-5-50(a).

As to the second question, the Supreme Court found that the Court of Appeals had erred in its application of the “law of the case” rule, as the appellate court’s first opinion in McGee’s

case did not resolve the issue of whether the defendants were entitled to official immunity. Regardless, the Court of Appeal's judgment was affirmed and the case

remanded for further proceedings against Hicks and Blanton. See: *Hicks v. McGee*, 289 Ga. 573, 713 S.E.2d 841 (Ga. 2011), *reconsideration denied*. ■

Former Mississippi Mayor Charged with Sexually Assaulting Prisoner

Federal prosecutors have charged the former mayor of Walnut Grove, Mississippi with sexually assaulting a prisoner while acting under color of law. He also was charged with telling the prisoner to lie during an investigation into the incident. [See: *PLN*, April 2012, p.1].

William Grady Sims, 61, was first elected mayor of Walnut Grove in 1981. He was accused of sexually assaulting a female prisoner held at the Walnut Grove Transition Center (WGTC) operated by GEO Group, the nation's second-largest private prison company.

WGTC houses prisoners from the Mississippi Department of Corrections. Ironically, Sims was employed as WGTC's warden in 2009 when he took the prisoner to a motel room and had sex with her.

Separately, state auditors found that Sims' relationship with private prison firms was illegally costing local taxpayers. On October 25, 2011, State Auditor Stacey Pickering ordered Sims to repay \$31,150 for ordering private prisons in the area to be

served by city employees and equipment.

"The demand against Mayor Sims represents multiple instances where city employees were directed by the mayor to do work at a private prison facility in Walnut Grove," Pickering said in a news release. "Taxpayers of Walnut Grove have been paying for equipment and labor to do work at these facilities that are for-profit, private prisons. In addition, town equipment and labor have been used on private property at taxpayer expense."

Sims pleaded guilty to a federal witness tampering charge in February 2012, and was sentenced on April 24, 2012 to seven months in prison and six months of home confinement, plus two years on supervised release. He also agreed to resign as mayor and not to run for public office or seek government employment in the future. See: *United States v. Sims*, U.S.D.C. (S.D. Miss.), Case No. 3:11-cr-00090-DCB-LRA. ■

Sources: *Associated Press*, www.fbi.gov

Florida Death Row Prisoners Cannot Challenge Sentence Pro Se

Citing its "constitutional responsibility to ensure the death penalty is administered in a fair, consistent and reliable manner, as well as having an administrative responsibility to work to minimize the delays inherent in the post-conviction process," the Florida Supreme Court held on October 6, 2011 that prisoners sentenced to death do not have a constitutional right to act pro se in post-conviction proceedings.

That ruling came in a case involving death row prisoner Robert Gordon. The trial court had granted Gordon leave to file a successive post-conviction petition in a pro se capacity. When the court summarily denied the petition, Gordon filed a pro se notice of appeal with the Florida Supreme Court.

The Court temporarily relinquished jurisdiction so the trial court could offer Gordon appointed counsel, and an at-

torney was ultimately appointed for the appeal.

Before briefs were filed, Gordon and his appointed counsel filed separate motions to discharge or withdraw counsel. The Supreme Court then held that death-sentenced prisoners have no federal constitutional right to act pro se in direct appeals of post-conviction proceedings under U.S. Supreme Court precedent.

The Supreme Court in *Martinez v. Court of Appeal of California*, 538 U.S. 152 (2000) left the determination of a right of self-representation on appeal to the states under their respective state constitutions. The Florida Supreme Court found that no such right existed, and the decision in this case extended that finding to post-conviction proceedings by death-sentenced prisoners. See: *Gordon v. State*, 75 So.3d 200 (Fla. 2011). ■

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“Voluntary” Work Program in Private Detention Centers Pays Detained Immigrants \$1 a Day

by Yana Kunichoff

In the Stewart Detention Center in rural Lumpkin, Georgia, Pedro Guzman cleaned the communal areas, cooked, painted walls, ran paperwork and buffed floors. But Guzman was not brought into Stewart as an employee – he was a detained immigrant taking part in the detention center’s “voluntary” work program.

“I didn’t go more than a month without a job,” said Guzman, who spent almost 20 months waiting, and working, inside Stewart while his immigration case was resolved.

In private prisons around the country, immigrants languishing in detention centers are being put to work by profit-making companies like the Corrections Corporation of America (CCA) for far below the minimum wage. For doing a range of manual labor in the facility, the immigrants, many of whom are not legally permitted to work in the United States, are paid between \$1-\$3 a day.

The Obama administration’s move away from the workplace raids of the Bush years and toward an increasing reliance on Secure Communities, which critics say has functioned as a dragnet for immigrants who have committed low-level crimes or none at all, has flooded detention centers across the country.

Between 1996 and 2011, deportations increased by 400 percent and the Department of Homeland Security now has a daily detention capacity of 34,000 beds. Along with this trend has come the widespread privatization of the federal detention centers.

Guzman was paid only \$1 a day for cleaning communal areas in the detention center. When he moved to working in the kitchen – “an 8 hour job and you do get your full 30 minute break” – his pay shifted to \$3 a day.

Most of the work in Stewart was done by detainees, said Guzman, who was placed into deportation proceedings when a letter about his asylum case was sent to the wrong address. “Ninety percent of the jobs in CCA are run by detainees,” he said of Stewart.

Immigrant rights advocates have called the voluntary work program another dehumanizing avenue for companies

like CCA to profit from immigrants already in a vulnerable position.

“The whole nature of this program is problematic,” said Azadeh Shahshahani, director of the National Security/Immigrants’ Rights Project at the ACLU of Georgia. “At the end of the day, they are getting the detainees to work for a wage that is far below minimum wage and for the work that they would have had to hire personnel. Obviously they are deriving a profit whatever way you look at it.”

“The detainees need the money, the phone cards are expensive ... and the food that they get is not enough to sustain themselves,” said Shahshahani, editor of a “Prisoners of Profit” report about immigration detention centers in Georgia. “They really need the money to eke out somewhat of a normal existence.”

If undocumented workers, the people who pick America’s produce, mow its lawns, do its laundry, build its houses and cook in its restaurants, are not allowed to work legally in the United States, what are their labor protections when employed by a private detention company?

“Illegal” Workers Legalized in Detention

According to a Freedom of Information Act (FOIA) request filed by Jacqueline Stevens, a professor of political science at Northwestern University, detainees in detention centers work in five main areas – recreation, processing, housing units, main hallway/traverse areas and the library.

At the facilities reviewed in the documents – Florence Correctional Center in Florence, Arizona; El Centro Service Processing Center in El Centro, California; Stewart Detention Center and Varick Detention Center in New York City – the maximum wage under the voluntary work program was \$1 a day.

“Detainees that participate in the volunteer work program are required to work according to an assigned work schedule and to participate in all work related training,” the response to the FOIA request noted. The maximum amount of work detainees were allowed to do was eight hours a day, 40 hours a week.

Immigration and Customs Enforce-

ment (ICE) calls the voluntary work program “one method of managing detained aliens to give them an opportunity to be gainfully occupied on a voluntary basis.” The program also contributes to the deportation program’s “ability to successfully perform its detention mission.”

Is there a loophole that allows CCA to use undocumented labor at below minimum wage to help run their detention centers, and what are the immigrants’ rights as workers?

In response to the question above, a spokesperson at the Department of Labor directed questions about workers in immigration detention centers to ICE. ICE did not directly address the question of what their labor position was. Instead, ICE said that the workers were not employees:

“The Voluntary Work Program, under conditions of confinement, does not constitute employment and is done by detainees on a voluntary basis for a small stipend.”

But some advocates say that this legal gray area covers something more sinister. Stevens, the Northwestern professor, said the voluntary work program is consistent with slave labor: “Forced to work at wages they can’t negotiate and far below the wages Congress set.”

“In any other context,” she continued, “these private companies would be penalized for hiring people who don’t have legal documents and paying them below the federal minimum wage.”

The ICE spokesperson said a federally mandated precedent makes it legal for undocumented workers in detention centers to be paid. The average rate of pay for immigrants – \$1 a day – was first set in the appropriations act for fiscal year 1979 and has held steady since. ICE considers the payment for work done by immigrants “allowances,” according to a section of the U.S. Code Classification tables, despite their undocumented status.

ICE Caps Its Payment for Detained Workers at \$1

The amount ICE pays the contracting company for the immigrants it employs is capped at \$1 even though “contract companies such as CCA may choose to provide a higher level of compensation.”

At Stewart, CCA's payment to Guzman of \$3 a day for kitchen work makes it triple the ICE-mandated daily wage.

This payment was challenged in a 1990 lawsuit under the Fair Labor Standards Act, which "establishes minimum wage, overtime pay, recordkeeping and youth employment standards affecting employees in the private sector and in Federal, State and local governments," and says that workers are entitled to a current minimum wage of \$7.25 an hour.

In the lawsuit, 16 immigrants at a detention center in Texas sued the then-Immigration and Naturalization Services (INS), arguing that only being paid \$1 a day violated the Fair Labor Standards Act.

The final ruling in the case by the U.S. Court of Appeals for the Fifth Circuit upheld INS's right to pay detained workers only \$1 a day. The court noted that "alien detainees are not government 'employees'" and "the federal government usually authorizes the employment of aliens only under limited circumstances, none of which apply here."

Therefore, the ruling said, the detainees couldn't claim protection under the act because "alien detainees whose work is described by no statute authorizing use of taxpayers' money to pay government employees cannot claim such status." [See: *Alvarado Guevara v. I.N.S.*, 902 F.2d 394 (5th Cir. 1990)].

There are several treaties that try to govern the use of labor in detention. One is the Inter-American Principles on Detention, cited in a 2012 report on private prisons by the ACLU of Georgia as say-

ing: "All persons deprived of liberty shall have the right to work."

"This includes the right 'to receive a fair and equitable remuneration,'" the report noted.

Then there is the 13th Amendment, which has been used as a basis for the allowance of prison labor – with an average pay that ranges from \$0.93 a day to \$1.25 an hour – though the fairness of this has also been challenged.

But Stevens noted that even within the context of a corrections environment, an immigration offense is a civil one, and therefore the detention should not be punitive.

"Detention centers are not legal punishment," said Stevens. "They are for people who are trying to pursue their civil right to remain in the country."

The Money Earned by Detainees Makes Its Way Back to CCA

Guzman said the work he did while detained at Stewart broke up the tedium of being locked up and the stress of dealing with his constantly delayed appeals. But he said there was another incentive to continue making the meager wage he was paid for working a 40-hour week in the kitchen.

"You would get paid once a week and it would go directly into your canteen money," said Guzman. And with that "you bought food, a calling card, a bar of soap, shampoo, toothbrush" – from the CCA-run store inside the detention center.

Stevens said her research has shown that the primary reasons for detainees to

take part in the voluntary work programs is "so that they can buy food and hygiene products. If they don't have relatives on the outside to pump up their commissary accounts then they'll buff floors."

If some of the money being paid to undocumented workers taking part in the voluntary work program goes back to CCA, how much are private prison companies earning from these workers?

Companies like CCA are paid a lump sum by ICE for housing detainees – and then from whatever costs they can cut on food, labor or facilities, comes their profits. CCA, "the nation's largest owner and operator of partnership correction and detention facilities and one of the largest prison operators in the United States, behind only the federal government and three states," had net income of \$31.7 million for the first quarter of 2012.

"The colossal 'savings' from paying people a small fraction of the legal wage makes possible these centers," wrote Stevens in a blog post on the voluntary work program in private detention centers. "How much exactly is being saved?"

According to Stevens' analysis of figures in her FOIA requests, the monthly payments from just one detention center break down like this:

"Each dollar is a day's payment's to one detainee, so July 2009 at 5,815 = 5815 individual days or shifts of labor. Not all of the shifts are 8 hours but they go up to that. If the range of hours worked for this example is 4-8 hours [a] day, then the payments that should have been made for July 2009 under federal minimum wage laws



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Immigrant Work Program (cont.)

would be \$168,635 to \$337,000. Again, what actually was paid was \$5,815."

"In brief," said Stevens, "the ICE jails are paying people \$1/day for work that minimum wage laws would require compensated at \$29-\$58/day."

This is only a small window on the earnings from this program. Among the questions CCA declined to answer, despite repeated requests for comment over a period of several weeks, was how widespread the voluntary work program was and how many immigrants were involved in it nationally.

Abuse?

ICE and CCA descriptions of the program stress the term "voluntary," but a recently released ACLU report shows otherwise, detailing instances of detained immigrants being forced to work at Stewart Detention Center:

"Omar Ponce was subjected to disciplinary action for refusing to work and for organizing a work strike in 2010. He was in the segregation unit for a week before he had his disciplinary review hearing. Another detainee was threatened with segregation if he refused to work less than eight hours per day. This is not atypical."

In response, CCA representative Mike Machak said: "The incident described in the ACLU report was reported to CCA staff, was dealt with appropriately and was reported to ICE in accordance with detention standards and contract requirements."

Oversight, said Machak, is provided by "our longstanding government partner [ICE], including on-site ICE staff."

The Irony

Critics of private detention like Bob Libal, a Texas organizer for Grassroots Leadership focusing on the expansion of the private federal detention system, stress the unfairness of people criminalized as workers detained and then made to work.

"I think it's pretty disturbing that private prison corporations are padding their bottom line by exploiting undocumented labor in their facilities," said Libal, "when it would be much more humane and beneficial for the sort of country as a whole to allow people to live and work outside of detention facilities while their immigration cases are processed."

It's an irony not lost on Guzman. "You will boot them out of the country because they don't have papers to work in the U.S.," he said when asked about the issue, "but then you give them a job and you underpay them. Why are you under-

paying them?"

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Vermont DOC Disbands Citizens' Advisory Group that Critics Called "Window Dressing" for Transparency

by Ken Picard

Andy Pallito was on the hot seat on July 19, 2012 at a meeting of the Joint Legislative Corrections Oversight Committee. Vermont's commissioner of corrections had failed to notify lawmakers that he had disbanded a citizen panel charged with advising his department.

Sen. Dick Sears, who chairs the Legislative Corrections Oversight Committee, first learned of Pallito's decision via an *Associated Press* story that ran on July 16.

"I apologize for catching you off-guard," Pallito told Sears and other lawmakers on the committee. "Frankly, in the realm of things I usually call you on, postponing the Corrections Citizens' Advisory Group for 60 days didn't seem like it rose to that level."

Pallito explained: After he canceled its quarterly meeting scheduled for July 13, a CCAG member accused him of not taking the group seriously and "wasting his time."

"That's not the first time I've heard a member say 'It's a waste of my time,'" Pallito told legislators. "Those are pretty serious comments. So, I decided to put the group on hold, take a step back and see how the department has been utilizing it."

Current and former CCAG members have complained for years that the group has delivered on few, if any, of its initial promises for more transparency and openness into DOC operations.

Evidently, the frustration runs both ways. Pallito told lawmakers that attendance at CCAG meetings dropped off once the DOC moved its operations from Waterbury to Williston after Tropical Storm Irene. "Frankly, I've spent more time managing the media on this issue than really being able to step back and contemplate its overall mission," he added.

The CCAG was created in 2005 in response to widespread criticism of the DOC. In December 2003, the Agency

of Human Services hired Montpelier attorney Michael Marks and former New Hampshire attorney general Philip McLaughlin to investigate the deaths of seven Vermont prisoners as well as other problems in the correctional system.

In their March 2004 report, Marks and McLaughlin voiced criticism of "a culture within the Department that fails to embrace accountability."

In its response, the DOC proposed the creation of the CCAG, which, among other things, would be granted "scheduled access to selected correctional facilities and the opportunity to speak to inmates or staff members in the facilities...."

In her email to lawmakers, former CCAG member Laura Ziegler said she participated in CCAG for about three years in the hope of gaining that "special access" to Vermont's prisoners, facilities and records.

"This did not occur. Very little occurred," Ziegler said. "The Department ran the meetings; there would occasionally be some meaningful dialogue, but the group's primary purpose seemed to be window dressing."

Robert Appel, executive director of the Vermont Human Rights Commission, concurred with Ziegler's assessment. Also a founding member of the CCAG, Appel resigned from the group early on largely due to personal concerns about potential conflicts of interest. Appel heads an independent agency that occasionally sues the DOC over issues such as racial discrimination, sexual harassment and failure to allow prisoners access to religious observances and diets.

Appel found the few meetings he attended to be "less than meaningful. In other words, it was bullshit."

"It's institutional. Government officials, for whatever reason, want to be left alone to do their work," Appel added.

"It always amazes me that, despite the rhetoric that 'We're open and transparent,' allowing everyday citizens to review governmental actions in a formal setting with some authority is resisted."

CCAG member Gordon Bock of Northfield is a former prisoner and an activist with CURE Vermont, the local affiliate of Citizens United for Rehabilitation of Errants. He said the advisory group's breakup is especially ill-timed given the number of problems at the DOC that have come to light in recent months.

Among them, Bock pointed to the Vermont Parole Board's falsification of an arrest warrant that resulted in convicted murderer Douglas Mason being released from prison three years early. Bock also noted the cancellation, in June, of Vermont's contract with the Greenfield Jail & House of Detention, which went undisclosed by the DOC until Bock learned of it and alerted the media. And there was the "white paper" documenting substandard living conditions for women in the Chittenden Regional Correctional Facility in South Burlington.

"Is this really the time," Bock asked lawmakers on the joint oversight committee, "for your esteemed committee to be the sole watchdog over DOC?" But not everyone blames the current commissioner for the CCAG's shortcomings. Sarah Kenney, associate director for public policy for the Vermont Network Against Domestic and Sexual Violence, has been a member from the beginning. She said the group's effectiveness has always "ebbed and flowed over the years" but has become increasingly dysfunctional.

"In recent years it's become less a forum for productive conversation about trends within the department and more a place for individuals to come and air their personal grievances with the department," Kenney said.

At last week's committee meeting, Sears invited current and former CCAG members to offer suggestions on what a newly constituted CCAG should look like. He also called on DOC staffers to research effective models in other states and get back to him for the committee's next meeting in September.

Bock knows what he wants the new CCAG to look like. He points to the Vermont State Police Advisory Committee, which has both independence and oversight authority established in law. Better yet, Bock suggested a model similar to the New York City Civilian Complaint Review Board, the independent agency

empowered to investigate, mediate, make findings and recommend actions about complaints against NYPD cops.

Another possible model for Vermont's commissioner to consider is in Colorado. In 1995, Dianne Tramutola-Lawson, president of International CURE, helped Colorado's corrections director create quarterly "citizen advocate meetings" to discuss systemic problems in that state's prison system.

Unlike Vermont's CCAG, Colorado's citizen advocate meetings have no formal membership, Tramutola-Lawson noted. The meetings, which are attended by the director of corrections as well as much of his staff, are open to the public, with agenda items warned in advance. Individual grievances cannot be aired; instead, the group addresses systemic problems only.

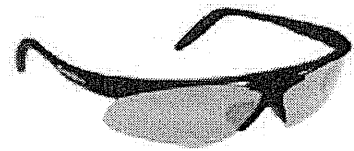
How effective are the citizen advocate meetings? Very, Tramutola-Lawson asserted. Just this year, for example, her group convinced the Colorado Department of Corrections to reduce its phone rates for prisoners.

"I just think the lines of communication for all of our families and people with loved ones incarcerated have really been streamlined," she added.

For his part, the HRC's Appel suggested that an open and effective model for feedback to the DOC is doable in Vermont, too. There's a delicate balance, he said, between a citizens' committee that informs policy and provides general direction and guidance, and one that "tries to run the organization."

"It's tricky," he added, "but I don't think it's unattainable." ■

This article originally appeared in Seven Days, an independent Vermont publication, on July 25, 2012. It is reprinted with permission.



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News in Brief

Arizona: ASPC Florence prison guard Jeffrey Williams, 46, was arrested and booked into the Pinal County jail on April 20, 2012 after child pornography was found on his computer. Williams had taken the computer to a repair shop, which notified the sheriff's office about the child porn. He reportedly confessed to having downloaded the illicit images and videos, and was charged with ten counts of sexual exploitation of a minor.

Australia: Sean Stephen Hatten, 29, serving a 13-year sentence at the Capricornia Correctional Centre for attempted murder, slashed another prisoner's throat with a prison-issued razor on April 13, 2011. In court for that offense in May 2012, prosecutors said he told guards at the time that he was "having a bad day." Hatten received a 15-year prison term for the "calculated and premeditated attack" on the other prisoner, which occurred while he was standing in line to make a hot drink.

California: Anthony "Chopper" Garcia was in the news in 2011 when he was arrested for and convicted of murder, partly because he had had a picture of the crime scene tattooed on his chest. In March 2012, it was reported that Garcia

received over \$30,000 in unemployment benefits while in jail awaiting trial from 2008 to 2010. His father and two girlfriends were accused of cashing the unemployment checks and depositing them in his jail account and those of other gang members. Garcia's father, Juan Garcia, and his girlfriends, Sandra Jaimez and Cynthia Limas, were arrested on charges that included grand theft.

Colorado: In April 2012, the Arapahoe County Commission voted to change the name of the Patrick J. Sullivan Detention Center. The jail, named for the former sheriff, will now be called the Arapahoe County Detention Center. Sullivan, 69, was arrested in November 2011 and pleaded guilty to possession of methamphetamine and soliciting prostitution following an undercover sting involving his gay lover. He was sentenced to 30 days in jail, two years probation and a \$1,100 fine, and was released on April 21, 2012 after serving 17 days.

Florida: The Pinellas County Jail uses a video visitation system, which apparently is closely monitored by jail staff. Mitchell Thomas, 46, learned that the hard way when he visited his wife, who was incarcerated at the jail, and exposed

his genitals to her during their video visit on May 1, 2012. He was arrested on a misdemeanor charge for exposing himself. Such incidents evidently are not very common. "This is the first I've heard of it," said Pinellas County Sheriff's Office spokeswoman Cecilia Barreda.

Georgia: Clayton County prisoner Kevin Garard Guerrier, 26, was in court on April 6, 2012 for a hearing on child support and a temporary protective order when he became disruptive, was ordered removed from the courtroom and struggled with deputies. He was rendered unconscious and hospitalized, then died 10 days later. The sheriff's office and the Georgia Bureau of Investigation are investigating his death.

Israel: A majority of the 4,699 Palestinian prisoners held in Israeli jails refused to eat on Prisoners' Day, April 17, 2012. Around 1,200 prisoners said they would continue to fast in protest of unfair conditions, according to news reports. Most of the Palestinian prisoners (3,864) are from the West Bank; over 300 are being held under Israeli's policy of "administrative detention," in which suspects are imprisoned for an indefinite period of time without being charged. Palestinian

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prisoner Khader Adnan, 33, who was held in administrative detention and had previously staged a 66-day hunger strike, was released on April 17.

Maine: Cumberland County jail prisoner Arien L'Italien, 23, was caught on March 10, 2012 as he tried to crawl back to his unit after visiting a female prisoner and having consensual sex with her in her cell. Both L'Italien and his imprisoned paramour, Karla Wilson, 25, had jammed the locks on their cell doors to facilitate the late-night rendezvous.

Maine: In April 2012, the Maine Center for Disease Control and Prevention reported that one prisoner had died and around 40 other prisoners and several staff members at another prison were sick due to a flu outbreak. "Correctional Medical Services, which provides health services to both facilities reported that influenza vaccination coverage among inmates was very low (less than 10 percent), and coverage among staff members was unknown but believed to be low," according to the Center. Both prisoners and employees were offered vaccinations following the outbreak.

Maine: State prison guard Randall Carl, 46, was convicted of animal cruelty on April 23, 2012 for tying a captured bobcat to a pole and allowing hunting

dogs to attack and kill it. The February 2009 incident was videotaped as part of a "training exercise." After being convicted at a jury trial in Waldo County Superior Court, Carl received a 15-month sentence, suspended except for 10 days, and was fined more than \$1,300.

Nebraska: In a bizarre incident, a woman who didn't want to meet with her probation officer asked two friends to stab her so she could go to the hospital instead. Jessalyn A. Stierwalt, 22, had been drinking heavily and wanted time to sober up before meeting with her probation officer, who was going to install an alcohol-monitoring device. She therefore had two friends, Scott Roberson-Turman and Kerry L. Duke II, stab her in the shoulder and stomach. All three were charged with various offenses and pleaded no contest to misdemeanor obstruction of government operations. Stierwalt and Roberson-Turman were sentenced on April 18, 2012 to 12 months in prison. "It takes stupidity to a new extreme," noted Gage County District Judge Paul Korslund.

North Carolina: Mountain View Correctional Facility guard William Wright, 31, died on April 11, 2012 after falling down a metal staircase while on duty. He was taken to a hospital after the accident

and was released the following day, but died several days later due to complications from a head injury. His death is being investigated by state and federal authorities.

Oregon: Prison guard Michael Wilson Yann, 39, was arrested on April 15, 2012 after he shot at police officers with a 9mm pistol during a standoff at his home. Police had responded to a report of an intoxicated man in the street. Yann was booked into the Marion County jail on charges of aggravated attempted murder, attempted murder and disorderly conduct, and held without bond. He was placed on administrative leave by the Department of Corrections, where he worked as a transportation officer.

Pakistan: On April 15, 2012, 384 prisoners, including one sentenced to death, escaped from the Bannu Central Jail after the facility was attacked by members of the Taliban, who used assault rifles and rocket-propelled grenades. "There were huge explosions. Plaster from the ceilings fell on us," stated prisoner Malik Nazeef. "Then there was gunfire. We didn't know what was happening." The jail's metal gates were blown open and the attackers shot locks off doors. One of the escapees, Adnan Rasheed, was under a death sentence for trying to assassinate Pakistan

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News in Brief (cont.)

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Pennsylvania: A federal criminal information was filed on March 23, 2012 against BOP guard Donald E. Lykon, 30, who was accused of smuggling cellphones, tobacco and marijuana into USP Canaan over a four-month period in 2011. Lykon allegedly accepted over \$5,000 in bribes from prisoners to deliver the contraband. Concurrently with the filing of the criminal information, he pleaded guilty to felony charges of accepting bribes and distributing marijuana.

Pennsylvania: On April 2, 2012, a

Monroe County jury imposed a death sentence on former prison guard Michael Parrish, 26, who was convicted of first-degree murder for killing his girlfriend, Victoria Adams, and infant son, Sidney. Formerly a white supremacist, Parrish had converted to Islam; he shot Adams and his son a dozen times in July 2009, then told police the next day that he didn't deserve to live. The jury apparently agreed.

Tennessee: Court of Criminal Appeals judge Jerry L. Smith was arrested in Knoxville on April 23, 2012 on a misdemeanor DUI charge. He was pulled over because he was driving a car with the back hatch open; according to the arresting officers he smelled of alcohol, had slurred speech and

failed a sobriety test. Smith pleaded guilty to the DUI charge on June 23, 2012 – his license was suspended and he was sentenced to 48 hours in jail. He later returned to work. The Tennessee legislature has not removed a judge from office in 18 years.

Texas: The Crain Unit near Gatesville, which houses female prisoners, has become overrun by feral cats. According to an April 16, 2012 *Associated Press* article, a local non-profit group, Kathy's Kitties, volunteered to have the estimated 150 to 175 cats at the prison neutered at no cost to the state. The felines would also be treated for fleas and ticks, and receive rabies shots. Prison officials had been trapping the cats and euthanizing them. ■

Criminal Justice Resources

ACLU National Prison Project

Handles state and federal conditions of confinement claims affecting large numbers of prisoners. Publishes the NPP Journal (available online at: www.aclu.org/national-prison-project-journal-fall-2011) and the Prisoners' Assistance Directory (write for more information). Contact: ACLU NPP, 915 15th St. NW, 7th Fl., Washington, DC 20005 (202) 393-4930. www.aclu.org/prisons

Amnesty International

Compiles information about prisoner torture, beatings, rape, etc. to include in reports about U.S. prison conditions; also works on death penalty issues. Contact: Amnesty International, 5 Penn Plaza, New York NY 10001 (212) 807-8400. www.amnestyusa.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 HIV status. Contact: CHJ, 900 Avila Street, Suite 102, Los Angeles, CA 90012. HIV Hotline: (214) 229-0979 (collect calls from prisoners OK). www.centerforhealthjustice.org

Critical Resistance

Seeks to build an international movement to abolish the Prison Industrial Complex, with offices in Florida, California, New York, Texas and Louisiana. Publishes The Abolitionist newsletter. Contact: Critical Resistance, 1904 Franklin Street #504, Oakland, CA 94612 (510) 444-0484. www.criticalresistance.org

Family & Corrections Network

Primarily provides online resources for families of prisoners related to parenting, children of prisoners, prison visitation, mothers and fathers in prison, etc. Contact: F&CN, 93 Old York Road, Suite 1 #510, Jenkintown, PA 19046 (215) 576-1110. www.fcnetwork.org

FAMM

FAMM (Families Against Mandatory Minimums) publishes the FAMMGram three times a year, which includes information about injustices resulting from mandatory minimum laws with an emphasis on federal laws. Recommended donation of \$10 for a subscription. Contact: FAMM, 1612 K Street NW #700, Washington, DC 20006 (202) 822-6700. 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

Innocence Project

Provides advocacy for wrongly 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

Just Detention International

Formerly Stop Prisoner Rape, JDI seeks to end sexual violence against prisoners. Provides counseling resources for imprisoned and released rape survivors and activists for almost every state. Contact: Stop Prisoner Rape, 3325 Wilshire Blvd. #340, Los Angeles, CA 90010 (213) 384-1400. 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, and includes all back issues of the Justice Denied magazine

and a database of more than 3,000 wrongly convicted people. Contact: Justice Denied, P.O. Box 68911, Seattle, WA 98168 (206) 335-4254. www.justicedenied.org

National CURE

Citizens United for Rehabilitation of Errants (CURE) is a national organization with state and special interest chapters 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, National Capitol Station, Washington, DC 20013 (202) 789-2126. www.curenational.org

November Coalition

Publishes the Razor Wire, a bi-annual newsletter that reports on drug war-related issues, releasing prisoners of the drug war and restoring civil rights. A subscription is \$10 for prisoners and \$30 for non-prisoners. Contact: November Coalition, 282 West Astor, Colville, WA 99114 (509) 684-1550. www.november.org

Partnership for Safety and Justice

Publishes Justice Matters three times a year, which reports on criminal justice issues in Oregon. Free to Oregon prisoners, \$7 for other prisoners and \$25 for non-prisoners. Contact: PS&J, 825 NE 20th Avenue #250, Portland, OR 97232 (503) 335-8449. www.safetyandjustice.org

The Sentencing Project

The Sentencing Project is a national policy research and advocacy organization that works for a fair and effective criminal justice system by promoting sentencing reform and alternatives to incarceration. They produce excellent reports on topics related to sentencing policy, racial disparities, drug policy, juvenile justice and voting rights/disenfranchisement, which are available online. Contact: The Sentencing Project, 1705 DeSales St. NW, 8th Fl., Washington, DC 20036 (202) 628-0871. www.sentencingproject.org

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With Liberty for Some: 500 Years of Imprisonment in America, by Scott Christianson, Northeastern University Press, 372 pages. \$18.95. The best overall history of the American prison system from 1492 through the 20th Century. A must-read for understanding how little things have changed in U.S. prisons over hundreds of years. 1026 ☐ ☐

Prison Nation: The Warehousing of America's Poor, edited by Tara Herivel and Paul Wright, 332 pages. \$35.95. PLN's second anthology exposes the dark side of the 'lock-em-up' political agenda and legal climate in the U.S. 1041 ☐ ☐

The Ceiling of America, An Inside Look at the U.S. Prison Industry, edited by Daniel Burton Rose, Dan Pens and Paul Wright, 264 pages. \$22.95. PLN's first anthology presents a detailed "inside" look at the workings of the American justice system. 1001 ☐ ☐

Prisoners' Guerrilla Handbook to Correspondence Programs in the U.S. and Canada, updated 3rd ed. by Jon Marc Taylor, Ph.D. and edited by Susan Schwartzkopf, PLN Publishing, 221 pages. \$49.95. Written by Missouri prisoner Jon Marc Taylor, the *Guerrilla Handbook* contains contact information and descriptions of high school, vocational, para-legal and college correspondence courses. 1071 ☐ ☐

The Criminal Law Handbook: Know Your Rights, Survive the System, by Attorneys Paul Bergman & Sara J. Berman-Barrett, Nolo Press, 608 pages. \$39.99. Explains what happens in a criminal case from being arrested to sentencing, and what your rights are at each stage of the process. Uses an easy to understand question-and-answer format. 1038 ☐ ☐

Represent Yourself in Court: How to Prepare & Try a Winning Case, by Attorneys Paul Bergman & Sara J. Berman-Barrett, Nolo Press, 528 pages. \$39.99. Breaks down the civil trial process in easy-to-understand steps so you can effectively represent yourself in court. The authors explain what to say in court, how to say it, etc. 1037 ☐ ☐

Law Dictionary, Random House Webster's, 525 pages. \$19.95. Comprehensive up-to-date law dictionary explains more than 8,500 legal terms. Covers civil, criminal, commercial and international law. 1036 ☐ ☐

The Blue Book of Grammar and Punctuation, by Jane Straus, 110 pages. \$14.95. A guide to grammar and punctuation by an educator with experience teaching English to prisoners. 1046 ☐ ☐

Legal Research: How to Find and Understand the Law, by Stephen Elias and Susan Levinkind, 568 pages. \$49.99. Comprehensive and easy to understand guide on researching the law. Explains case law, statutes and digests, etc. Includes practice exercises. 1059 ☐ ☐

Deposition Handbook, by Paul Bergman and Albert Moore, Nolo Press, 352 pages. \$34.99. How-to handbook for anyone who conducts a deposition or is going to be deposed. 1054 ☐ ☐

Finding the Right Lawyer, by Jay Foonberg, ABA, 256 pages. \$19.95. Explains how to determine your legal needs, how to evaluate a lawyer's qualifications, fee payments and more. 1015 ☐ ☐

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Spanish-English/English-Spanish Dictionary, Random House. \$8.95. Two sections, Spanish-English and English-Spanish. 60,000+ entries from A to Z; includes Western Hemisphere usage. 1034 ☐ ☐

Writing to Win: The Legal Writer, by Steven D. Stark, Broadway Books/Random House, 283 pages. \$19.95. Explains the writing of effective complaints, responses, briefs, motions and other legal papers. 1035 ☐ ☐

Actual Innocence: When Justice Goes Wrong and How to Make it Right, updated paperback ed., by Barry Scheck, Peter Neufeld and Jim Dwyer, 403 pages. \$16.00. Describes how criminal defendants are wrongly convicted. Explains DNA testing and how it works to free the innocent. Devastating critique of police and prosecutorial misconduct. 1030 ☐ ☐

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Beyond Bars, Rejoining Society After Prison, by Jeffrey Ian Ross, Ph.D. and Stephen C. Richards, Ph.D., Alpha, 240 pages. \$14.95. *Beyond Bars* is a practical and comprehensive guide for ex-convicts and their families for managing successful re-entry into the community, and includes information about budgets, job searches, family issues, preparing for release while still incarcerated, and more. 1080 ☐ ☐

Jailhouse Lawyers: Prisoners Defending Prisoners v. the U.S.A., by Mumia Abu Jamal, City Lights Publishers, 280 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. 1073 ☐ ☐

A Dictionary of Criminal Law Terms (Black's Law Dictionary® Series), by Bryan A. Garner, 768 pages. \$29.00. This handbook contains police terms such as preventive detention and protective sweep, and phrases from judicial-created law such as independent-source rule and open-fields doctrine. A good resource to navigate your way through the maze of legal language in criminal cases. 1088 ☐ ☐

The Habeas Citebook: Ineffective Assistance of Counsel, by Brandon Sample, PLN Publishing, 200 pgs. \$49.95. This is PLN's second published book, which covers ineffective assistance of counsel issues in federal habeas petitions. Hundreds of case cites! 1078 ☐ ☐

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Hepatitis and Liver Disease: What You Need to Know, by Melissa Palmer, MD, 457 pages. **\$17.95.** Describes symptoms & treatments of hepatitis B & C and other liver diseases. Includes medications to avoid, what diet to follow and exercises to perform, plus a bibliography. 1031 ☐

10 Insider Secrets to a Winning Job Search, by Todd Bermont, 216 pages. **\$15.99.** Roadmap on how to get a job even under adverse circumstances—like being an ex-con. Includes how to develop a winning attitude, write attention-grabbing résumés, prepare for interviews, net-working and much more! 1056 ☐

Arrest-Proof Yourself, by Dale Carson and Wes Denham, 288 pages. **\$14.95.** This essential “how not to” guide written by an ex-cop explains how to act and what to say when confronted by the police to minimize the chances of being arrested and avoid additional charges. Includes information on basic tricks that police use to get people to incriminate themselves. 1083 ☐

Arrested: What to Do When Your Loved One's in Jail, by Wes Denham, 240 pages. **\$16.95.** Whether a defendant is charged with misdemeanor disorderly conduct or first-degree murder, this is an indispensable guide for those who want to support family members, partners or friends facing criminal charges. 1084 ☐

Prisoners' Self-Help Litigation Manual, updated 4th ed. (2010), by John Boston and Daniel Manville, Oxford Univ. Press, 960 pages. **\$39.95.** The premiere, must-have “Bible” of prison litigation for current and aspiring jail-house lawyers. If you plan to litigate a prison or jail civil suit, this book is a must-have. Highly recommended! 1077 ☐

How to Win Your Personal Injury Claim, by Atty. Joseph Matthews, 7th edition, NOLO Press, 304 pages. **\$34.99.** While not specifically for prison-related personal injury cases, this book provides comprehensive information on how to handle personal injury and property damage claims arising from accidents. 1075 ☐

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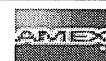
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