# Prison Legal News

VOL. 24 No. 12
ISSN 1075-7678

*Dedicated to Protecting Human Rights*

December 2013

## FCC Order Heralds Hope for Reform of Prison Phone Industry

*by John E. Dannenberg and Alex Friedmann*

*"After a long time – too long – the Commission takes action to finally address the high cost that prison inmates and their families must pay for phone service. This is not just an issue of markets and rates; it is a broader issue of social justice." – FCC Commissioner Jessica Rosenworcel*

On August 9, 2013, the Federal Communications Commission (FCC), in a landmark decision, voted to cap the cost of long distance rates for phone calls made by prisoners and enact other reforms related to the prison phone industry. [See: *PLN*, Sept. 2013, p.42].

The FCC's 131-page final order was released in September and published in the *Federal Register* on November 13, 2013. It has not yet gone into effect due to a 90-day waiting period following publication in the *Register*, plus legal challenges have since been filed by the nation's two largest prison phone companies.

The order, entered in response to a petition for rulemaking submitted to the FCC, is the result of a decade-long effort to lower prison phone rates and implement much-needed changes in the prison phone industry.

### Prison Phone Services: A Primer

The billion-dollar prison phone industry is comprised of companies that provide phone services for prisoners and detainees held in state, federal and privately-operated prisons, county and municipal jails, juvenile facilities, immigration detention centers and other correctional facilities. Such services are commonly referred to as Inmate Calling Services (ICS).

Five companies, known as ICS providers, dominate the prison phone market; Global Tel*Link (GTL), Securus Technologies, CenturyLink, Telmate and ICSolutions provide phone services for 49 of the 50 state Departments of Corrections. A number of other companies, such as PayTel, NCIC, Legacy and EagleTel, provide ICS services primarily to jails.

When prisoners make phone calls they typically have three payment options – collect, prepaid or debit. Collect calls are paid by the call recipient, prepaid calls are paid from a pre-funded account established by the call recipient and debit calls are funded from a prisoner's institutional debit account. Prisoners can usually call only a small number of people on a specified list, and calls are frequently limited to 15 or 20 minutes per call.

There are three types of phone calls within the telecommunications industry – local, intrastate and interstate. Local calls are made to numbers within a local calling area, such as the same city or county. Intrastate calls are made within the boundaries of a state, either within a local access and transport area (LATA), called an intraLATA call, or across LATAs, known as an interLATA call. Interstate (long distance) calls are made across state lines and are generally the most expensive.

Prisoners' family members and friends pay for the vast majority of ICS calls, either by accepting collect calls, establishing prepaid accounts or sending money to their incarcerated loved ones to place on their debit phone accounts.

ICS rates are much higher than non-prison rates, in large part because prison phone companies pay "commission" kickbacks to the corrections agencies with which they contract. Such commissions are usually based on a percentage of the revenue generated from prisoners' calls and have nothing to do with the actual cost of providing the phone service. Because ICS providers factor commission payments – which currently average 47.79% for state Departments of Corrections (DOCs) – into the phone rates they charge, the rates are artificially inflated. Absent commission kickbacks, which are received by 42 state DOCs, the rates could be considerably lower. ICS providers paid at least *$123.3 million* to state prison systems in 2012.

Phone calls are the primary form of communication for prisoners who are housed at facilities located far from their families and thus do not receive in-person visits. Research has shown that prisoners who maintain close connections with their families while incarcerated are less likely to commit crimes and return to prison following their release.

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**Prison Legal News**
*a publication of the*
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*PLN* is indexed by the *Alternative Press Index, Criminal Justice Periodicals Index* and the *Department of Justice Index.*

## Hope for Prison Phone Reform (cont.)

Even prison phone companies acknowledge the fact that maintaining family ties has a beneficial effect on prisoners and results in reduced recidivism. For example, according to GTL, "Studies and reports continue to support that recidivism can be significantly reduced by regular connection and communications between inmates, families and friends – [a] 13% reduction in felony reconviction and a 25% reduction in technical violations." Telmate president Kevin O'Neil agreed, saying, "The more inmates connect with their friends and family members the less likely they are to be rearrested after they're released."

High prison phone rates, however, create a financial barrier to communication between prisoners and their families due to the costs associated with ICS calls.

"These rates discourage communication between inmates and their families and larger support networks, which negatively impact the millions of children with an incarcerated parent, contribute to the high rate of recidivism in our nation's correctional facilities, and increase the costs of our justice system," the FCC observed.

As stated by the Human Rights Defense Center (HRDC), the parent organization of *Prison Legal News*, "When families cannot pay the cost of phone calls from their incarcerated loved ones, those same families and their communities pay a different kind of price: isolation, stress, decreased rehabilitation and increased recidivism rates. The costs are also literal; many families of people held in prisons, jails and immigration detention centers pay high phone bills at the expense of groceries, medical bills and other necessities."

Notably, the FCC's recent order establishes a rate cap of $.25 per minute for collect interstate calls and $.21 per minute for prepaid and debit interstate calls, which equates to a cap of $3.75 for a 15-minute collect call and $3.15 for a 15-minute debit or prepaid call. This is a significant reduction from the highest prison phone rates, which currently range up to $17.30 for a 15-minute call (or more than $275 a month for a one-hour call once a week).

PLN and HRDC played an active and instrumental role in the FCC's decision to reduce the costs of prison phone calls and implement other reforms; exorbitant prison phone rates have been a focus of HRDC, and PLN has reported on ICS-related issues since 1990.

### History Behind the FCC's Order

The high costs of prison phone calls and the practice of commission kickbacks were presented to the FCC in 2003, in the form of a petition for rulemaking filed by attorneys representing Martha Wright, a District of Columbia resident, who filed a lawsuit challenging the phone rates she had to pay to stay in touch with her incarcerated grandson. The federal court referred the matter to the FCC since that agency has primary jurisdiction over interstate phone rates. See: *Wright v. Corrections Corporation of America*, U.S.D.C. (D. DC), Case No. 1:00-cv-00293-GK.

An alternative petition for rulemaking, commonly known as the "Wright petition," which requested a cap on prison phone rates, was filed with the FCC in 2007. See: *In the Matter of Rates for Interstate Inmate Calling Services*, WC Docket No. 96-128. Little action was taken on the Wright petition for the next four years.

In April 2011, following extensive research initially funded by a small grant from the Funding Exchange, PLN published a damning exposé on the prison phone industry that included detailed information on prison phone rates and commission percentages and amounts, based on 2007-2008 data. PLN exposed the exorbitant rates that ICS providers charge, reporting that state DOCs received an average kickback of 41.9% of prison phone revenue, that over $143 million in commission kickbacks had been paid in one year alone under state DOC phone contracts and that eliminating ICS commissions demonstrably resulted in lower phone rates. [See: *PLN*, April 2011, p.1].

As a result of the interest generated by PLN's report on the prison phone industry, which was filed with the FCC on the Wright petition's docket, HRDC co-founded the national Campaign for Prison Phone Justice in conjunction with the Center for Media Justice/Media Action Grassroots Network (MAG-Net) and Working Narratives.

The Campaign, which grew to include 55 supporting organizations and thousands of individual members, coordinated actions to pressure the FCC to act on the Wright petition and reduce the cost of prison phone

calls – such as letter-writing and email campaigns, plus a rally outside the Commission's Washington, D.C. headquarters. Tens of thousands of people submitted comments to the FCC or signed petitions, including over 1,700 prisoners and dozens of civil rights, faith-based, immigration reform and prisoners' rights organizations. [See: *PLN*, July 2013, p.34; Dec. 2012, p.44; Nov. 2012, p.20].

In December 2012, under the direction of then-Acting Chairwoman Mignon Clyburn, the FCC issued a Notice of Proposed Rulemaking (NPRM) on the Wright petition (Docket No. 12-375). [See: *PLN*, Feb. 2013, p.46]. In response to the Notice, HRDC filed additional comments with the FCC on March 25, 2013 that included updated data on state-by-state ICS rates and commissions, plus specific recommendations for reforms.

The FCC held a workshop on prison phone-related issues on July 10, 2013, which included testimony from PLN managing editor Alex Friedmann as well as Virginia state delegate Patrick Hope and representatives from public utility commissions, prison phone companies and organizations such as the Prison Policy Initiative and National CURE. [See: *PLN*, Aug. 2013, p.26].

Finally, in August 2013, nearly a decade after Martha Wright filed her initial petition for rulemaking with the FCC, the Commission voted to cap the cost of interstate prison phone calls and institute other reforms. The rate caps were very close to those requested in the Wright petition, which had sought benchmark rates (caps) of $.25 per minute for collect calls and $.20 per minute for debit and prepaid calls.

The data provided by HRDC was so important to the FCC's deliberations that the Commission's final order referenced PLN or HRDC at least 46 times, including references to PLN's April 2011 report on the prison phone industry.

The FCC's order is more than a mechanical implementation of rate caps, however. In an unusual show of compassion for the plight of those who have suffered as a result of price gouging by prison phone companies and the corrections agencies they contract with, two of the FCC Commissioners included personal remarks in the order that amounted to a public apology for not having stemmed such abuses long ago.

The FCC-mandated cap on prison phone rates threatens the profit margins of ICS providers. With existing contracts that require prison phone companies to continue paying commission kickbacks while they must reduce their rates to comply with the FCC's order, ICS providers face a financial dilemma unless they renegotiate their contracts. Which should not be difficult, as most contracts have provisions for amendments – particularly when there are changes in relevant statutes or regulations.

The order does not threaten the monopolistic nature of the prison phone industry, though, because once a company wins a bid to provide ICS services it enjoys a monopoly during the contract term. Such monopolies discourage competition in the prison phone market and contribute to higher rates. [See: *PLN*, Oct. 2012, p.20; Jan. 2007, p.1].

Two prison phone companies, GTL and Securus, filed petitions for a stay of the FCC's order until they could bring a legal challenge, then filed lawsuits in federal court seeking review of the order in November 2013. In other words, they want to continue price-gouging prisoners

and their families by postponing the FCC-mandated reforms for as long as possible while using revenue from prisoners' phone calls to subsidize the cost of their litigation in the interim.

On a brighter note, one California county responded to the FCC's order by proposing to manage its own jail and juvenile detention facility phone systems – simply dispensing with ICS providers as an unnecessary anachronism.

### An Updated Look at the Prison Phone Industry

PLN's April 2011 exposé on the prison phone industry included a chart with state-by-state ICS rates, commission percentages and annual commission payments for state DOCs. PLN focused on state prison systems due to the impracticality of obtaining similar data from the thousands of jails in cities and counties across the U.S.

The chart with state-by-state prison phone data, included as an exhibit to HRDC's comments submitted to the FCC, was the result of extensive research over a two-year period. As it reflected data from 2007-2008, however, HRDC continued to collect updated information on prison phone rates as well as commission percentages and payments, plus copies of state DOC phone contracts – most of which have been posted on HRDC's Prison Phone Justice website, www.prisonphonejustice.org.

The updated prison phone data is presented in four charts included with this cover story: Chart A (interstate rates), Chart B (intrastate interLATA rates), Chart C (local rates) and Chart D (commission kickback percentages and amounts).

#### *Interstate Rates*

Alabama, Alaska, Georgia and Minnesota charge the highest collect interstate rates for prison phone calls, at $17.30 for a 15-minute call. Other states with exceptionally high interstate rates include Ohio, which charges $16.97 for a collect 15-minute call, and Idaho, which charges $16.55. [See Chart A].

Based on a 15-minute interstate ICS call, 13 states charge over $10.00 for collect calls, 8 charge more than $10.00 for prepaid calls and 7 charge over $10.00 for a debit call.

In terms of the lowest interstate rates, three states charge less than $1.00 for collect, prepaid and debit calls. New Mexico charges a flat $.65 for collect and debit calls, plus a flat $.59 for prepaid calls. New York charges $.048 per minute for all types of calls, or $.72 for a 15-minute call. The rates in South Carolina include a flat $.99 for a collect call and flat $.75 for prepaid and debit calls.

Currently, the average rates for 15-minute interstate ICS calls are $7.18 for collect, $6.05 for prepaid and $5.56 for debit calls.

#### *Intrastate Rates*

For intrastate interLATA rates, based on a 15-minute prison phone call, 11 states currently charge over $5.00 for collect calls, 7 charge more than $5.00 for a prepaid call and 5 charge over $5.00 for debit calls. [See Chart B].

The highest intrastate ICS rates are in Delaware, which charges $10.70 for 15-minute calls of all types under a contract with GTL. Other high rates include $8.40 for a 15-minute collect call in South Dakota, $6.75 for collect, debit and prepaid calls in Alabama, and $6.45 for a collect call in Minnesota.

## Hope for Prison Phone Reform (cont.)

Four states charge less than $1.00 for a 15-minute intrastate call for all types of calls: New Mexico (flat $.65 for collect and debit calls, and flat $.59 for prepaid); Rhode Island (flat $.70 for collect and prepaid, and flat $.63 for debit calls); New York ($.72 for all types of calls based on a rate of $.048 per minute); and South Carolina (flat $.99 for collect and flat $.75 for debit and prepaid calls).

The current average rates for 15-minute intrastate interLATA prison phone calls are $3.90 for collect, $3.41 for prepaid and $3.42 for debit calls.

### *Local Rates*

Twelve states provide local ICS calls for $1.00 or less for all types of calls, based on a 15-minute call; however, another 9 states charge more than $3.00 for a 15-minute local call for all categories of calls. Alaska is the only state that offers free local calls. [See Chart C].

Other than Alaska, the lowest local ICS rates include a flat $.50 in Florida for all calls; a flat $.50 for collect and prepaid calls in North Dakota plus $.05 per minute for debit calls ($.75 for a 15-minute call); a flat $.66 for collect, $.59 for prepaid and $.65 for debit calls in New Mexico; a flat $.70 for collect and prepaid calls and $.63 for debit calls in Rhode Island; a flat $.70 for collect calls and $.50 for prepaid and debit calls in Nebraska; $.048 per minute for all types of calls in New York; and a flat $.65 for collect calls and $.50 for prepaid and debit calls in Maryland.

The highest rates for 15-minute local calls are $5.70 for all categories of calls in Mississippi; $5.30 for collect and prepaid calls and $4.50 for debit calls in Maine; $5.00 for collect calls in Colorado; and $4.95 for all types of local calls in New Jersey.

Average rates for 15-minute local ICS calls are currently $2.30 for collect, $2.08 for prepaid and $1.98 for debit calls.

### *Commission Kickbacks*

The vast majority of state DOCs receive commission kickbacks from their ICS providers, usually in the form of a percentage of revenue generated from prisoners' phone calls. Based on full or partial commission data from 49 states, prison phone companies paid at least $123.3 million in ICS kickbacks to DOCs in 2012. [See Chart D]. Notably, this doesn't include commissions generated from phone services at federal prisons, jails, privately-operated prisons, juvenile facilities, immigration detention centers and other correctional facilities.

Current state DOC commission rates range from a low of 7% in Alaska to a high of 76% in Illinois (though Maryland receives an 87% commission on collect ICS calls while Maine gets a 100% kickback on debit calls). The average commission rate for states that have a percentage-of-revenue commission is 47.79%, based on 2012-2013 data. (For states that receive commissions within a range of percentages, the lowest rate in the range was used when calculating the average).

Some states, including Ohio, Oregon and New Hampshire, receive a flat commission amount; Oregon receives an additional commission percentage based on the amount of prison phone revenue. Oklahoma receives a payment of $2.30 for each ICS call, which equates to a 76.6% commission based on the state's current flat rate of $3.00 per call.

Alabama uses a per-diem rate, in which the state's prison phone provider, CenturyLink, pays $.572 times the average prisoner population, per month. Idaho has a hybrid model consisting of flat commission amounts for collect, prepaid and debit calls made from prisons, plus 20% of revenue for calls made from Community Work Centers. The commission rate for the Alaska DOC is based on a sliding scale according to the amount of revenue generated by prison phone calls during the preceding year, while Kansas, Washington and several other states receive a percentage commission with a minimum annual guaranteed payment.

Iowa is unique in that it provides ICS services through a government agency, the Iowa Communications Network (ICN), in conjunction with a private contractor, Public Communications Services (PCS) – a subsidiary of Global Tel*Link. Rather than receiving a traditional commission, the state retains all revenue generated from prison phone calls after paying ICN and PSC/GTL's costs for providing the phone service.

Beyond commission payments, some states receive other perks from prison

phone companies. For example, under its contract with the California Department of Corrections and Rehabilitation, GTL provides cell phone blocking technology at all California state prisons. (Not incidentally, by limiting access to contraband cell phones the company anticipates greater use of, and thus greater revenue from, the prison phone system). GTL also pays an $800,000 annual fee to the California Technology Agency. [See: *PLN*, Oct. 2013, p.40].

In Virginia, in addition to a 35% commission, GTL pays the state a minimum $150,000 annual fee for "DOC technology initiatives," and the fee increases if GTL receives annual prison phone revenue that exceeds $13 million.

Eight states have banned ICS commission kickbacks, mostly through legislation: California, Michigan, Missouri, Nebraska, New Mexico, New York, Rhode Island and South Carolina.

Unsurprisingly, since prison phone companies don't have to recoup commission payments from the phone rates charged in non-commission states, those states have some of the lowest ICS rates in the nation. For instance, of the 10 lowest interstate prison phone rates for collect, prepaid and debit calls, 5 are in states that have banned commissions. Of the 10 lowest intrastate rates, 6 are in states that do not accept commissions, while of the 10 lowest local rates, 4 are in states that prohibit commissions.

In its comments submitted to the FCC, HRDC cited several examples of states that have banned commissions and achieved much lower prison phone rates as a result. Prior to banning commissions in 2001, New Mexico charged $10.50 for a 15-minute collect interstate call. The state's current rate for the same type of call is $.65 – a 93.8% decrease. After South Carolina banned prison phone commissions in April 2008, the cost of a 15-minute collect interstate call dropped from $5.19 to $.99, a reduction of 80.9%. And in New York, which prohibited commissions in 2008, the cost of a 15-minute prison phone call fell from $2.30 to $.72 – a 68.6% decrease (previously, the New York DOC received a 57.5% commission that generated annual kickback payments of about $20 million).

As the FCC noted in its Notice of Proposed Rulemaking for the Wright petition, "under most contracts, the commission is the single largest component affecting the rates for inmate calling service." Or as stated by HRDC, "Absent having to pay commissions to contracting government agencies, ICS providers could offer significantly lower phone rates."

### *Prison Phone Companies*

Three companies dominate the prison phone industry: Global Tel*Link, which has DOC contracts in 30 states; Securus Technologies, which provides DOC phone services in 10 states; and CenturyLink, which contracts with DOCs in 5 states. These companies and their subsidiaries thus control 90% of the state DOC phone market. Other companies with DOC phone contracts include Hawaiian Telcom (Hawaii), Telmate (Missouri and Oregon), and ICSolutions (New Hampshire and Wyoming).

• The nation's largest prison phone service provider, GTL, was purchased by American Securities, LLC in October 2011 in a deal reportedly valued at $1 billion. American Securities, a private equity firm, owns 18 other companies in addition to GTL – such as the restaurant chain Potbelly

Sandwich Works. Previously, GTL was owned by Veritas Capital and GS Direct, the latter being a subsidiary of Goldman, Sachs & Co. [See: *PLN*, Feb. 2012, p.23]. GTL operates several subsidiary ICS companies which include Value Added Communications (VAC), Public Communications Services (PCS), Conversant Technologies and DSI-ITI.

• Securus Technologies was formed through a merger of T-Netix and Evercom Systems in 2004. The company was acquired by Castle Harlan, Inc., a New York-based private equity corporation, on May 31, 2011; the sale was valued at $440-450 million. Castle Harlan owns 4 other companies in addition to Securus, including Caribbean Restaurants, LLC, which operates 171 Burger Kings in Puerto Rico.

• CenturyLink is the rebranded name of CenturyTel after that firm acquired Embarq Corporation, another telecommunications company, in 2009. CenturyLink bills itself as the "third largest telecommunications company" in the U.S. and primarily provides non-prison Internet, phone and wireless services. It supplies ICS services to a number of jails and 5 state prison systems through CenturyLink Correctional Markets, plus conducts business through its wholly-owned subsidiary, Embarq Payphone Services, Inc.

• Prison phone company ICSolutions was acquired by Centric Group in January 2011 as an affiliate of Keefe Group, which is also owned by Centric. Keefe Group provides commissary, video visitation and other services to prisons and jails nationwide.

• Telmate, according to a company spokesman, "provides telecommunications, video visitation, messaging and photo sharing services to hundreds of facilities in nearly every U.S. state and several Canadian provinces, serving facilities of every size ranging from local jails to state prisons and federal ICE facilities."

An analysis of the nation's highest prison phone rates charged by ICS providers found that one company is overrepresented among state DOCs with the highest rates. For interstate, intrastate and local rates, GTL had 6 or 7 of the highest 10 rates in all categories of calls – collect, prepaid and debit. However, since GTL has 60% of DOC phone contracts (in 30 of 50 states), it is not greatly overrepresented in states that have the highest rates.

Rather, that distinction goes to CenturyLink, which has 2 of the 10 highest interstate ICS rates for prepaid and debit calls, and 2 of the 10 highest rates for local debit calls. Thus, although the company has just 10% of DOC phone contracts (in 5 of 50 states), it is responsible for 20% of the highest rates for those categories of prison phone calls.

### *BOP, ICE and Private Prisons*

Phone services at federal Bureau of Prisons (BOP) facilities are provided by Sprint through a GSA Networx contract. The BOP uses an Inmate Telephone System (ITS) known as TRUFONE; the system is primarily debit-based (termed direct-dial), and federal prisoners are limited to 300 minutes of calling time per month.

A September 2011 report by the U.S. Government Accountability Office (GAO) noted that the "BOP's rates for inmate telephone calls typically are lower than selected states and military branch systems." [See: *PLN*, Dec. 2012, p.22].

Unlike in most state DOCs, the majority of calls from BOP facilities are interstate (long distance); this is mainly due to the fact that federal prisoners can be housed at any BOP prison nationwide, far from their families. The percentage of long distance calls has recently dropped, though, which the GAO attributed to "technology that allows inmates' friends and family who do not live within the inmates' local calling area to acquire telephone numbers local to the inmates' prison locations."

Indeed, a cottage industry has developed in which numerous services, some of which advertise in PLN, provide prisoners' families with local forwarding phone numbers for the purpose of skirting more expensive long distance ICS rates.

According to the GAO report, "In fiscal year 2010, BOP's inmate telephone system generated approximately $74 million in revenue, cost approximately $39 million to operate, and showed a profit of approximately *$34 million*" (emphasis added). In terms of gross revenue, the BOP's phone system generated $69.6 million in fiscal year (FY) 2011, $65.3 million in FY 2012 and $60.25 million in FY 2013; net profits were not available.

Revenue from the Bureau of Prisons' phone services are deposited in the BOP's Trust Fund, which manages income and pays expenses related to the ITS system. The Trust Fund is primarily used to pay wages for BOP prisoners, and to provide educational and recreational services and programs.

The GAO observed that lowering the BOP's phone rates could have both positive and negative implications. "The primary advantage would be that inmates would incur lower costs for making calls. This could possibly encourage greater communication

between inmates and their families, which BOP has stated facilitates the reintegration of inmates into society upon release from prison," the report said. "In contrast, reducing inmate telephone rates could also have some disadvantages....With fewer profits, BOP would have less Trust Fund money to spend on inmate amenities. As a result, unless BOP recouped these revenues from other sources, BOP would have to reduce the wages it pays inmates for their labor and/or scale back the number and type of other educational and recreational activities it currently offers using revenue from the Trust Fund. According to BOP officials, such reductions could make prisons more dangerous to manage and more expensive to operate."

In regard to ICS services at immigration detention facilities, the ability to make affordable phone calls is vitally important for immigrant detainees who are facing deportation hearings or seeking asylum. Approximately 84% of detainees are not represented by counsel; they therefore rely heavily on phone calls to obtain evidence needed in immigration proceedings by calling their families, consulates, legal representatives and human rights organizations.

The Immigration and Customs Enforcement agency (ICE) specifies in its 2011 revised standards for detention facilities that "Each facility shall provide detainees with access to reasonably priced telephone services. Contracts for such services shall comply with all applicable state and federal regulations and be based on rates and surcharges comparable to those charged to the general public. Any variations shall reflect actual costs associated with the provision of services in a detention setting."

The standards further require that detainees be allowed to "make direct or free calls" to local immigration courts, the Executive Office for Immigration Review, the Board of Immigration Appeals, federal and state courts, consular officials, legal representatives and service providers, the Office of the Inspector General of the Department of Homeland Security, the U.N. High Commissioner for Refugees, government offices to obtain documents for immigration cases, the ICE/OPR Joint Intake Center and immediate family members for detainees facing emergencies or who "demonstrate a compelling need."

ICE's revised standards for detention facilities will hopefully resolve problems related to detainees' access to phone services that were cited in a 2010 report by the Office of Inspector General of the Department of Homeland Security. The report concluded that "additional controls are needed to ensure contractor compliance" with ICS systems in facilities housing ICE detainees, and that some detainees "had, in the past, been inappropriately charged an additional fee to obtain access to a local telephone service." [See: *PLN*, Feb. 2011, p.33].

With respect to privately-operated prisons, jails and detention centers, it is difficult to obtain ICS-related information from such facilities because they are typically exempt from public records laws and the Freedom of Information Act. [See, e.g.: *PLN*, Feb. 2013, p.14]. Regardless, PLN managed to collect prison phone data for several private prisons.

For example, a contract between Corrections Corporation of America and Evercom (Securus) specifies the following collect calling rates for CCA's Whiteville Correctional Facility (WCF) in Tennessee: $.85 for local calls, $1.94 + $.06-.15/

minute for intrastate calls and $3.00 + $.35/minute for interstate calls (the latter costing $8.25 for a 15-minute call). The contract includes a 58.4% commission, which generated $347,855.52 in kickbacks at WCF in 2012.

A 2012 prison phone contract for the South Bay Correctional Institution in Florida, operated by the GEO Group, the nation's second-largest for-profit prison company, includes a commission of 35% and phone rates of $.50 for collect local calls and $1.20 + $.04/minute for collect interstate and intrastate calls. The contract, with ICSolutions, generated $125,600 in commission kickbacks during FY 2012.

This represents the worst of both worlds, with private prison companies profiting not only from housing prisoners but also from ICS commissions paid by prison phone providers.

## Current and Former Data Compared

There have been some notable changes in the prison phone industry since PLN compiled and analyzed 2007-2008 state-by-state data related to ICS phone rates and commissions, though other aspects of ICS services have remained the same.

### *Phone Rates*

In regard to rates, the average cost of prison phone calls has generally declined from 2007-2008 to 2012-2013. For example, during that time period the rates for interstate collect calls dropped in 22 state DOCs and remained the same in most others.

Of the states that experienced declines in interstate collect ICS costs, the most notable, based on 15-minute calls, included Colorado (from $17.30 to $5.25); Connecticut (from $17.30 to $4.87); New Mexico (from $10.50 to $.65); North Carolina (from $17.30 to $3.40); Oregon (from $17.30 to $2.40); and Vermont (from $10.75 to $3.50).

Further, the 2007-2008 average cost of a 15-minute collect interstate call was $10.23, compared with a current (2012-2013) average cost of $7.18. The average cost of a 15-minute collect intrastate call in 2007-2008 was $4.87, compared with a current average cost of $3.90. However, the cost of a 15-minute local collect call, which averaged $2.28 in 2007-2008, increased very slightly to $2.30 in 2012-2013. (When calculating these averages, where there is a range of phone rates for certain categories of calls, the lowest rate was used to produce a conservative average).

An examination of collect ICS rates for 2007-2008 found that 25 states charged over $10.00 for a 15-minute interstate call; of those, 10 charged $17.30 or more. Twenty-two states charged more than $5.00 for a 15-minute collect intrastate call and 11 states charged over $3.00 for a collect local call.

Based on current prison phone rate data, the number of states charging over $10.00 for a 15-minute collect interstate call has dropped to 13 (including just 4 that charge $17.30); states that charge over $5.00 for a collect intrastate call dropped to 11, and a dozen states charge more than $3.00 for a local collect call (a slight increase).

Washington State previously had the highest collect interstate rate in 2007-2008, at $4.95 + $.89/minute, or $18.30 for a 15-minute call. Washington's current collect interstate rate is $3.50 + $.50/minute ($11.00 for a 15-minute call), which, although still unreasonably high, represents a significant decrease.

One notable difference in prison phone services between 2007-2008 and 2012-2013 relates to a shift in the use of flat rates – i.e., when a fixed amount is charged regardless of the call duration. In 2007-2008, with respect to collect calls, only one state offered a flat interstate rate while 4 had flat intrastate rates and 34 used flat local rates. According to current data, 5 states now have flat interstate rates, 8 states offer flat intrastate rates and at least 26 have flat local rates, for all types of calls. Flat rates tend to be associated with lower calling costs, but since they incur the full rate whether the call is for one minute or 15 minutes, per-minute costs are higher for flat rate calls of short duration.

### *Commissions*

The average ICS commission kickback rate has increased by over five percent, from 41.9% in 2007-2008 to a current average of 47.79%. (When calculating these averages, only states with a commission percentage were included, not those that receive commissions based on a flat fee or per-diem basis; where states receive commissions within a range of percentages, the lowest rate was used to produce a conservative average).

As one example of this increase, only one state received a prison phone commission above 60% in 2007-2008 – Alaska (although Idaho received 66% at the upper end of a range of commissions). Current data indicates that *seven states* receive commissions in excess of 60% (Connecticut,

Illinois, Kansas, Louisiana, Maryland, Mississippi and Wyoming). Whereas previously the highest commission rate among state DOCs was 61.5%, the current highest percentage rate is 78%, for the Illinois DOC.

The total amount of prison phone commissions paid to DOCs in 2007-2008 was $143.49 million, based on full or partial data from 49 states (the total amount originally reported by PLN in April 2011 was slightly higher; that data was corrected in October 2012). Total commission kickbacks paid to state DOCs during 2012 were at least $123.3 million.

This reflects a decline of around $20.2 million in annual commissions paid to DOCs over the past five-year period, though that decline is mainly attributable to California's decision to phase out ICS commissions starting in 2007-2008 (California received commission payments of $19.5 million that year). Excluding the loss of prison phone kickbacks in California, the total amount of ICS commissions received by state DOCs in 2012 was essentially the same since comparable data was collected for 2007-2008.

As another example of things remaining the same in the prison phone industry, at the time PLN reported nationwide prison phone-related data in April 2011, only eight states had banned commissions or were in the process of doing so. Currently, no other states have banned commissions and 42 states continue to receive kickbacks from ICS providers.

### *Prison Phone Companies*

As indicated above, three companies – GTL, Securus and CenturyLink – currently control 90% of the state DOC market, either directly or through their subsidiaries. This represents a slight increase since PLN reported prison phone data for 2007-2008; at that time, GTL, Securus and CenturyLink or their subsidiaries had contracts with 43 (86%) of the state DOCs.

Fifteen DOC phone contracts changed hands over the five-year period from 2007-2008 to 2012-2013; however, most of the states (70%) continued to contract with the same company, and when ICS contracts change it is usually from one of the three largest prison phone providers to another. This fairly low rate of contract turnover, and the fact that just three firms dominate the market, indicate that the prison phone industry is an oligopoly with little actual competition.

"While the process of awarding contracts to provide ICS may include competitive bidding such competition in many instances benefits correctional facilities, not necessarily ICS consumers – inmates and their family and friends who pay the ICS rates, who are not parties to the agreements, and whose interest in just and reasonable rates is not necessarily represented in bidding or negotiation," the FCC noted in its September 2013 final order.

Further, Consolidated Communications Public Services (CCPS) and FSH Communications no longer provide prison phone services to state DOCs; CCPS lost its sole state contract with Illinois in 2012, while FSH sold its prison phone business to VAC, a subsidiary of Global Tel*Link. Additionally, GTL acquired two smaller companies that provide ICS-related services, Conversant Technologies and 3V Technologies, in October 2011.

This reflects the continued consolidation of providers within the prison phone industry – although Telmate, which mostly

supplies phone services to jails, has won two state DOC contracts since 2007-2008 (Montana in 2010 and Oregon in 2012).

*ICS Contracts*

Prison phone contracts continue to have lengthy terms. For example, when Florida rebid its ICS contract in 2013, the initial contract term was for five years with five one-year renewal options. Similarly, the Illinois DOC's recent contract with Securus, which went into effect in September 2012, had an initial term through June 2015 plus an option to renew for up to six more years. And when Oklahoma entered into an ICS contract with VAC (GTL) in 2011, the initial term was for one year – with nine one-year renewals.

As HRDC noted in its comments submitted to the FCC, the initial terms of prison phone contracts for three states – Connecticut, Texas and Arizona – extend for 7 years. Such long-term contracts ensure that prison phone companies maintain a monopoly on providing ICS services within state DOCs for prolonged periods of time.

Additionally, PLN's April 2011 report on the prison phone industry described how some state DOCs evaluated bids for ICS contracts based on the highest commission rate, in order to maximize their kickback revenue. That practice also continues.

According to the Illinois DOC's 2012 invitation for bids for its prison phone contract, the commission rate was given the greatest weight among factors used to evaluate the bids – 55%, or 550 of 1,000 total available "price points."

The contract was awarded to Securus, which offered an 87.1% commission and flat phone rates of $4.10 per call for all call types. The contract was subsequently amended in September 2013 to reduce the phone rates to a flat $3.55 per call and lower the commission to 76%; the amendment was due to a ruling by the Illinois Commerce Commission related to the maximum phone rates that can be charged under state law.

Further, the Florida DOC issued an invitation to negotiate for its ICS contract in April 2013. When selecting Embarq (CenturyLink) as the company that "demonstrate[d] the best value" and was "the most advantageous," the DOC remarked that CenturyLink's bid "increases the department's commission rate by approximately 27%" while lowering the cost of collect calls. In submitting its best and final offer, CenturyLink asked for "special consideration" of the company's revenue performance, noting that its "billing & customer service program consistently ... generates 25% or more commissionable revenue than other providers." Securus, bidding for the same contract, stated that its bid addressed the DOC's "requirement for both low rates and high commissions."

Likewise, when the Oklahoma DOC asked for a final best offer for bids on the state's ICS contract in 2011, it specified, "The final award of this contract will be based upon the highest revenue sharing offered to DOC for the life of the contract."

These examples indicate that ICS commissions and the lucrative revenue they generate for corrections agencies remain a compelling factor when selecting prison phone providers.

**HRDC's Recommendations to the FCC**

HRDC's research focused on core issues related to the prison phone industry: the cost of ICS calls, the impact of commission kickbacks on those costs, extra fees charged by prison phone companies and how to best address those issues.

HRDC recommended that the FCC "impose rate caps not to exceed $.05/minute for collect, prepaid and debit interstate calls from prisons, jails and detention centers, with no per-call charges." The proposed cap was based on current interstate prison phone rates in New York and New Mexico, which are *below* $.05 per minute, as examples of rates that can be achieved even without regulatory oversight. Both New Mexico and New York have banned ICS commissions.

While prison phone companies complained that a rate cap would be arbitrary and capricious, HRDC demonstrated that the opposite was true – that the unregulated ICS rates currently in effect are themselves arbitrary and capricious.

"Prisoners in different states, or even the same state, pay extremely divergent phone charges that range from $.65 (New Mexico) to $17.30 (Alabama, Alaska,

Georgia and Minnesota) for a 15-minute interstate collect phone call," HRDC wrote in its comments to the FCC. "This is particularly true given that the same ICS provider can offer wildly fluctuating rates in different jurisdictions, which is also arbitrary and capricious. For example, Global Tel*Link charges $.99 for a 15-minute interstate collect call in South Carolina while charging $17.30 for the same type of call in Georgia (a neighboring state). Securus charges $1.75 for a 15-minute interstate collect call in Missouri while charging $17.30 for the same type of call in Alaska."

Additionally, HRDC observed in March 2013 that "current data indicates that at least 16 states have interstate collect and/or debit call rates that are *below* the proposed benchmark rates of $.25/min. and $.20/min. for collect and debit calls, respectively" – i.e., the rate caps requested in the Wright petition. Thus, it was readily apparent that states can adopt ICS rates below the proposed caps while still addressing necessary security concerns in their prison systems.

"Basically," HRDC concluded, "if some states that contract with the largest ICS providers are able to offer reasonable interstate collect calling rates, such as New Mexico ($.043/min.), New York ($.048/min.), South Carolina ($.066/min.) and Nebraska ($.0966/min.), then there is no reason why the same ICS providers cannot offer comparable rates in other jurisdictions."

HRDC further argued for the elimination of prison phone kickbacks in order to facilitate lower rates: "Although prohibiting ICS providers from paying commissions is not essential to reducing prison phone rates, commissions are closely correlated with high rates."

In addition, HRDC recommended that extra fees charged by prison phone companies, such as fees to fund, maintain and close prepaid phone accounts, be prohibited. A May 2013 report by the Prison Policy Initiative examined ancillary ICS fees in great detail, noting that Securus charges $4.95 to close an account while GTL charges $5.00. Most prison phone companies charge fees to fund prepaid accounts using a credit card; according to the Prison Policy Initiative report, ICS providers "charge up to $9.50 to pay over the internet, up to $10 to pay by phone and up to $12.45 to pay via Western Union."

If such fees are not banned, HRDC argued, then prison phone companies could circumvent the FCC's rate caps "by simply increasing the extra fees or adding new account-related fees that effectively raise the overall costs of ICS calls." Revenue from ancillary fees goes directly to ICS providers, as the fees are not subject to commission payments.

Some companies, anticipating the

reduced phone rates that would result from the FCC's order, have enhanced their account-related fees in an apparent effort to maximize fee revenue to compensate for the lower rates.

For example, after the FCC voted to cap interstate prison phone rates in August 2013, Securus raised its processing fee for credit card payments made by phone from $7.95 to $9.95; it also increased its monthly Wireless Administration Fee from $2.99 to $3.99. The company added a State Cost Recovery Fee, which may apply "as a per-call surcharge of up to five percent (5%) and associated applicable taxes" for intrastate calls, plus a Location Validation Fee, which may apply "as a per-call surcharge of up to four percent (4%) and associated applicable taxes" for calls made from facilities that use certain security features provided by Securus.

In order to promote competition and provide flexibility in terms of payment options for ICS calls, HRDC further suggested that the FCC require or encourage debit and prepaid calls in all prison phone systems.

HRDC did not limit its recommendations to the FCC to just the mundane aspects of how to achieve reductions in prison phone rates. It also argued that prisoners should receive a "minimum number of free calling minutes per month," noting that this would be particularly important for juvenile offenders, to ensure they can maintain contact with their families, and for immigrant detainees, who rely on phone calls to contact foreign consulates and human rights and legal organizations.

Providing prisoners and detainees with a minimum number of free calling minutes "would address a long-standing concern with ICS services: that they are socio-economically biased because they condition the ability to make phone calls on the ability of prisoners and call recipients to pay high prison phone rates. Thus, prisoners and family members with sufficient financial resources can maintain phone contact while those who are impoverished cannot." HRDC noted that Alaska provides free local ICS calls, and that the first five minutes of local calls from New Hampshire prisons do not incur per-minute rates.

Lastly, HRDC recommended in its comments to the FCC that prison phone systems be subject to periodic reviews "to ensure that prison phone rates remain just and reasonable," and that ICS providers be required to comply with the FCC's mandates related to prison phone services within six months after the date the Commission's order goes into effect.

### The FCC's Order: What it Does

As a prefatory matter, the FCC's order only applies to interstate prison phone calls and not to local or intrastate calls. Interstate calls "constitute no more than 15 percent of all ICS traffic," according to the Commission. Further, the FCC explained that in imposing rate caps for interstate ICS calls, it was not asserting authority over existing contracts between prison phone companies and corrections agencies.

"The reforms we adopt today are not directed at the contracts between correctional facilities and ICS providers. Nothing in this Order directly overrides such contracts," the FCC wrote. "Rather, our reforms relate only to the relationship between ICS providers and end users, who, as noted, are not parties to these agreements. Our statutory obligations require us to ensure that rates and practices are just and reasonable, and to ensure that payphone compensation is fair both to end users and to providers of payphone services, including ICS providers."

Accordingly, the FCC's final order incorporated the following key provisions:

• All rates charged for ICS calls and ancillary charges or fees must be based on costs that are reasonably and directly related to the provision of prison phone services (i.e., cost-based). Thus, for example, the costs of ICS calls can not include expenses related to the payment of commissions. The FCC did not ban commissions, however – only ordered that they can not be factored into the cost of interstate prison phone calls. "We do not conclude that ICS providers and correctional facilities cannot have arrangements that include site commissions," the FCC stated. "We conclude only that ... such commission payments are not costs that can be recovered through interstate ICS rates."

• ICS rates are capped at a maximum of $.25 per minute for interstate collect calls and $.21 per minute for interstate prepaid

and debit calls, or $3.75 and $3.15 for 15-minute collect and debit/prepaid calls, respectively, inclusive of any connection charges. Prison phone companies can seek waivers to charge rates above the caps in "rare occasions" where they serve "extremely high cost facilities."

• An ICS provider's rates are presumptively lawful and in compliance with the FCC's order if they are set at or below "safe harbor" limits of $.14 per minute for interstate collect calls and $.12 per minute for interstate debit and prepaid calls, inclusive of any connection charges. This equates to $2.10 for a 15-minute collect call and $1.80 for a 15-minute debit or prepaid call. ICS providers that set rates above the safe harbor limits but below the rate caps will have to justify the reasonableness of their rates to the FCC if they are the subject of consumer complaints.

• Prison phone companies shall not levy or collect any charges in addition to or in excess of regular ICS rates for calls made through a Telecommunications Relay Service (TRS) – e.g., calling services for prisoners with hearing or speech disabilities.

• ICS providers must file annual reports with the FCC disclosing their prison phone rates and fees, as well as additional data that will help the Commission evaluate whether they are in compliance with the order. This reporting requirement will not go into effect until approval is obtained from the Office of Management and Budget.

The FCC's order applies to all correctional facilities nationwide, including prisons, immigration detention centers and jails, and, once implemented and enforced, will significantly reduce the costs of interstate ICS calls.

When the Commission's order goes into effect it will affect 30 state DOCs that currently charge more than the rate cap established for collect interstate calls ($3.75 based on a 15-minute call). The same number of DOCs currently charge more than the rate cap for debit and/or prepaid interstate calls ($3.15 based on a 15-minute call).

Additionally, at least 41 state DOCs have collect interstate rates above the safe harbor limit set by the FCC ($2.10 based on a 15-minute call), while 40 charge more than the safe harbor for debit and/or prepaid calls ($1.80 based on a 15-minute call).

The fact that so many DOCs have interstate prison phone rates above the caps set by the FCC demonstrates why the Commission's order was necessary and long overdue.

### *FNPRM on Intrastate Rates*

In its final order, the FCC also announced that it would issue an invitation for comments on proposed rulemaking related to intrastate (in-state) prison phone rates; video, email and voicemail services for prisoners; international calling rates; how to ensure that costs of ICS services are "just, reasonable and cost-based"; how the FCC can enforce rules prohibiting companies from blocking calls to cell phones; how to foster competition within the prison phone market; quality issues related to ICS calls; and whether additional measures are needed to protect the communication rights of prisoners with hearing disabilities and those with whom they communicate.

"We seek comment on additional measures we could take to ensure that interstate and intrastate ICS are provided consistent with the statute and public interest, the Commission's authority to implement these measures, and the pros and cons of each

measure," the FCC stated.

The Commission released a Further Notice of Proposed Rulemaking (FNPRM) concerning the above issues on November 13, and a 30-day public comment period ended on December 13, 2013.

The most significant aspect of the FNPRM is the FCC's interest in extending to in-state prison phone calls the Commission's reforms related to interstate calls. For most state DOCs, as well as most jails, ICS services are mainly intrastate because prisoners generally make calls to family members and friends who reside in the same state. There are exceptions, such as federal prisoners, who can be housed at any BOP facility nationwide, and prisoners held in private prisons in other states (California, Hawaii, Vermont and Idaho currently house some of their prisoners in out-of-state contract facilities).

By far, though, most of the nation's 2.2 million prisoners are incarcerated in their home states and make calls within those states. Thus, extending the FCC's final order to intrastate prison phone calls – including rate caps and safe harbor limits – would significantly reduce the financial burden that intrastate calls impose on prisoners and their families.

As argued by PLN managing editor Alex Friedmann when he testified at the FCC's workshop in July 2013, since virtually all phone calls are routed electronically across state lines, even local and intrastate calls, there is little remaining distinction between "interstate" and "intrastate." Thus all ICS calls, both within a state and to other states, should be regulated by the FCC to the same extent.

One indicator why the Commission needs to extend rate caps to intrastate prison phone calls is the number of states with in-state ICS rates that *exceed* the FCC's cap and safe harbor limits for interstate calls.

Currently, at least 23 states charge intrastate rates and 8 states have local rates above the FCC's cap for collect interstate calls ($3.75 for a 15-minute call). Additionally, at least 23 states charge intrastate rates and 9 states have local rates above the cap for debit and/or prepaid interstate calls ($3.15 for a 15-minute call).

With respect to the safe harbor limits, at least 39 states have intrastate rates and 23 charge local rates that exceed the safe harbor for collect interstate calls ($2.10 for a 15-minute call); similarly, at least 38 states have intrastate rates and 22 charge local rates above the safe harbor for prepaid and/or debit interstate calls ($1.80 for a 15-minute call).

Therefore, unless rate caps are extended to intrastate and local calls, states can continue to charge in-state ICS rates that far exceed the caps and safe harbor limits the FCC has established for interstate prison phone calls. The Delaware DOC, for example, currently charges $10.70 for a 15-minute intrastate call, while in Mississippi a 15-minute local call costs $5.70.

The Commission's FNPRM, and thus any future action on intrastate ICS rates and other prison phone reforms, remains pending.

## Comments by the Commissioners

When the FCC decided to cap the cost of interstate ICS calls in August 2013, it did so on a 2-to-1 vote. Then-Acting Chairwoman Mignon Clyburn – who had championed reform of the prison phone industry – and Commissioner Jessica Rosenworcel voted for the rate caps and related measures to curb the worst abuses of ICS providers. Commissioner Ajit Pai, appointed to the FCC in 2012 by President Obama, cast the dissenting vote.

In an unusual epilogue, the Commissioners appended statements reflecting their personal thoughts and comments to the FCC's final order released on September 26, 2013.

Commissioner Rosenworcel wrote:

"When I step back from the record in this proceeding, there is one number that simply haunts me – perhaps because I am a parent. Across the country, 2.7 million children have at least one parent in prison. That is 2.7 million children who do not know what it means to talk regularly with their mother or father. After all, families with an incarcerated parent are often separated by hundreds of miles. They may lack the time and means to make regular visits. So phone calls may be the only way to stay in touch. Yet when the price of a single phone call can be as much as you and I spend for unlimited monthly plans, it is hard to keep connected. Reaching out can be an impossible strain on the household budget. This harms the families and children of the incarcerated. But it goes far beyond that. It harms all of

# CHART A - Interstate ICS Rates

| State | Company | Rates (2012-2013) Collect | Pre-Paid | Debit | Cost of 15-Minute Call Collect | Pre-Paid | Debit | |
|---|---|---|---|---|---|---|---|---|
| AL | Embarq (CenturyLink) * | $3.95 + .89/min. | $3.95 + .89/min. | $3.95 + .89/min. | $17.30 | $17.30 | $17.30 | |
| AK | Securus | 3.95 + .89/min. | 3.95 + .89/min. | 3.95 + .89/min. | 17.30 | 17.30 | 17.30 | 1 |
| AZ | Securus | 2.40 + .40/min. | 2.00 + .40/min. | 2.00 + .40/min. | 8.40 | 8.00 | 8.00 | |
| AR | GTL | 3.95 + .45/min. | N/A | 3.95 + .45/min. | 10.70 | N/A | 10.70 | |
| **CA** | GTL | .44/min. | .44/min. | N/A | 6.60 | 6.60 | N/A | |
| CO | VAC (GTL) | 3.00 + .15/min. | 1.50 + .13/min. | 1.50 + .10/min. | 5.25 | 3.45 | 3.00 | |
| CT | Securus | .3245/min. | .2433/min. | .3245/min. | 4.87 | 3.65 | 4.87 | |
| DE | GTL | 1.55 + .61/min. | 1.55 + .61/min. | 1.55 + .61/min. | 10.70 | 10.70 | 10.70 | |
| FL | T-NETIX (Securus) | 1.20 + .06/min. | 1.02 +.06/min. | 1.20 + .06/min. | 2.10 | 1.92 | 2.10 | |
| GA | GTL | 3.95 + .89/min. | N/A | N/A | 17.30 | N/A | N/A | |
| HI | Hawaiian Telcom | ? | ? | ? | ? | ? | ? | |
| ID | PCS (GTL) | 3.80 + .85/min. | 3.60 + .80/min. | 3.40 flat | 16.55 | 15.60 | 3.40 | |
| IL | Securus | 3.55 flat | 3.55 flat | N/A | 3.55 | 3.55 | N/A | 2 |
| IN | PCS (GTL) | .24/min. | .24/min. | .24/min. | 3.60 | 3.60 | 3.60 | |
| IA | PCS (GTL) | N/A | N/A | 3.00 + .30/min. | N/A | N/A | 7.50 | 3 |
| KS | Embarq (CenturyLink) * | .18/min. | .18/min. | .17/min. | 2.70 | 2.70 | 2.55 | |
| KY | Securus | 2.00 + .30/min. | 2.00 + .30/min. | 1.60 + .25/min. | 6.50 | 6.50 | 5.35 | |
| LA | Securus | 2.15 + .17-.27/min. | 1.93 + .15-.24/min. | 1.93 + .15-.24/min. | 4.70-6.20 | 4.18-5.53 | 4.18-5.53 | |
| ME | PCS (GTL) | 3.00 + .69/min. | 3.00 + .69/min. | .30/min. | 13.35 | 13.35 | 4.50 | |
| MD | GTL | .95 + .30/min. | .30/min. | .30/min. | 5.45 | 4.50 | 4.50 | 4 |
| MA | GTL | .86 + .10/min. | .86 + .10/min. | .65 + .075/min. | 2.36 | 2.36 | 1.78 | |
| **MI** | PCS (GTL) | .23/min. | .23/min. | .21/min. | 3.45 | 3.45 | 3.15 | |
| MN | GTL | 3.95 + .89/min. | N/A | .32/min. | 17.30 | N/A | 4.80 | |
| MS | GTL | 2.10 + .24/min. | 2.10 + .24/min. | 2.10 + .24/min. | 5.70 | 5.70 | 5.70 | |
| **MO** | Securus | 1.00 + .05/min. | .05/min. | .05/min. | 1.75 | 0.75 | 0.75 | |
| MT | Telmate | .24 + .12/min. | .24 + .12/min. | .24 + .12/min. | 2.04 | 2.04 | 2.04 | |
| **NE** | PCS (GTL) | .70 + .05/min. | .50 + .05/min. | .50 + .05/min. | 1.45 | 1.25 | 1.25 | |
| NV | CenturyLink * | 2.50 + .49/min. | 2.50 + .49/min. | 2.50 + .49/min. | 9.85 | 9.85 | 9.85 | |
| NH | ICSolutions | 1.20 + .10/min. | .15/min. | .15/min. | 2.70 | 2.25 | 2.25 | |
| NJ | GTL | .33/min. | .33/min. | .33/min. | 4.95 | 4.95 | 4.95 | |
| **NM** | Securus | .65 flat | .59 flat | .65 flat | 0.65 | 0.59 | 0.65 | |
| **NY** | VAC (GTL) | .048/min. | .048/min. | .048/min. | 0.72 | 0.72 | 0.72 | |
| NC | GTL | 3.40 flat | 3.40 flat | 3.06 flat | 3.40 | 3.40 | 3.06 | |
| ND | Evercom (Securus) | 2.40 + .24/min. | 2.40 + .24/min. | .34/min. | 6.06 | 6.06 | 5.10 | 5 |
| OH | GTL | 3.90 + .871/min. | 3.12 + .697/min. | 3.12 + .697/min. | 16.97 | 13.58 | 13.58 | |
| OK | VAC (GTL) | 3.00 flat | 3.00 flat | N/A | 3.00 | 3.00 | N/A | |
| OR | Telmate | .16/min. | .16/min. | .16/min. | 2.40 | 2.40 | 2.40 | |
| PA | GTL | 3.50 + .50/min. | 2.45 + .46/min. | 2.33 + .43/min. | 11.00 | 9.35 | 8.78 | |
| **RI** | GTL | 1.30 + .30/min. | 1.30 + .30/min. | 1.17 + .27/min. | 5.80 | 5.80 | 5.22 | |
| **SC** | GTL | .99 flat | .75 flat | .75 flat | 0.99 | 0.75 | 0.75 | |
| SD | VAC (GTL) | 3.15 + .43/min. | 1.35 + .09/min. | 1.35 + .09/min. | 9.60 | 2.70 | 2.70 | |
| TN | GTL | 3.535 + .6175/min. | 3.1817 + .5558/min. | 3.1817 +.5558/min. | 12.80 | 11.52 | 11.52 | |
| TX | Embarq (CenturyLink) + | .43/min. | .43/min. | .387/min. | 6.45 | 6.45 | 5.81 | |
| UT | VAC (GTL) | 3.00 + .45/min. | 3.00 + .45/min. | 2.55 + .35/min. | 9.75 | 9.75 | 7.80 | |
| VT | PCS (GTL) | 1.25 + .15/min. | 1.00 + .10/min. | .50 + .10/min. | 3.50 | 2.50 | 2.00 | |
| VA | GTL | 2.40 + .43/min. | 2.40 + .40/min. | 2.40 + .40/min. | 8.85 | 8.40 | 8.40 | |
| WA | VAC (GTL) | 3.50 + .50/min. | 3.50 + .50/min. | 3.50 + .50/min. | 11.00 | 11.00 | 11.00 | |
| WV | GTL | .85 + .50/min. | .75 + .44/min. | N/A | 8.35 | 7.35 | N/A | |
| WI | Embarq (CenturyLink) + | .18/min. | .18/min. | N/A | 2.70 | 2.70 | N/A | |
| WY | ICSolutions | 2.80 + .55/min. | 2.40 + .50/min. | 2.00 + .25/min. | 11.05 | 9.90 | 5.75 | |
| BOP | Sprint | 2.45 + .40/min. | 1.50 + .23/min. | .23/min. | 8.45 | 4.95 | 3.45 | 6 |
| | | | | **Averages:** | **$7.18** | **$6.05** | **$5.56** | |

*Source: Prison Legal News research data 2012-2013*

* ICS provided by CenturyLink, with prepaid accounts provided by ICSolutions

\+ ICS provided by CenturyLink, with prepaid accounts provided by Securus

Bolded states have banned ICS commissions

## Hope for Prison Phone Reform (cont.)

us because we know that regular contact between prisoners and family members reduces recidivism.

"Today, this changes. After a long time – too long – the Commission takes action to finally address the high cost that prison inmates and their families must pay for phone service. This is not just an issue of markets and rates; it is a broader issue of social justice. We establish a framework that will immediately reduce interstate inmate calling service rates.... This effort has my unequivocal support."

Commissioner Rosenworcel also thanked Martha Wright, whose petition for rulemaking submitted to the FCC a decade ago was the genesis of and impetus for the Commission's order mandating reform of the prison phone industry.

Commissioner Clyburn expressed her appreciation for Mrs. Wright too, and for the many people who had encouraged the FCC to take action.

"For ten years, family, friends and legal representatives of inmates have been urging the courts and waiting for the FCC to ease the burden of an exorbitant inmate calling rate structure," she wrote. "Their wait is at long last over. Borrowing from a 1964 anthem inspired by challenges of his time, the immortal songwriter Sam Cooke sang that it's been a long, long time in coming, but change has finally come.

"Today's Order reforms the rates and charges for interstate inmate calling services and provides immediate and meaningful relief, particularly for low income families across this nation. This Order fulfills our obligation to ensure just, reasonable and fair phone rates for all Americans, including the millions with loved ones in prison.

"This all began with one Washington, D.C. grandmother, Mrs. Martha Wright, who spoke truth to power in 2003, and reminded us that one voice can still spur a movement and drive meaningful change.... In 2003, she filed a petition with the FCC asking for help. Others who were paying a high toll for interstate inmate calls would follow her lead and after many twists and turns – we are finally here."

Commissioner Clyburn also acknowledged the burden that exorbitant prison phone rates place on prisoners' families. "Too often, families are forced to choose between spending scarce resources to stay in touch with their loved ones or covering life's basic necessities," she said. "One family member described how communicating with her husband is a 'great hardship,' but that the few minutes that they are able to talk each week, 'have changed his life.' Another parent told us how he has spent significant amounts of money to receive collect calls from his son – calls that he 'cannot afford,' but accepts because his son's 'emotional health and survival in prison is important' to him.

"These are not isolated anecdotes. There are 2.7 million children with at least one parent in prison and they often want and need to maintain a connection. In addition to coping with the anxiety associated with a parent who is not there on a daily basis, these young people are often suffering severe economic hardships, which are exacerbated by unaffordable inmate calling costs. In the meantime, 700,000 inmates are released from correctional facilities each year. It's critical for them to have strong support structures in order to re-assimilate

# CHART B - Intrastate ICS Rates

| State | Company | InterLATA Rates (2012-2013) Collect | Pre-Paid | Debit | Cost of 15-Minute Call Collect | Pre-Paid | Debit | |
|---|---|---|---|---|---|---|---|---|
| AL | Embarq (CenturyLink) * | $2.25 + .30/min. | $2.25 + .30/min. | $2.25 + .30/min. | $6.75 | $6.75 | $6.75 | |
| AK | Securus | 1.55 + .065-.39/min. | 1.55 + .065-.39/min. | 1.55 + .065-.39/min. | 2.63-7.61 | 2.63-7.61 | 2.63-7.61 | 1 |
| AZ | Securus | 2.00 + .20/min. | 1.60 + .20/min. | 1.60 + .20/min. | 5.00 | 4.60 | 4.60 | |
| AR | GTL | 3.00 + .12/min. | N/A | 3.00 + .12/min. | 4.80 | N/A | 4.80 | |
| **CA** | GTL | .135/min. | .135/min. | N/A | 2.03 | 2.03 | N/A | |
| CO | VAC (GTL) | 2.75 + .15/min. | 1.25 + .13/min. | 1.25 + .10/min. | 5.00 | 3.20 | 2.75 | |
| CT | Securus | .3245/min. | .2433/min. | .3245/min. | 4.87 | 3.65 | 4.87 | |
| DE | GTL | 1.55 + .61/min. | 1.55 + .61/min. | 1.55 + .61/min. | 10.70 | 10.70 | 10.70 | |
| FL | T-NETIX (Securus) | 1.20 + .06/min. | 1.02 +.06/min. | 1.20 + .06/min. | 2.10 | 1.92 | 2.10 | |
| GA | GTL | 2.00 + .19/min. | N/A | N/A | 4.85 | N/A | N/A | |
| HI | Hawaiian Telcom | 1.45 + .09-.14/min. | ? | ? | 2.80-3.55 | ? | ? | 7 |
| ID | PCS (GTL) | 3.80 flat | 3.60 flat | 3.40 flat | 3.80 | 3.60 | 3.40 | |
| IL | Securus | 3.55 flat | 3.55 flat | N/A | 3.55 | 3.55 | N/A | 2 |
| IN | PCS (GTL) | .24/min. | .24/min. | .24/min. | 3.60 | 3.60 | 3.60 | |
| IA | PCS (GTL) | N/A | N/A | 2.00 + .19 -.27/min. | N/A | N/A | 4.85-6.05 | 3 |
| KS | Embarq (CenturyLink) * | .18/min. | .18/min. | .17/min. | 2.70 | 2.70 | 2.55 | |
| KY | Securus | 1.50 + .20/min. | 1.50 + .20/min. | 1.20 + .16/min. | 4.50 | 4.50 | 3.60 | |
| LA | Securus | 2.15 + .15-.21/min. | 1.93 + .14-.19/min. | 1.93 + .14-.19/min. | 4.40-5.30 | 4.03-4.78 | 4.03-4.78 | |
| ME | PCS (GTL) | 1.55 + .25/min. | 1.55 + .25/min. | .30/min. | 5.30 | 5.30 | 4.50 | |
| MD | GTL | .95 + .30/min. | .30/min. | .30/min. | 5.45 | 4.50 | 4.50 | 4 |
| MA | GTL | .86 + .10/min. | .86 + .10/min. | .65 + .075/min. | 2.36 | 2.36 | 1.78 | |
| **MI** | PCS (GTL) | .20/min. | .20/min. | .18/min. | 3.00 | 3.00 | 2.70 | |
| MN | GTL | 3.00 + .23/min. | N/A | .32/min. | 6.45 | N/A | 4.80 | |
| MS | GTL | 2.10 + .24/min. | 2.10 + .24/min. | 2.10 + .24/min. | 5.70 | 5.70 | 5.70 | |
| **MO** | Securus | 1.00 + .05/min. | .05/min. | .05/min. | 1.75 | 0.75 | 0.75 | |
| MT | Telmate | .24 + .12/min. | .24 + .12/min. | .24 + .12/min. | 2.04 | 2.04 | 2.04 | |
| **NE** | PCS (GTL) | .70 + .05/min. | .50 + .05/min. | .50 + .05/min. | 1.45 | 1.25 | 1.25 | |
| NV | CenturyLink * | 1.00 + .13/min. | 1.00 + .13/min. | 1.00 + .13/min. | 2.95 | 2.95 | 2.95 | |
| NH | ICSolutions | 1.20 + .10/min. | .15/min. | .15/min. | 2.70 | 2.25 | 2.25 | |
| NJ | GTL | .33/min. | .33/min. | .33/min. | 4.95 | 4.95 | 4.95 | |
| **NM** | Securus | .65 flat | .59 flat | .65 flat | 0.65 | 0.59 | 0.65 | |
| **NY** | VAC (GTL) | .048/min. | .048/min. | .048/min. | 0.72 | 0.72 | 0.72 | |
| NC | GTL | 3.40 flat | 3.40 flat | 3.06 flat | 3.40 | 3.40 | 3.06 | |
| ND | Evercom (Securus) | 2.40 + .24/min. | 2.40 + .24/min. | .34/min. | 6.06 | 6.06 | 5.10 | 5 |
| OH | GTL | 1.04 + .322/min. | .832 + .257/min. | .832 + .257/min. | 5.87 | 4.69 | 4.69 | |
| OK | VAC (GTL) | 3.00 flat | 3.00 flat | N/A | 3.00 | 3.00 | N/A | |
| OR | Telmate | .16/min. | .16/min. | .16/min. | 2.40 | 2.40 | 2.40 | |
| PA | GTL | 2.35 + .26/min. | 2.15 + .20/min. | 2.04 + .19/min. | 6.25 | 5.15 | 4.89 | |
| **RI** | GTL | .70 flat | .70 flat | .63 flat | 0.70 | 0.70 | 0.63 | |
| **SC** | GTL | .99 flat | .75 flat | .75 flat | 0.99 | 0.75 | 0.75 | |
| SD | VAC (GTL) | 2.70 + .38/min. | 1.35 + .09/min. | 1.35 + .09/min. | 8.40 | 2.70 | 2.70 | |
| TN | GTL | 1.853 + .116/min. | 1.667 + .105/min. | 1.667 + .105/min. | 3.60 | 3.24 | 3.24 | |
| TX | Embarq (CenturyLink) + | .26/min. | .26/min. | .234/min. | 3.90 | 3.90 | 3.51 | |
| UT | VAC (GTL) | 2.80 + .12/min. | 2.80 + .12/min. | 2.25 + .10/min. | 4.60 | 4.60 | 3.75 | |
| VT | PCS (GTL) | 1.25 + .15/min. | 1.00 + .10/min. | .50 + .10/min. | 3.50 | 2.50 | 2.00 | |
| VA | GTL | 2.25 + .25/min. | 1.75 + .23/min. | 1.75 + .23/min. | 6.00 | 5.20 | 5.20 | |
| WA | VAC (GTL) | 3.50 flat | 3.15 flat | 3.15 flat | 3.50 | 3.15 | 3.15 | |
| WV | GTL | .85 + .20/min. | .75 + .18/min. | N/A | 3.85 | 3.45 | N/A | |
| WI | Embarq (CenturyLink) + | .12/min. | .12/min. | N/A | 1.80 | 1.80 | N/A | |
| WY | ICSolutions | 1.17 + .17/min. | .98 + .14/min. | .50 + .05/min. | 3.72 | 3.08 | 1.25 | |
| BOP | Sprint | ? | ? | ? | ? | ? | ? | 6 |
| | | | | **Averages:** | **$3.90** | **$3.41** | **$3.42** | |

*Source: Prison Legal News research data 2012-2013*

* ICS provided by CenturyLink, with prepaid accounts provided by ICSolutions

\+ ICS provided by CenturyLink, with prepaid accounts provided by Securus

Bolded states have banned ICS commissions

successfully. Studies have shown that having meaningful contact beyond prison walls can make a real difference in maintaining community ties, promoting rehabilitation, and reducing recidivism. Making these calls more affordable can facilitate all of these objectives and more."

She concluded by emphasizing, "change has finally come."

### Reaction to the FCC's Order

The FCC's order was well-received by the many organizations and individuals who had long urged the Commission to redress the abuses of the prison phone industry. While some felt the order did not go far enough, it is arguably more than any other government agency has done to protect prisoners and their families from exploitation by profit-driven companies and greedy corrections officials.

One community has already taken the FCC's order as a signal for positive change. In October 2013, Santa Clara County, California Supervisor Joe Simitian introduced a proposal to let offenders held in the county's juvenile detention facility make free calls to their families and friends, "ending exorbitant phone rates at least 23 times higher than normal," according to the *Mercury News*.

Under the proposal the county would terminate its contract with GTL, the current ICS provider which gives the county a 61% commission, and supply phone services at the juvenile facility internally. As a result, phone rates would drop from $.70 a minute to $.03 per minute. "It was institutional price gouging. We had a captive audience in every sense of the word," Simitian observed. A similar proposal is being made for the county's jails.

"Santa Clara County is setting a wonderful example that the rest of the country should follow," said Peter Wagner, executive director of the Prison Policy Initiative.

Not everyone was happy with the FCC's final order, though.

Global Tel*Link and Securus filed petitions to stay the order in October 2013 and requested that the FNPRM be held in abeyance. Securus' petition complained that the Commission's order was onerous, requiring the company to renegotiate over 1,700 ICS contracts within 90 days to be in compliance – a task it said was impossible to complete. Securus also claimed that it would be unable to recover commission payments it must continue to pay under its existing contracts.

Additionally, the company argued that the rate caps will require it to provide below-cost phone services – despite the fact that 18 states *already* charge rates within the FCC's cap on collect interstate calls, and 15 states have rates at or below the cap on prepaid and debit interstate calls. In fact, 7 states currently charge ICS rates for collect, debit and/or prepaid calls that are at or below the FCC's safe harbor limits.

Incongruously taking the position that it now somehow represents the interests of prisoners and their families, Securus further argued that the rate caps "could lead correctional facilities to deny inmates access to telecommunications services." More telling is the company's complaint that the caps would "deprive state and county governments of funds used for salutary purposes such as victims' rights funds and inmate welfare"; i.e., services that are funded by commission kickbacks from ICS providers, which in turn are mostly paid by recipients of prisoners' phone calls – primarily their family members.

GTL's petition for a stay of the FCC's order emphasized the company's bottom line, including the "millions of dollars in unrecoverable losses" that would "create disruption and uncertainty in the industry." Presumably with a poker face, GTL argued that staying the order would not harm the petitioners. Attorney Lee G. Petro, who represents Martha Wright, the lead petitioner before the FCC, responded that GTL's argument was "almost laughable," noting the company was simply trying to safeguard its profit margins. "The FCC is there to protect the public interest, not to protect a company's bottom line," he observed, dryly.

Weighing in on the side of Securus and GTL was the National Sheriffs' Association, which filed a comment with the FCC contending that a "one size fits all" approach to prison phone services fails to account for "the realities of how these services are provided." Stated another way, because many sheriffs receive commission kickbacks from ICS providers, and have become accustomed to padding their jail budgets with those funds, they will suffer financially under the FCC's order.

# CHART C - Local ICS Rates

| State | Company | Rates (2012-2013) Collect | Pre-Paid | Debit | Cost of 15-Minute Call Collect | Pre-Paid | Debit | |
|---|---|---|---|---|---|---|---|---|
| AL | Embarq (CenturyLink) * | $2.75 flat | $2.75 flat | $2.75 flat | $2.75 | $2.75 | $2.75 | |
| AK | Securus | free | free | free | free | free | free | 1 |
| AZ | Securus | 1.84 flat | 1.60 flat | 1.60 flat | 1.84 | 1.60 | 1.60 | |
| AR | GTL | 3.00 + .12/min. | N/A | 3.00 + .12/min. | 4.80 | N/A | 4.80 | |
| **CA** | GTL | .096/min. | .096/min. | N/A | 1.44 | 1.44 | N/A | |
| CO | VAC (GTL) | 2.75 + .15/min. | 1.25 + .13/min. | 1.25 + .10/min. | 5.00 | 3.20 | 2.75 | |
| CT | Securus | .32/min. | .24/min. | .32/min. | 4.87 | 3.65 | 4.87 | |
| DE | GTL | 1.22 flat | 1.22 flat | 1.22 flat | 1.22 | 1.22 | 1.22 | |
| FL | T-NETIX (Securus) | .50 flat | .50 flat | .50 flat | 0.50 | 0.50 | 0.50 | |
| GA | GTL | 2.70 flat | N/A | N/A | 2.70 | N/A | N/A | |
| HI | Hawaiian Telcom | 1.95 flat | ? | ? | 1.95 | ? | ? | 7 |
| ID | PCS (GTL) | 3.80 flat | 3.60 flat | 3.40 flat | 3.80 | 3.60 | 3.40 | |
| IL | Securus | 3.55 flat | 3.55 flat | N/A | 3.55 | 3.55 | N/A | 2 |
| IN | PCS (GTL) | .24/min. | .24/min. | .24/min. | 3.60 | 3.60 | 3.60 | |
| IA | PCS (GTL) | N/A | N/A | 2.00 flat | N/A | N/A | 2.00 | 3 |
| KS | Embarq (CenturyLink) * | .18/min. | .18/min. | .17/min. | 2.70 | 2.70 | 2.55 | |
| KY | Securus | 1.85 flat | 1.85 flat | 1.50 flat | 1.85 | 1.85 | 1.50 | |
| LA | Securus | .98 flat | .88 flat | 0.88 flat | 0.98 | 0.88 | 0.88 | |
| ME | PCS (GTL) | 1.55 + .25/min. | 1.55 + .25/min. | .30/min. | 5.30 | 5.30 | 4.50 | |
| MD | GTL | .65 flat | .50 flat | .50 flat | 0.65 | 0.50 | 0.50 | 4 |
| MA | GTL | .86 + .10/min. | .86 + .10/min. | .65 + .075/min. | 2.36 | 2.36 | 1.78 | |
| **MI** | PCS (GTL) | .20/min. | .20/min. | .18/min. | 3.00 | 3.00 | 2.70 | |
| MN | GTL | 1.00 + .05/min. | N/A | .35 flat | 1.75 | N/A | 0.35 | |
| MS | GTL | 2.10 + .24/min. | 2.10 + .24/min. | 2.10 + .24/min. | 5.70 | 5.70 | 5.70 | |
| **MO** | Securus | 1.00 + .05/min. | .05/min. | .05/min. | 1.75 | 0.75 | 0.75 | |
| MT | Telmate | .24 + .12/min. | .24 + .12/min. | .24 + .12/min. | 2.04 | 2.04 | 2.04 | |
| **NE** | PCS (GTL) | .70 flat | .50 flat | .50 flat | 0.70 | 0.50 | 0.50 | |
| NV | CenturyLink * | 1.00 + .13/min. | 1.00 + .13/min. | 1.00 + .13/min. | 2.95 | 2.95 | 2.95 | |
| NH | ICSolutions | 1.20 + .10/min. | .50 + .10/min. | .50 + .10/min. | 2.20 | 1.50 | 1.50 | 8 |
| NJ | GTL | .33/min. | .33/min. | .33/min. | 4.95 | 4.95 | 4.95 | |
| **NM** | Securus | .66 flat | .59 flat | .65 flat | 0.66 | 0.59 | 0.65 | |
| **NY** | VAC (GTL) | .048/min. | .048/min. | .048/min. | 0.72 | 0.72 | 0.72 | |
| NC | GTL | 1.25 flat | 1.25 flat | 1.13 flat | 1.25 | 1.25 | 1.13 | |
| ND | Evercom (Securus) | .50 flat | .50 flat | .05/min. | 0.50 | 0.50 | 0.75 | |
| OH | GTL | 1.14 flat | .911 flat | .911 flat | 1.14 | 0.91 | 0.91 | |
| OK | VAC (GTL) | 3.00 flat | 3.00 flat | N/A | 3.00 | 3.00 | N/A | |
| OR | Telmate | .16/min. | .16/min. | .16/min. | 2.40 | 2.40 | 2.40 | |
| PA | GTL | 1.65 flat | 1.60 flat | 1.52 flat | 1.65 | 1.60 | 1.52 | |
| **RI** | GTL | .70 flat | .70 flat | .63 flat | 0.70 | 0.70 | 0.63 | |
| **SC** | GTL | .99 flat | .75 flat | .75 flat | 0.99 | 0.75 | 0.75 | |
| SD | VAC (GTL) | 2.70 flat | .90 flat | 1.00 flat | 2.70 | 0.90 | 1.00 | |
| TN | GTL | .895 flat | .8055 flat | .8055 flat | 0.90 | 0.81 | 0.81 | |
| TX | Embarq (CenturyLink) + | .26/min. | .26/min. | .234/min. | 3.90 | 3.90 | 3.51 | |
| UT | VAC (GTL) | 3.15 flat | 3.15 flat | 2.50 flat | 3.15 | 3.15 | 2.50 | |
| VT | PCS (GTL) | 1.25 + .07/min. | 1.00 + .06/min. | .25 + .05/min. | 2.30 | 1.90 | 1.00 | |
| VA | GTL | 1.00 flat | .90 flat | .90 flat | 1.00 | 0.90 | 0.90 | |
| WA | VAC (GTL) | 3.50 flat | 3.15 flat | 3.15 flat | 3.50 | 3.15 | 3.15 | |
| WV | GTL | .85 flat | .75 flat | N/A | 0.85 | 0.75 | N/A | |
| WI | Embarq (CenturyLink) + | .12/min. | .12/min. | N/A | 1.80 | 1.80 | N/A | |
| WY | ICSolutions | .70 + .08/min. | .60 + .07/min. | .50 + .05/min. | 1.90 | 1.65 | 1.25 | |
| BOP | Sprint | varies | 1.50 + .06/min. | .06/min. | .95-5.70 | 2.40 | 0.90 | 6 |
| | | | | **Averages:** | **$2.30** | **$2.08** | **$1.98** | |

*Source: Prison Legal News research data 2012-2013*

* ICS provided by CenturyLink, with prepaid accounts provided by ICSolutions

\+ ICS provided by CenturyLink, with prepaid accounts provided by Securus

Bolded states have banned ICS commissions

## Hope for Prison Phone Reform (cont.)

Both GTL and Securus filed petitions for review in the D.C. Circuit Court of Appeals on November 14, 2013 – just one day after the final order was published in the *Federal Register*. The companies are seeking review of the order on the grounds that it exceeds the FCC's jurisdiction or authority and is "arbitrary, capricious, an abuse of discretion" or otherwise contrary to the law or violative of their rights. See: *Securus Technologies v. FCC*, U.S. Court of Appeals (D.C. Circuit), Case No. 13-1280; *Global Tel*Link v. FCC*, U.S. Court of Appeals (D.C. Circuit), Case No. 13-1281.

However, when drafting the final order the Commission specifically addressed its authority and jurisdiction to regulate prison phone rates, principally under Section 201 of the Communications Act of 1934, which requires that all telecom carriers' interstate rates be "just and reasonable."

Pursuant to 47 U.S.C. § 201(b), "All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful." Further, "[t]he Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this chapter." While 47 U.S.C. § 276 requires all payphone providers to be "fairly compensated," that does not preclude the FCC from promulgating rules to ensure ICS rates are concurrently just and reasonable.

Most provisions of the FCC's final order will go into effect on February 11, 2014 with the exception of data reporting requirements, though the petitions for review filed by GTL and Securus may result in delays depending on when the D.C. Circuit enters a ruling. Ironically, while both companies have filed petitions seeking to overturn the FCC's order, Securus is simultaneously suing GTL in federal court on a patent infringement claim.

### Conclusion: The Bell Tolls

PLN and HRDC have invested decades of work into confronting the injustice of exorbitant prison phone rates and their impact on prisoners, prisoners' families and our communities. The FCC's order represents a major milestone. While the reforms mandated by the FCC face legal challenges from ICS providers that rightly fear the impact they will have on their profit margins, the conclusion is inescapable: The evils of the prison phone industry have been exposed and are being remedied – slowly, perhaps, but surely.

On November 21, 2013, the FCC denied Securus' and GTL's petitions to stay the Commission's order and to hold the FNPRM in abeyance. "Justice delayed is justice denied," Commissioner Clyburn stated. "Families and loved ones have already been waiting ten long years for relief from unlawfully high and unaffordable rates.... I look forward to working with Chairman [Tom] Wheeler and my fellow Commissioners to adopt permanent rate caps to ensure that inmate calling service phone calls are just and reasonable as required by the statute."

Upon denying the petitions to stay, the FCC wrote that "delay of implementation of the reforms adopted in the Order will perpetuate the significant harms that third parties are currently subject to in the form of unjust, unreasonable and unfair ICS rates and the various secondary harms that those excessive rates cause, such as a higher rate of recidivism and emotional harm to prisoners' children."

Thus, ICS providers should not ask for whom the bell tolls, as it has tolled for them. Prison phone companies have for too long price-gouged prisoners and their loved ones in collusion with corrections agencies that profit from such exploitation through commission kickbacks. If ICS providers want to continue providing prison phone services, they must do so within the new paradigm of regulation, rate caps and public scrutiny.

Lady Justice may be blind, but judging from the FCC's order she is not deaf – and the pleas of prisoners and their families for reform of the abusive prison phone industry are finally being heard, loud and clear.

Sources: *FCC Order (WC Docket No. 12-375, 9/26/13); FCC Order Denying Petitions to Stay (WC Docket No. 12-375, 11/21/13); transcript from FCC Workshop (7/10/2013); San Jose Mercury News; Securus' Motion for Stay (WC Docket No. 12-375, 9/17/2013) and Petitioners' Response; National Sheriffs' Association Comment (WC Docket No. 12-375, October 2013); Huffington Post; www.icsolutions.com; https://securustech.net; www.gtl.net; www.telmate.com; http://qwest.centurylink.com/corrections; www.thedeal.com; www.prisonpolicy.org; www.paytel.com; www.castleharlan.com; www.americansecurities.com; www.prisonphonejustice.org; www.phonejustice.org; www.epsicare.com; www.bloomberg.com; www.buzzfeed.com; "Bureau of Prisons: Improved Evaluations and Increased Coordination Could Improve Cell Phone Detection," Government Accountability Office, GAO-11-893 (Sept. 2011)*

# CHART D - ICS Commissions

| State | Company | Commission Payments 2009 | 2010 | 2011 | 2012 | Percentage 2012-2013 | |
|---|---|---|---|---|---|---|---|
| AL | Embarq (CenturyLink)* | $4,463,686.90 | $4,124,126.47 | $3,530,496.70 | $3,038,002.18 | see note | 9 |
| AK | Securus | 84,125.08 | 74,503.59 | 83,393.95 | 85,438.58 | 7-32.1% | |
| AZ | Securus | 3,723,046.36 | 3,884,803.26 | 4,120,894.06 | 4,314,062.50 | 53.70% | |
| AR | GTL | 2,394,900.77 | 2,475,527.50 | 2,447,253.75 | 2,010,223.57 | 45.00% | |
| **CA** | GTL | 13,000,000.00 | 6,500,000.00 | **NONE** | **NONE** | **NONE** | 10 |
| CO | VAC (GTL) | 3,017,759.33 | 2,658,759.15 | 2,656,328.07 | 2,029,186.79 | 49.00% | |
| CT | Securus | 3,590,667.50 | 3,797,824.40 | 4,032,757.64 | 4,212,201.86 | 68.75% | |
| DE | GTL | 1,310,401.78 | 1,144,827.32 | 1,195,151.36 | 998,380.04 | 30.00% | 11 |
| FL | T-NETIX (Securus) | 5,383,690.20 | 5,374,083.28 | 5,205,803.74 | 5,156,269.19 | 35.00% | |
| GA | GTL | 7,445,914.55 | 7,695,712.76 | 6,284,715.76 | 5,316,672.82 | 60.00% | |
| HI | Hawaiian Telcom | 106,013.36 | 97,598.47 | 103,493.08 | 100,325.32 | ? | |
| ID | PCS (GTL) | 1,248,804.57 | 1,368,425.38 | 1,495,963.54 | 1,441,051.81 | see note | 12 |
| IL | Securus | 10,392,626.00 | 10,940,246.00 | 12,649,898.00 | 12,946,806.00 | 76.00% | 2 |
| IN | PCS (GTL) | 1,693,965.32 | 1,547,481.77 | 1,929,932.14 | 1,696,977.76 | 43.50% | |
| IA | ICN/PCS (GTL) | 1,231,000.00 | 1,231,000.00 | 750,000.00 | 650,972.00 | see note | 3 |
| KS | Embarq (CenturyLink)* | 1,814,693.80 | 1,876,165.29 | 1,769,540.31 | 1,839,450.64 | 68.20% | 13 |
| KY | Securus | 3,333,168.18 | 2,706,767.18 | 2,880,166.42 | 2,796,139.46 | 54.00% | 14 |
| LA | Securus | 3,602,686.75 | 3,303,407.37 | 3,289,038.16 | 3,044,009.33 | 70.00% | |
| ME | PCS (GTL) | 234,329.79 | 225,504.10 | 171,379.45 | 367,231.71 | 60-100% | 15 |
| MD | GTL | ? | ? | ? | ? | 65-87% | 4 |
| MA | GTL | 1,972,546.06 | 1,870,044.28 | 1,706,889.43 | 1,714,972.89 | 15-30% | |
| **MI** | PCS (GTL) | **NONE** | **NONE** | **NONE** | **NONE** | **NONE** | |
| MN | GTL | 3,388,860.00 | 3,470,898.00 | 3,767,811.00 | 3,690,953.00 | 59.00% | |
| MS | GTL | 2,788,922.59 | 2,262,203.71 | 1,945,008.21 | 1,651,805.23 | 60.50% | |
| **MO** | Securus | **NONE** | **NONE** | **NONE** | **NONE** | **NONE** | |
| MT | Telmate | 252,121.02 | 226,095.50 | 227,834.67 | 220,617.00 | 25.00% | 16 |
| **NE** | PCS (GTL) | **NONE** | **NONE** | **NONE** | **NONE** | **NONE** | |
| NV | CenturyLink * | 3,033,941.22 | 2,747,336.97 | 2,736,802.16 | 2,706,372.51 | 54.20% | |
| NH | ICSolutions | 252,000.00 | 284,000.00 | 300,000.00 | 308,000.00 | see note | 8 |
| NJ | GTL | 5,106,355.00 | 3,734,512.00 | 3,633,197.00 | 3,877,997.00 | 41.00% | |
| **NM** | Securus | **NONE** | **NONE** | **NONE** | **NONE** | **NONE** | |
| **NY** | VAC (GTL) | **NONE** | **NONE** | **NONE** | **NONE** | **NONE** | |
| NC | GTL | 7,578,956.67 | 7,217,875.33 | 7,464,539.07 | 6,881,021.44 | 58.00% | |
| ND | Evercom (Securus) | 126,245.62 | 114,110.95 | 107,516.94 | 97,856.12 | 40.00% | 5 |
| OH | GTL | 13,531,849.15 | 17,236,087.91 | 15,000,000.00 | 15,000,000.00 | see note | 17 |
| OK | VAC (GTL) | 1,240,396.00 | 1,218,429.88 | 1,167,318.18 | 1,017,657.90 | see note | 18 |
| OR | Telmate | 3,000,000.00 | 3,000,000.00 | 3,000,000.00 | 3,000,000.00 | see note | 19 |
| PA | GTL | 7,174,942.65 | 7,250,923.88 | 7,361,264.77 | 7,620,897.51 | 44.40% | |
| **RI** | GTL | **NONE** | **NONE** | **NONE** | **NONE** | **NONE** | |
| **SC** | GTL | **NONE** | **NONE** | **NONE** | **NONE** | **NONE** | |
| SD | VAC (GTL) | 241,839.00 | 154,767.00 | 229,398.76 | 520,332.05 | 33-38% | 20 |
| TN | GTL | 2,991,100.00 | 2,916,310.00 | 2,635,599.00 | 2,595,417.00 | 50.10% | |
| TX | Embarq (CenturyLink)+ | 224,228.00 | 4,276,006.00 | 5,673,568.00 | 6,760,593.15 | 40.00% | |
| UT | VAC (GTL) | 798,429.40 | 699,489.59 | 745,155.88 | 765,858.16 | 55.00% | 21 |
| VT | PCS (GTL) | 303,160.50 | 467,295.94 | 410,513.74 | 482,292.11 | 37.00% | |
| VA | GTL | 4,524,329.69 | 4,033,303.82 | 4,104,977.98 | 3,401,139.48 | 35.00% | 22 |
| WA | VAC (GTL) | 5,100,000.00 | 5,100,000.00 | 5,100,000.00 | 5,100,000.00 | 51.00% | 23 |
| WV | GTL | 903,735.30 | 890,005.21 | 919,726.80 | 931,637.16 | 46.00% | |
| WI | Embarq (CenturyLink)+ | 2,039,339.45 | 2,052,346.15 | 2,171,279.29 | 2,344,085.34 | 30.00% | |
| WY | ICSolutions | 347,512.83 | 475,976.21 | 532,305.11 | 604,859.00 | 65.50% | |
| **STATE TOTALS:** | | **$134,992,290.39** | **$132,724,781.62** | **$125,536,912.12** | **$123,337,765.61** | **Avg. 47.79%** | |

*Source: Prison Legal News research 2012/2013 (commission amounts are for calendar or fiscal years, depending on how the data was reported).*

* ICS provided by CenturyLink, prepaid accounts provided by ICSolutions

\+ ICS provided by CenturyLink, prepaid accounts provided by Securus

# Consolidated Footnotes – Charts A to D

1 Alaska provides free local calls, plus free calls to the state's Public Defender Agency, Office of Public Advocacy and Ombudsman's Office. First-minute rates for intrastate calls range from $.17 to $.60, with subsequent minutes as indicated in Chart B.

2 Illinois' ICS contract changed to Securus in late 2012; the charts reflect current (2013) rates. The state's prior contract was with Consolidated Communications Public Services (CCPS). Illinois' contract with Securus initially had a commission rate of 87.1%, later reduced to 76%; the commission amounts in Chart D are pursuant to the state's prior contract with CCPS, which had a commission rate of 56%.

3 Iowa only allows debit calls, with a maximum charge of $9.00 for interstate calls and $7.40 for intrastate calls. The Iowa DOC's phone service is provided through the Iowa Communications Network (ICN), a state government agency, and PCS/GTL. The state does not receive a commission but rather retains all revenue in excess of the cost of providing prison phone services, which is termed "revenue" or "rebates."

4 Maryland's ICS contract changed to GTL in early 2013; the charts reflect current (2013) rates. The commission rate in Chart D (65-87%) is based on documents provided by the MD DOC; the commission for debit/prepaid calls is 65% and the commission for collect calls is 87%. The MD DOC's previous ICS contract with Securus had a commission rate of 48-60%.

5 In North Dakota, the rates are $.30 for the first minute then $.24/min. thereafter for collect and prepaid interstate and intrastate calls (plus the connection/per-call charge).

6 Phone rates were obtained from the BOP and from a 2011 report by the General Accountability Office: "Bureau of Prisons: Improved Evaluations and Increased Coordination Could Improve Cell Phone Detection," GAO-11-893 (Sept. 2011).

7 Rates are based on a 2011 email from the Hawaii Department of Public Safety, which confirmed on November 20, 2013 that those rates are still in effect.

8 Under New Hampshire's ICS contract, the first 5 minutes of local calls (all types) do not incur per-minute charges, though the connection/per-call charge applies. The state receives flat commission payments on a monthly basis ($27,000 per month beginning in September 2012).

9 The Alabama DOC receives a "per diem" commission; commission payments are calculated based on a per diem rate multiplied by the average prisoner population, per month. Under the state's 2012 contract with CenturyLink, the per diem rate is $.572.

10 California phased out commissions in 2011, but the California Technology Agency receives an $800,000 annual fee from GTL, plus GTL provides cell phone detection technology at California state prisons at no cost.

11 The FY 2009 and FY 2010 commission amounts for Delaware include combined commission payments for ICS and public payphone services. The state's ICS contract specifies a declining commission rate of 50% in FY 2010 and 2011, 40% in FY 2012 and 30% in FY 2013.

12 Idaho receives a commission of $2.25 per debit call, $2.00 per prepaid collect call and $1.75 per collect call. Community Work Centers have a 20% commission.

13 Kansas receives a minimum guaranteed annual commission of $2.36 million plus a "signing bonus" of $250,000 pursuant to its 2013 ICS contract. The commission amounts are from the state's prior ICS contract, which had a commission of 41.3%.

14 In addition to the commission amounts, Kentucky receives an $80,000 annual technology grant from Securus.

15 Under a contract with PCS/GTL that expired in early 2013, Maine received a 60% commission on collect and prepaid calls plus a 100% commission on debit calls. The Maine DOC currently uses an in-house debit calling system with no collect calls.

16 Montana receives minimum monthly commission payments of $23,000 or 25% of ICS revenue, whichever is greater.

17 Ohio receives a flat annual commission of $15 million under a contract that began in 2010. The commission amount for 2009 reflects 11 monthly deposits under the prior contract, while 2010 reflects 14 monthly deposits under both the prior and current contract.

18 Oklahoma receives a flat commission of $2.30 per call, which equates to a 76.6% commission based on the state's flat ICS rate of $3.00 per call.

19 Oregon receives a base annual commission of $3 million, paid quarterly, plus "an additional commission ... of 50% of quarterly gross revenue on all Contractor provided inmate telephone equipment and of quarterly profits on all Enhanced Services over $1.5 million."

20 South Dakota receives a 38% commission on collect and prepaid local and intraLATA calls, 33% on collect and prepaid interLATA and interstate calls, and $1.00 commission per debit call (all call types).

21 In addition to ICS commissions, Utah receives a quarterly administrative fee in "an amount equal to 1% of the net sales ... under this Contract for the period." Utah DOC halfway houses that use coin payphones have a 45% commission rate.

22 In addition to ICS commissions, GTL pays Virginia a minimum $150,000 annual fee "towards DOC technology initiatives," and such fees increase if GTL receives annual ICS revenue that exceeds $13 million.

23 Washington receives a 51% commission with a minimum annual payment of $5.1 million. The amounts in Chart D reflect the minimum commissions received by the state; actual amounts may be higher.

*For all charts:* ICS rates and providers may have changed since this data was compiled by *Prison Legal News* in 2012-2013. Securus rates were checked with the online Securus rate calculator (https://securustech.net/call-rate-calculator); CenturyLink rates were checked on the company's website: (http://qwest.centurylink.com/corrections). Data in the charts was obtained from corrections agencies via public records requests or their websites, or from ICS providers; most source documents are posted on www.prisonphonejustice.org.

# Prison Phone Companies Fight for Lucrative Florida DOC Contract

*by David Ganim*

In April 2013, the Florida Department of Corrections (FDOC) issued an invitation for companies to bid on the department's coveted prison phone contract.

The FDOC evaluated responses to the bid invitation and conducted negotiations with three companies: Global Tel*Link (GTL), Securus Technologies, Inc., which currently holds the department's phone contract, and CenturyLink – the nation's three largest prison phone service providers. The FDOC then issued a request for best and final offers (BAFO), and each company responded by June 18, 2013. After reviewing the final bids, the FDOC selected CenturyLink as the company that demonstrated the best value and service.

CenturyLink was able to woo the FDOC by offering an unusual proposition – increasing the department's "commission" kickback to 62.6% of gross prison phone revenue from the current rate of 35%, while lowering the cost of a 15-minute call by approximately 25%. The 62.6% commission would be in effect for the initial contract term of five years, then change to 63.6% for the first two one-year renewals and increase to 64.1% for the third, fourth and fifth-year renewals.

CenturyLink indicated that its pro-

posed rates did not include a per-call surcharge, which would allow prisoners to make more frequent calls at lower cost.

Not to be outdone, Securus' BAFO included a 46% commission for the first 5 years and then 75% for the next five one-year renewals. Further, the company offered a free medication prescription discount plan for FDOC employees and prisoners upon their release. GTL's BAFO included a 65% commission for the first five years and 70% for the next five one-year renewals, plus a $100,000 annual fee for a "technology fund" and a cell phone detection system at no additional cost.

All three companies offered to provide blended rates of under $.10 per minute for all categories of prison phone calls.

The FDOC selected CenturyLink as the winning bidder even though Global Tel*Link's initial bid was reportedly rated higher. GTL and Securus complained, and the FDOC decided to rebid the contract. CenturyLink filed a protest in response, resulting in a three-way battle among the prison phone firms.

The Florida Division of Administrative Hearings dismissed all of the protests on November 1, 2013, finding that the companies had "failed to prove that the Department's rejection of all replies due to unclear criteria for [the contract] award is illegal, arbitrary, dishonest, or fraudulent."

Consequently, the FDOC's phone contract will again be rebid, which will likely result in another contentious round of bidding and further protests.

Sources: *www.carrlawpa.com; Florida Division of Administrative Hearings, Docket Nos. 13-003028BID, 13-003029BID, 13-003030BID, 13-003041BID; BAFOs from CenturyLink, Securus and GTL*

# From the Editor

*by Paul Wright*

Welcome to the last issue of PLN for 2013. As the year closes we can look back and see we have accomplished a great deal, including expanding the magazine to 64 pages, successfully urging the FCC to cap the cost of interstate prison phone calls, and prevailing in censorship and public records lawsuits. We also moved our office to Florida from Vermont and will soon be reopening a PLN office in Seattle, Washington.

All of this does not happen on its own; it depends on help and support from our readers and supporters like you. If you can afford to make a donation to PLN or the Human Rights Defense Center, PLN's parent nonprofit organization, please do so. Your support will help us advocate on behalf of prisoners, work to reform the criminal justice system, litigate to protect basic First Amendment rights and much more. What goes around, comes around. For those interested in the full depth and breadth of what PLN and HRDC do, please review our annual reports at: www.prisonlegalnews.org/annualreports.aspx. If you don't have access to the Internet, send us 8 new first-class stamps and request our 2012 annual report, and we'll mail you a copy.

This month's cover story on the current state of the prison phone industry is the result of years of ongoing research into the rates charged by prisons and jails around the country and the commission kickbacks paid by prison phone companies. This data was critical in getting the FCC to cap interstate prison phone rates and, most importantly, PLN/HRDC is the only one that has it. No one else had ever bothered to get the actual state-by-state prison phone rates, in part because it is very time consuming.

We have one full-time staff person, David Ganim, who tracks down prison phone contracts and rate and commission data, and makes them publicly available on our prison phone justice website: www.prisonphonejustice.org. When we ask people to help support the Prison Phone Justice Campaign, this is the research they are supporting – research that no one else is doing, and around which the Campaign revolves. In its order capping interstate prison phone rates, the FCC repeatedly referred to the data supplied by HRDC, which was instrumental in demonstrating the need for reform of the prison phone industry.

While the FCC's recent order is a significant victory, we have a long way to go in the campaign to end exorbitant prison phone rates and stop the price gouging and exploitation of prisoners and their families by telecom companies and corrections officials. The key to the campaign has been having the actual data that shows the levels of greed with which these corporate and government predators operate. If you think stopping the exploitation of those who accept phone calls from prisoners – mostly their family members – is a worthy goal, then please make a donation to PLN/HRDC. Many thanks to David Ganim and former PLN phone justice coordinator Mel Motel for gathering the data presented in this issue's cover story, and to John Dannenberg and PLN managing editor Alex Friedmann for organizing it in an intelligible format.

Our goals for 2014 include launching the Washington Prison Phone Justice Campaign in order to eliminate prison phone commission kickbacks and lower prison and jail phone rates in Washington State. This is our first statewide campaign to address the high cost of prison phone calls and end government-sanctioned prison phone monopolies.

Additionally, PLN will keep bringing our readers hard-hitting reporting that covers all aspects of the criminal justice system. We'll continue to advocate nationally for saner criminal justice policies and practices that respect prisoners' rights. We will also continue to challenge unconstitutional prison and jail policies that ban books and magazines, and are preparing to relaunch our websites with even more content and better search functionality.

Your contributions and financial support make all of this possible. Even if you can't afford to donate, please encourage your friends and family members to do so on your behalf, or to purchase a PLN subscription or some of the books we distribute. Every little bit helps and no donation is too small or too big.

Enjoy the holidays, and best wishes for a new and better year to all of our readers and supporters from everyone at PLN/HRDC.



## *We've moved!*

Prison Legal News and the Human Rights Defense Center have a new mailing address:

**P.O. Box 1151**
**Lake Worth, FL 33460**

Our new phone number is **(561) 360-2523.**

# PLN FUNDRAISER 2013

## *Please Support Prison Legal News and the Human Rights Defense Center!*

HUMAN RIGHTS DEFENSE CENTER
Dedicated to Protecting Human Rights
www.HumanRightsDefenseCenter.org

Prison Legal News, a project of the non-profit Human Rights Defense Center, cannot fund its operations through subscriptions and book sales alone. We rely on donations from our readers and supporters like you!

PLN conducts one fundraiser a year; we don't bombard our readers with donation requests, only ask that if you are able to contribute something to our important work, please do so. Every dollar counts and is greatly appreciated and will be put to good use. No donation is too small, even books of stamps!

**Where does your donation go? Here's some of what we've done in the past year:**

- HRDC, a co-founder and coordinator of the Campaign for Prison Phone Justice, was instrumental in urging the Federal Communications Commission to reduce the cost of prison phone calls, which the FCC did on August 9, 2013 when it capped interstate prison phone rates nationwide!
- PLN/HRDC received the First Amendment Award from the Society of Professional Journalists on August 26, 2013 – a prestigious honor!
- PLN obtained the first-ever ruling on the merits striking down a jail policy that restricted prisoners from receiving any mail other than postcards, in PLN v. Columbia County, Oregon.
- PLN filed censorship suits against the Nevada DOC and jails in Comal and Upshur Counties in Texas; Virginia Beach, Virginia; and Kenosha, Wisconsin. We have other censorship and public records suits pending nationwide, including against Corrections Corporation of America.

**With your help we can do more! Please send your donation to:**

**Prison Legal News, P.O. Box 1151, Lake Worth, FL 33460**
Or call PLN's office at 561-360-2523 and use your credit card to donate.
Or visit PLN's website at www.prisonlegalnews.org and click on the "Donations" link.

## PLN Support Gifts

### Gift option 1

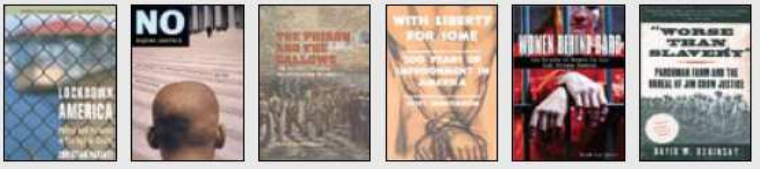
As a token of our gratitude for your support, we are providing the PLN card when making a donation of $50. The card is hand embroidered by women prisoners in Bolivia who are paid a fair wage for the cards to help support their families.

### Gift option 2

In recognition of your support, we are providing the PLN hemp tote bag when making a donation of at least $75. Handmade in Vermont using hemp fiber. Carry books and groceries stylishly and help end the war on drugs!

### Gift option 3

To show our appreciation for your support, we are providing the following selection of books for you to choose from when making a donation of $100. Donations of $100 or more can choose one free title. Each $100 donation entitles you to another free title; i.e., donate $500 and you get five books! $1,000 and you get everything on the page! Please circle the books you want and send the corresponding donation amount.


### Gift option 4

As a thank you gift for your support, we are providing the entire PLN anthology of critically acclaimed books on mass imprisonment signed by editor Paul Wright! (The Celling of Amercia, Prison Nation and Prison Profiteers) plus the PLN hemp tote bag to carry the books in when making a donation of $250 or more.

# Habeas Hints:
# Staring Down the Two-Headed Monster: *Richter-Pinholster*

*by Kent Russell*

*This column provides "habeas hints" to prisoners who are considering or handling habeas corpus petitions as their own attorneys ("in pro per"). The focus of the column is on the Antiterrorism and Effective Death Penalty Act (AEDPA), the federal habeas corpus law which now governs habeas corpus practice in courts throughout the United States.*

**Part Two of Two**

***Harrington v. Richter,***
***131 S.Ct. 770 (2011)***
***Cullen v. Pinholster,***
***131 S.Ct. 1388 (2011)***

In *Richter*, the U.S. Supreme Court (SCOTUS) made ineffective assistance of counsel (IAC) claims – heretofore the staple of habeas corpus litigation – even harder to win on federal habeas corpus than they were before; and in *Pinholster* the Court all but eliminated federal evidentiary hearings as an aid to satisfying AEDPA's requirement that a state court's denial of habeas relief be shown to be "unreasonable." The decisions in *Richter* and *Pinholster* represent a two-headed monster that habeas petitioners will frequently face and have to stare down.

In this two-part column, I discuss these two important cases and suggest some Habeas Hints for how to make the best of them. In Part One we focused on *Richter*. [See: *PLN*, Nov. 2013, p.12]. Here, in Part Two, we will zero in on *Pinholster*.

*Pinholster* concerned a defendant charged with capital murder in California after he solicited friends to rob local drug dealers and, when the dealers tried to prevent the robbers' escape, beat and stabbed them to death. After his arrest, Pinholster threatened to kill a cooperating witness unless he kept quiet. At the guilt phase of the trial Pinholster stupidly testified in his own defense – boasting that he had committed hundreds of robberies while insisting that he always used a gun, even though he had a history of having kidnapped a person while using a knife. The jury found him guilty of two counts of first-degree murder, triggering the penalty phase of the trial.

Shortly before the penalty phase started, the defense moved to exclude any aggravating evidence on the ground that the prosecution had not provided notice to use such evidence as required under California law. The motion was denied on the basis that Pinholster had represented himself at a previous stage of the case, during which the required notice had been given. Defense counsel then stated that, having banked on the court's grant of the motion to exclude, he was not prepared to offer any mitigating evidence. The court inquired whether a continuance might be helpful but counsel declined, saying that because he couldn't think of any mitigation witness other than Pinholster's mother, having more time wouldn't matter.

Accordingly, although the prosecution produced eight penalty witnesses who testified about Pinholster's multiple acts of brutal violence, brazen assaults on police officers, involvement with criminal gangs and prison disciplinary violations, the defense called only Pinholster's mother, who testified that her son suffered a troubled childhood even though his siblings turned out fine. After 2½ days of deliberations, the jury voted for the death penalty.

On state habeas corpus before the California Supreme Court, habeas counsel argued that Pinholster's trial counsel had been ineffective at the sentencing phase. This IAC claim was bolstered by a spate of mitigation evidence, including declarations showing that the upbringing of the entire Pinholster family was abysmal, and that Pinholster himself suffered from bipolar disease and seizure disorders. Nevertheless, the California Supreme Court summarily denied habeas relief on the merits. Counsel then presented the IAC claim on federal habeas corpus; the district court held an evidentiary hearing and subsequently granted the petition. The Ninth Circuit affirmed, holding that, both on the basis of the evidence admitted at the federal hearing as well as on the state record alone, the California Supreme Court's denial amounted to an unreasonable application of the *Strickland* standard.

The U.S. Supreme Court granted certiorari and, in a 6-3 decision, reversed.

In a blockbuster ruling that will apply to most prisoners seeking relief on federal habeas corpus, SCOTUS ruled that evidence introduced in federal court for the first time has "*no bearing*" on AEDPA's requirement that a federal habeas petitioner demonstrate that a state court's denial of relief was an unreasonable application of Supreme Court law. Hence, because there is no point in a federal court taking new evidence that it can't consider, federal courts entertaining habeas petitions under AEDPA as to claims that have been adjudicated on the merits in state court (i.e., virtually all of them, since no habeas claim can be filed in federal court that has not been exhausted by being denied on the merits in state court) will now have to do so *without granting evidentiary hearings* – even as to petitioners who were diligent but unsuccessful in seeking an evidentiary hearing at the state level.

The remainder of the SCOTUS majority opinion in *Pinholster* was devoted to denying Pinholster's IAC claim by applying the reasoning of *Richter* to the state court evidence which remained after the evidence that had come in at the federal evidentiary hearing was excluded from consideration. First, even though defense counsel had no back-up plan for the penalty phase of the trial other than to rely entirely on testimony from Pinholster's mother, SCOTUS found that "the state court record supports the idea that Pinholster's counsel acted strategically to get the prosecution's aggravation witnesses excluded for lack of notice, and if that failed, to put on Pinholster's mother." The majority also found lack of prejudice, because Pinholster was an utterly "unsympathetic" client, and because putting on psychiatric evidence of his mental problems "would have opened the door to rebuttal by a state expert." Thus, despite a vigorous dissent by three justices who made a strong argument for both deficient performance and prejudice, SCOTUS reversed the Ninth Circuit and reinstated Pinholster's death sentence.

## Habeas Hints

• Although this was touched on in Part One of this column, it bears repeating that, although both *Richter* and *Pinholster* concluded that the petitioner could not show the state court had unreasonably applied Supreme Court law, neither case considered whether the state fact-finding procedures which led up to the state court's summary denial of habeas relief may have been so deficient that they "resulted in a decision that was based on *an unreasonable determination of the facts* in light of the evidence presented in the State court proceeding." (See 28 U.S.C. § 2254(d)(2), presenting this as an alternative basis for federal habeas corpus relief under AEDPA). Challenges to the facts under (d)(2) can take two forms: 1) A petitioner may challenge the *substance* of the state court findings and attempt to show that those findings were not supported by substantial evidence in the state court record; or 2) He or she can challenge the fact-finding *process* itself on the ground that it was deficient in some material way. (See, e.g., *Hibbler v. Benedetti*, 693 F.3d 1140, 1146 (9th Cir. 2012)). Challenging the substance of the state court's factual findings is fairly straight-forward – for example, in IAC cases you present the facts showing deficient performance and prejudice and argue that there is no substantial evidence in the state record to show otherwise – but doing so requires the petitioner to negate every fact or inference that could have possibly supported the denial.

• An alternative when challenging the substance of the state court's factual findings is to argue that the state's fact-finding process was defective because the petitioner never had a fair chance in state court to have the relevant habeas facts heard and determined. For example, the state court's fact-finding procedures have been found to be faulty under (d)(2) of AEDPA when the state failed to accept as true factual allegations in the petition that were neither incredible on their face nor clearly refuted by the record; or failed to hold a hearing where those facts, accepted as true, satisfied the basic requirements for relief (i.e., stated a "prima facie case") as to a specific habeas claim. (See, e.g., *Nunes v. Mueller*, 350 F.3d 1045, 1054 (9th Cir. 2003) [where petitioner makes out a prima facie case under *Strickland*, state court's summary denial of IAC claim without an evidentiary hearing amounts to an unreasonable determination of the facts]; see also *Hurles v. Ryan*, 706 F.3d 1021, 1038-40 (9th Cir. 2013) [state's purported

determination of the facts without a fair opportunity for petitioner to present evidence violates AEDPA]).

• *Pinholster* acknowledged that the "state court record" includes everything that was presented to the state courts, whether or not cited to the state's highest court on state habeas. Therefore, *Pinholster* won't be an obstacle if a federal habeas claim depends wholly on transcripts or evidence contained somewhere in the record of the trial, the direct appeal or on state habeas.

• *Pinholster*'s ban on federal evidentiary hearings applies only at the stage where the federal court is determining whether the state court's denial of habeas corpus is "unreasonable" under AEDPA. Granted, that's 90% of the battle on federal habeas, but if you get to the point where the AG takes the position that habeas corpus relief is barred because you did not demonstrate that a state court's violation of AEDPA was not only unreasonable but also prejudicial (see *Brecht v. Abrahamson*, 507 U.S. 619 (1993)), then argue that an evidentiary hearing on the latter issue is appropriate and necessary, notwithstanding *Pinholster*.

• SCOTUS has not yet addressed whether AEDPA's limits on federal review of state decisions and federal fact development, combined with practically non-existent fact development procedures on state habeas, amounts to an unconstitutional "suspension of the writ" (see *Boumedine v. Bush*, 553 U.S. 723 (2008) [a constitutionally adequate habeas corpus proceeding must at least include a meaningful opportunity to satisfy the requirements of AEDPA]); or whether it denies the petitioner due process (see, e.g., *District Attorney's Office v. Osborne*, 557 U.S. 52 (2009) [due process affords a habeas corpus petitioner the right to a fair opportunity in state court to discover and present potentially exculpatory evidence that was not contained in the record on direct appeal]). In the pre-*Pinholster* world, these arguments failed because, although it was fairly apparent that state courts were rarely if ever providing discovery or evidentiary hearings to state habeas petitioners seeking to develop evidence beyond that which was presented at trial, U. S. District Courts could fill the constitutional gap by allowing for new evidence to be developed at the federal level. But now that *Pinholster* pretty much prohibits the consideration of any new evidence on federal habeas corpus, the federal safety valve has been shut off – thereby paving the way for a reincarnation of these arguments in the wake of *Pinholster*.

• While there is not just one way to skin this cat, consider the following strategy when pursuing a habeas claim that depends on factual development at the state level in states which (like California) prohibit discovery to non-capital habeas petitioners. 1) On state habeas, make specific discovery demands relevant to the claims in your state habeas petition (e.g., requests for production of documents, interrogatories, subpoenas for witnesses who otherwise won't testify voluntarily, etc.). These discovery requests will probably be ignored, but making them and having them ignored or denied highlights the fundamental unfairness in the state's fact-finding procedure and blocks the AG from later arguing in federal court that you did not exhaust your discovery demands. 2) When you get to federal court, move for discovery under Habeas Rule 6 *before* the court decides whether the state court's denial of habeas relief was unreasonable under AEDPA. 3) If the district court denies discovery, make one or both of the arguments set forth above in your traverse. Or, if the district court allows discovery and new evidence is thereby obtained, a) request that the federal proceedings be stayed while you return to state court and present the new evidence there; b) after the state court denies relief on the basis of the new evidence (thereby accomplishing exhaustion), return to federal court, incorporate the new evidence into the federal habeas claim(s) that had been stayed, and *then* ask the district court to find that the state courts' denial of habeas relief violated AEDPA.

*Kent A. Russell specializes in habeas corpus and is the author of the* California Habeas Handbook, *which thoroughly explains state and federal habeas corpus under AEDPA. For the cost of the latest edition, check Kent's website – www.russellhabeas.com – which also contains an optional order form. Or contact Kent directly at 3169 Washington Street, San Francisco, CA 94115 (415) 563-8640, e-mail: kentrussell@sbcglobal.net.*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# BOP Compromises on Plan to Transfer Prisoners from FCI Danbury

*by Derek Gilna*

In an unexpected turnabout, the Bureau of Prisons (BOP) has modified its July 2013 decision to transfer all prisoners from the only federal women's facility in the northeast, located in Danbury, Connecticut. The BOP had planned to ship 1,120 prisoners held at FCI Danbury to a recently-opened 1,800-bed facility in Aliceville, Alabama – over 1,000 miles away. The $250 million Aliceville prison had been championed by U.S. Senator Richard Shelby of Alabama.

However, almost a dozen other U.S. Senators – as well as prisoners' rights organizations and advocates, federal district court judges and prisoners' families – unleashed a firestorm of criticism over the proposed move, which threatened to exile prisoners at Danbury far from their families in the northeast. This was despite the BOP announcing as early as 1997 that it was committed to meeting the "different physical, social, and psychological needs" of women prisoners.

The BOP attempted to justify the wholesale transfer of women from FCI Danbury by claiming the move would "relieve overcrowding" in men's prisons, as BOP officials intended to convert Danbury into a facility for male prisoners. The minimum-security satellite camp at FCI Danbury would continue to house around 200 women.

While there are 25 federal facilities for male prisoners in the northeast, only Danbury holds women prisoners in that region. The low-security facility has housed such notable prisoners as "Queen of Mean" real estate tycoon Leona Helmsley, singer Lauryn Hill and Piper Kerman, author of the book (now a hit TV series) "Orange is the New Black."

The BOP pays lip service to "maintaining ties" between prisoners and their families; however, the agency's plan to transfer hundreds of women more than 1,000 miles to a remote prison in rural Alabama indicated that maintaining family ties was low on the BOP's priority list.

U.S. Senators Kirsten Gillibrand of New York and Chris Murphy of Connecticut voiced their opposition to the BOP's decision to relocate prisoners from FCI Danbury and convert the facility to a men's prison, as did online magazine *Slate* contributor Judith Resnick, who slammed the BOP in the strongest possible language.

"Being moved far from home limits the opportunities of women being moved out of Danbury; it hurts them in prison and once they get out," Resnick wrote. "Instead of taking a route consistent with its policies, and newly announced commitments to parenting by prisoners, the government is sending hundreds of prisoners on a long hard trip to Aliceville."

"These women clearly did something wrong in order to get to federal prison but their kids didn't," Senator Murphy noted. "The best way to bring any inmate back into society is to make sure that while they are incarcerated they keep their connections with their families."

Gillibrand and Murphy recruited fellow U.S. Senators Charles Schumer of New York, Richard Blumenthal of Connecticut, Patrick Leahy and Bernie Sanders of Vermont, Jeanne Shaheen of New Hampshire, Robert P. Casey of Pennsylvania, Angus King of Maine, and Elizabeth Warren and Ed Markey of Massachusetts, who signed a joint letter in August 2013 that criticized the BOP's plan to transfer prisoners from FCI Danbury.

"This transfer would dramatically disrupt the lives of these female inmates, many of whom are from the Northeast, and place them out of reach of their families and loved ones," the letter stated. "Given BOP's commitment to maintaining family contact, the goal should be to have as many inmates as close as possible to their homes. The Federal Corrections Institute at Danbury is uniquely well-situated to do just that."

The National Association of Women Judges also weighed in, meeting with BOP Director Charles E. Samuels, Jr. and with Deputy Attorney General James Cole to express concerns about removing women prisoners from Danbury. Further, the BOP's plan was opposed by National CURE, FedCURE and the New York-based Osborne Association.

Additionally, a dozen federal judges in northeast districts sent a joint letter to Attorney General Eric Holder in October 2013, stating, "If the planned mission change for Danbury goes forward, our ability to recommend incarceration near family members and children for male inmates will continue, but we will have no ability to do the same for female inmates."

The BOP temporarily suspended its plan to transfer prisoners from Danbury due to the strong opposition, which was followed by delays caused by the federal government shutdown in October 2013, but BOP Director Samuels indicated the agency intended to proceed with relocating women prisoners to FCI Aliceville. He noted that some of the prisoners from Danbury would be housed closer to their families as a result of the move.

Senator Blumenthal, who called the BOP's plan "profoundly shortsighted and misguided," stated on October 6, 2013 that he intended to meet with Attorney General Holder in an effort to reverse the BOP's decision. "As a former federal prosecutor, I believe this very unwise and unfair policy is completely antithetical to the goals of wise criminal justice," he said.

Ultimately, the wide-ranging criticism of the BOP's plan to transfer prisoners from FCI Danbury to Aliceville resulted in a compromise.

In November 2013, the BOP announced it would spend $8-10 million to expand the satellite camp at Danbury to house around 400 women prisoners whose families are in the northeast. The conversion of FCI Danbury to a men's prison will continue, however, and hundreds of women prisoners will be shipped from Danbury to Aliceville – mainly non-citizens and prisoners who do not have family in the northeast.

The first mass transfers to FCI Aliceville began on November 13, 2013, and the facility is expected to reach full capacity in early 2014. Interestingly, Aliceville was previously a prison town – it hosted a prisoner-of-war camp that held up to 6,000 mostly-German and Italian POWs from 1943 to 1945.

Sources: *Reentry Central, Connecticut Law Journal, Associated Press, Hartford Courant, www.newsday.com, www.newstimes.com, www.montgomeryadvrtiser.com, www.slate.com, www.forbes.com*

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# Telemedicine Behind Bars

The National Commission on Correctional Health Care (NCCHC), which provides accreditation for medical services in prisons, jails and other correctional facilities, held its national conference in Nashville, Tennessee from October 28 to 30, 2013.

PLN managing editor Alex Friedmann attended the conference and sat in on several presentations that addressed the issue of telemedicine in the correctional setting. Telemedicine involves medical consultations over a remote connection, typically with a patient speaking with a physician or other medical practitioner on a video screen.

The first NCCHC conference session on telemedicine was conducted by Lawrence Mendel, a physician and acting medical director at the Leavenworth Detention Center, a facility operated by Corrections Corporation of America.

According to Mendel, the first prison telemedicine program began in 1978 at the South Florida Reception Center in conjunction with Jackson Memorial Hospital. The use of telemedicine expanded during the 1990s and it is now used in a variety of settings to provide long-distance medical evaluations and diagnoses.

One advantage of telemedicine in prisons and jails, according to Dr. Mendel, is the ability to provide specialty medical services at facilities located in rural areas where specialists may not be available locally. Additionally, telemedicine can result in a reduction in scheduling delays since medical practitioners don't have to travel to distant facilities to see prisoner-patients.

And, of course, telemedicine can cut costs – particularly staff-related expenses (including overtime) incurred when prisoners are transported to medical appointments. Further, it can provide an alternative to local providers who order expensive tests and treatment for prisoners. Telemedicine thus "has the potential to become cost effective with relatively little use," Mendel stated, and is the "only security measure that can pay for itself."

Based on transportation costs alone, he estimated that around 16 telemedicine sessions per month result in break-even costs. The cost of telemedicine equipment has dropped over time and is currently around $6,600 per video conferencing unit.

Mendel also noted that most prisoners prefer telemedicine, as it means they don't have to endure being shackled and transported to off-site medical appointments.

Friedmann posed the following questions: "The vast majority of medical consults outside the prison setting are face to face, in-person examinations. If that is the community standard of care, to what extent does telemedicine applied specifically to prisoners represent a deviation from the standard of care? Also, if the emphasis on telemedicine is to cut costs and ensure the system pays for itself, does that emphasis on cost cutting come at the expense of quality of care?"

Mendel responded that since prisoners can refuse telemedicine visits there is no difference in the standard of care; i.e., they can demand in-person medical examinations and consultations. With respect to cost savings, he said "no one does telemedicine to save money" but rather to solve a problem – despite the repeated references to reducing costs during his presentation.

The second NCCHC conference session on telemedicine was presented by Dr. Rebekah Haggard, employed with Corizon, a for-profit prison medical company, who spoke on the topic of leveraging telemedicine to achieve the "Triple Aim." The Triple Aim is a framework developed by the Institute for Healthcare Improvement that describes an approach to optimizing health system performance which emphasizes 1) better care, 2) better health and 3) better affordability – that is, lower costs.

Haggard noted that most medical mistakes are due to diagnostic errors and said telemedicine can reduce such errors by forcing the practitioner to focus on the patient's complaints, since the primary interaction – via video – is with the patient. "Listen to the patient," she said. "They will tell you their diagnosis."

She argued that telemedicine minimizes cognitive bias and mistakes in diagnoses. Also, practitioners have more time to spend with patients through telemedicine, as they don't have to factor in travel time to correctional facilities.

In 2012, Corizon conducted more than 20,000 audio-visual medical visits at 150 sites in over 20 states; those visits included consultations and examinations for both medical and mental health care.

Like Mendel, Dr. Haggard repeatedly cited the cost savings that can be achieved through telemedicine. In one state prison system (which she declined to identify when asked), she referenced $2.9 million in reduced staffing costs and overtime by using telemedicine.

Haggard also said there were improved outcomes in terms of cancer death rates and HIV treatment through telemedicine, but did not cite any sources. She acknowledged that prisoners may refuse telemedicine visits – though it was unclear whether prisoners are informed they have the option to decline.

Friedmann asked if she would advocate telemedicine even if the cost was equal to or greater than traditional, in-person medical visits. She said she would, as she felt that telemedicine provided better patient care.

Neither Dr. Haggard nor Dr. Mendel indicated whether they or their families use telemedicine rather than in-person visits for their own medical care.

Sources: *NCCHC conference sessions, www.ihi.org*

# Third Circuit Allows Prisoner's Substitution of Deceased Guard's Estate

The Third Circuit Court of Appeals held on October 16, 2012 that a district court had improperly denied a prisoner's motion to substitute a deceased guard's estate as a defendant.

Delaware prisoner Wardell Leroy Giles filed suit in federal court against prison sergeant Gary Campbell and other defendants, alleging excessive force and denial of medical care during a November 2001 transfer to the Sussex Correctional Institution. As a result of an altercation with guards, Campbell suffered a broken rib, punctured lung and other injuries, and was allegedly punched and kicked while restrained.

The district court granted summary judgment on qualified immunity grounds to several of the defendants, including Campbell, in June 2004. The court ruled in favor of the remaining defendants following a bench trial.

Giles appealed the district court's qualified immunity ruling, and the Third Circuit reversed and remanded. See: *Giles v. Kearney*, 571 F.3d 318 (3d Cir. 2009).

On remand, counsel for the defendants filed a suggestion of death, informing the court that Campbell had died in July 2006 while the appeal was pending. Giles responded by moving to substitute the administrator of Campbell's estate as a defendant pursuant to Federal Rule of Civil Procedure 25(a)(1). Neither the suggestion of death nor the motion to substitute was served on the estate.

The district court denied substitution, holding that the 2004 summary judgment ruling had extinguished Giles' claims against Campbell prior to his death. The court ordered Giles to remove Campbell as a defendant and the case proceeded to trial against the remaining defendants. A jury ruled in their favor.

On appeal, the Third Circuit reviewed the denial of the substitution of Campbell's estate for abuse of discretion. Applying Delaware law, the Court of Appeals held the district court had erroneously concluded that the grant of summary judgment to Campbell was a final judgment that extinguished Giles' claims. Rather, following *Swartz v. Meyers*, 204 F.3d 417 (3d Cir. 2000), the appellate court found that the claims against Campbell remained pending when he died and were not barred under Delaware law.

The Third Circuit held that FRCP 25(a)(3) required service of both the suggestion of death and motion to substitute upon Campbell's estate; since neither had been served, the district court lacked personal jurisdiction over the estate. Thus, the denial of Giles' motion to substitute was vacated and the case remanded for further proceedings. See: *Giles v. Campbell*, 698 F.3d 153 (3d Cir. 2012).

Following remand, the district court granted Giles' motion to appoint counsel and allowed him to substitute the representative of Campbell's estate as a defendant in July 2013. This case remains pending.

# Under Fire, the Federal Bureau of Prisons Audits its Use of Solitary Confinement – and Buys a New Supermax Prison

*by James Ridgeway and Jean Casella*

Amidst growing criticism of its abundant use of solitary confinement, the federal Bureau of Prisons has quietly set in motion an "internal audit" to review its "restricted housing operations." The audit, which has been contracted out to a Washington think tank and will be conducted largely by former corrections officials, seems unlikely to bring any dramatic change to the lives of the more than 12,000 people being held in isolation in the federal prison system. Meanwhile, the federal government has completed the purchase of a prison meant to house still more isolation cells.

The audit fulfils a pledge made by BOP director Charles Samuels last year, following Congress' first and so far only hearing on solitary confinement. [See: *PLN,* October 2012, p.1]. At that hearing, convened by a Senate Judiciary subcommittee chaired by Illinois Senator Dick Durbin, Samuels acknowledged under questioning that he didn't know how many people with mental illness were in isolation in federal prisons, and was short on details about the BOP's use of solitary confinement.

Since that time, controversy surrounding the BOP's use of solitary has only grown. Current lawsuits are challenging the treatment of individuals with mental illness at ADX Florence, the notorious federal supermax prison in Colorado. [See: PLN, Nov. 2012, p.42]. Increased media coverage of ADX has uncovered horror stories of psychotic prisoners who gouge holes in their own flesh or eat their own feces, along with at least one suicide.

In addition, a scathing report last spring from the Government Accountability Office found that the BOP did not know whether its use of "segregated housing" had any impact on prison safety, how it affected the individuals who endure it, or how much it costs American taxpayers. [See: *PLN,* Aug. 2013, p.15].

Yet when he testified before Congress again in September 2013, Charles Samuels discussed solitary confinement under the heading "Recent Innovations and Achievements."

"[W]e are in the midst of making significant changes to our Special Housing Unit (SHU) policies and procedures," Samuels told a House Judiciary subcommittee led by Republican chair George Sensenbrenner and ranking Democratic member Bobby Scott, during a hearing on oversight of federal prisons. "These changes will allow us to improve the efficiency of our SHU operations without compromising safety."

In a statement that was permitted to stand without questioning from the committee members, Samuels asserted: "I have focused significant resources on the mental health of inmates who are placed in SHUs to ensure we are doing everything we can to work with these inmates." (Samuels was the only witness invited to testify, though the ACLU submitted written testimony).

Samuels also said that in the past year the BOP had "decreased the number of inmates housed in SHU by 25 percent, primarily by focusing on alternative management strategies and alternative sanctions for inmates." He cited no specific "alternative sanctions," but did describe changes in the processing, tracking and reporting systems for disciplinary segregation.

When asked what had happened to the 25 percent of prisoners who had been removed from the SHUs, a Bureau of Prisons spokesperson had no concrete numbers but said that they either were put into general population, sent to state prisons or possibly dispatched to Special Management Units, or SMUs.

While individuals are sent to the SHU or the SMU for somewhat distinct reasons, the differences between the two types of units are negligible, with both confining inhabitants to their cells for 23 hours a day. A source with knowledge of the federal prison system told Solitary Watch that the use of SMUs has been growing since their genesis six years ago, and that shuffling prisoners from SHUs to SMUs might yield misleading statistics on the reduction of isolation in the BOP overall.

Samuels wrapped up his brief testimony on segregated housing by stating: "The National Institute of Corrections recently awarded a cooperative agreement for independent consultants to conduct a comprehensive review of our restricted housing operations and to provide recommendations for best practices. We look forward to the outcome of the evaluation as a source of even greater improvements to our operations."

The National Institute of Corrections (NIC), which conducts research and develops programs, is in fact a part of the federal Bureau of Prisons, meaning that the agency is investigating itself. But the NIC has chosen, as it often does, to contract out the audit.

The BOP would not provide any details regarding the contract, suggesting that if we wanted them we would have to file a Freedom of Information Act request. But Shaina Vanek, the administrative officer at NIC, readily provided the information. The Special Housing Unit Review and Assessment, she said, was awarded to CNA Analysis and Solutions.

The audit will take a year to complete, with a literature search on segregation and inquiries into the operations of several prisons which have not yet been chosen. Overall, it is meant to take a look across a "broad spectrum," according to Vanek, and to produce an analysis and recommendations for the future. The contract for the job is worth $498,211 – small potatoes as BOP contracts go, and not much to audit a practice that involves 7 percent of the federal prison population.

The work, which commenced in September 2013, will be headed up by Ken McGinnis, director of corrections programs for the company, whose "responsibilities have ranged from the management and administration of all facets of the Illinois and Michigan correctional systems to serving as warden and directing the operations of maximum, medium, and minimum-security adult institutions. He served as the chief administrative officer of two of the nation's largest and most complex correctional systems." Most recently he was involved in a CNA study meant to bring greater efficiency to the Colorado prison system.

CNA, a nonprofit which works for all levels of government, is best known as a military think tank. (It got its start dur-

ing World War II when a group of MIT scientists investigated ways to repel U-boat attacks). Headquartered in Alexandria, Virginia, CNA has in recent years diversified into other fields, including air traffic management, energy and prisons.

Commissioning a study by CNA is a far cry from bringing in a reform-minded outfit like the Vera Institute for Justice, which is what several state prison systems have recently done in an effort to reduce their use of isolation. The audit may recommend incremental change by "reclassifying" a small number of isolated prisoners, but it is unlikely to produce any serious challenge to the use of solitary confinement.

Even as the BOP moves forward with the audit, other developments suggest that the federal government is planning to increase its use of certain forms of prison isolation. On October 1, 2013, as the government shutdown began, the Obama administration released $165 million in unobligated Justice Department funds to buy the Thomson Correctional Center from the state of Illinois. As Solitary Watch reported earlier this year, the government has plans to use the prison for segregated housing. Some portions of the facility will be designated as Administrative Maximum, or ADX, the most extreme type of isolation, and others will be SMUs.

The purchase was celebrated by two unlikely elected officials. Senator Dick Durbin, who held the Congressional hearing on solitary – and whose protégé Cheri Bustos represents the district that includes Thomson – told the local *Rockford Register-Star*: "I hope we'll see before the end of the year the transfer of the prison to the federal government." Illinois Governor Pat Quinn, who closed down the Tamms state supermax earlier this year, said at a news conference: "I want to thank President Obama and Senator Durbin for their strong support throughout this process. We look forward to Thomson being a fully operational facility that will drive major economic growth in the region in the near future."

To carry out the sale, the administration had to make an end run around Virginia's Republican Congressman Frank Wolf, who heads the House Appropriations Committee and refused to sign off on the purchase of the Thomson prison, where Republicans believe Obama will try to place detainees from Guantanamo.

Wolf, a longtime proponent of prison reform, has also joined with the Appropriations Committee's ranking Democrat, Chaka Fattah, to float a bill that would launch a $1 million inquiry into BOP operations. The bill, which passed the full committee but has not yet gone to the floor, would establish and support the Charles Colson Task Force on Federal Corrections, named for the Watergate conspirator turned prison evangelist and reformer. [*Ed. Note*: Colson died on April 21, 2012].

The nine-person task force would be charged with addressing "the challenges in the federal corrections system," clearly with the aim of reducing the growth in both the population and cost of the BOP. But with a few exceptions (including, notably, current Prison Fellowship leader Pat Nolan), BOP critics on the right have shown little concern for the conditions in which federal prisoners actually live, including the use of solitary confinement.

*This article was published by Solitary Watch (www.solitarywatch.com) on October 18, 2013, and is reprinted with permission.*

# BOP Settles Lawsuits Related to Food Poisoning at Pennsylvania Prison

*by Derek Gilna*

As previously reported in *Prison Legal News*, hundreds of federal prisoners at USP Canaan, a high-security federal prison northwest of Scranton, Pennsylvania, became sick after eating salmonella-contaminated chicken in June 2011. [See: *PLN*, August 2012, p.31].

Although Bureau of Prisons (BOP) officials denied reports of widespread food poisoning at the facility, saying at the time that there was "no truth in the rumors," the number of prisoners who had to be transported by ambulance to nearby medical centers resulted in coverage by the local news media.

Apparently, chicken that had been stored at room temperature for a week was used to prepare fajitas served to the prison population. Almost two hundred prisoners fell ill and dozens received some form of medical treatment. More than 90 food poisoning-related lawsuits were filed, resulting in average settlements of about $1,750 per claim according to an August 20, 2013 news report.

The BOP has long prided itself on how little it spends on prisoner food, noting that it saves money by buying food in bulk from brokers who know they have a ready market for expired and out-of-date commodities. Financial pressure means that prison staff sometimes serve food that probably should be thrown away.

"It is well known there was food poisonings and the staff here attempted to cover it up as well as cover up the fact that they did not give the proper medical treatment to everyone that became ill," said USP Canaan prisoner Timothy Daniels. He claimed he had suffered vomiting, abdominal pain and severe diarrhea, but received only minimal medical care. According to the Judgment Fund, which lists the federal government's litigation payouts, Daniels accepted $2,000 to settle his food poisoning suit.

Another USP Canaan prisoner, Calvin Smith, reported that 150 prisoners assigned to the kitchen were removed from their jobs after the salmonella outbreak. He settled his lawsuit against the BOP in May 2013 for $2,000. See: *Smith v. United States*, U.S.D.C. (M.D. Penn.), Case No. 3:13-cv-00323-JMM-MCC.

The largest settlement, in the amount of $5,000, went to prisoner Richard Randolph, who had to be hospitalized for three days due to salmonella poisoning. His case settled in January 2013. See: *Randolph v. United States*, U.S.D.C. (M.D. Penn.), Case No. 1:12-cv-00784-SHR-MCC.

There were no published reports indicating whether BOP kitchen staff had been disciplined as a result of the food poisoning incident, even though such employees are responsible for supervising all phases of kitchen operations – including the purchase and preparation of food for consumption by both prisoners and staff members. There were also no reports as to whether any prison employees suffered food poisoning.

Source: *http://legaltimes.typepad.com*

# The "Invisible" Crisis of Correctional Health Care

*by Cara Tabachnick*

After 33 years behind bars, Alvin Entzminger, who was released in March, needed immediate medical attention for a host of chronic illnesses.

"I went into prison a healthy individual and came out suffering," claimed Entzminger, now in his late 50s.

Entzminger's story was one of several poignant testimonies provided by ex-prisoners at an October 9, 2013 conference on the health care challenges facing corrections systems.

As their stories demonstrated, such care is desperately needed by former prisoners like Edwin Lopez, 59, who had cycled in and out of jails and prisons since he was in his teens following the death of his mother. When he left prison, his HIV was untreated.

The lack of care has consequences far beyond its effect on an individual prisoner, Lopez warned.

"The community forgets we won't spend all of our life in prison – we will come home," Lopez told the conference. "If there is no medical or other support, we mostly will turn to violence and crime."

The prisoners were joined by correctional care physicians, researchers and academics from around the U.S. at the New York Public Library's Schomburg Center for Research in Black Culture in New York for a conference entitled, "Making the Invisible Visible: Addressing the Health Needs of the Formerly Incarcerated."

The conference, sponsored by the Spencer Cox Center for Health of St. Luke's and Roosevelt Hospitals, covered the broad range of health issues affecting incarcerated populations, including mental illness, HIV/AIDS and substance abuse.

Almost 85 percent of the 2.3 million people currently incarcerated and the almost 7 million people under correctional supervision (parole and probation) in the United States have chronic medical conditions like HIV or diabetes when released from prison, said Yale Assistant Professor Dr. Emily Wang, founder and co-director of Transitions Clinic.

Almost 40 percent of individuals are first diagnosed behind bars, noted Dr. Wang, whose clinic provides treatment for individuals with chronic diseases recently released from prison.

Yet while primary healthcare is a constitutional right in prisons and jails, the population is mostly served by a patchwork of providers and many don't have access to consistent care, the conference was told.

### Burden on Hospitals

Over 85 percent of recently released prisoners are uninsured. Most utilize hospital emergency rooms for chronic care, severely overburdening public hospitals.

"There are significant health-related barriers to people returning home from

prison," said Wang. "Often there is no discharge planning and short or no amounts of necessary medications upon release."

Sometimes those barriers result in tragedies.

In Albany, New York, a lawsuit was filed against Correctional Medical Services, Inc. (which has since merged with Prison Health Services to become Corizon, the largest prison health care provider in the country) in the case of Irene Bamenga, who died at the Albany County Correctional Facility while awaiting deportation to France. She had a severe heart condition and never saw a doctor the week she was there.

While programs like Transitions Clinic and the Coming Home Project (based at the Spencer Cox Center) help reduce emergency room visits, some consistent issues in correctional health care can be easily resolved, said Lopez, who is now a peer supporter at Spencer Cox.

For example, he noted that people who cycle through prison and/or jails often lose their Medicaid or Medicare eligibility.

"We take it out on who?" he asked rhetorically. "We take it out on the community."

Once prisoners are released into the community, they have to reapply for health care – a process that can take up to three months, possibly endangering their health and that of their families and neighbors.

Dr. Homer Venters, medical director for New York City's Department of Health and Mental Hygiene (DOHMH) at Rikers Island jail and Bellevue/NYU Program for Survivors of Torture, said keeping adequate electronic records is crucial in order to provide continuity of care at community clinics and hospitals.

"Jails are chaotic," said Venters. "There is not a lot of time to sort out these things with resources, and most jails don't have resources."

Venters touched on the other major concerns of medical professionals involved in correctional healthcare, such as not giving wrong medications and dosages – which is why correct information is so important.

He noted the dual loyalties of doctors and nurses: in a correctional setting, security is often a more important issue than patient care.

Another challenge is to maintain health and discharge plans for patients reentering the community.

### Treating Addiction

Other speakers discussed treating substance abuse addiction, prevalent in many prisoners in the correctional system.

Dr. Joshua Lee, Assistant Professor at New York University Medical Center and a jail physician, spoke about different types of treatment for opiate addicts.

He mentioned a new medicine, naltrexone, which when injected every 4 weeks shows great promise for managing addiction.

"We need to start treatment in jail and continue afterwards in community," said Lee, adding that Rikers has a long-successful methadone program while other major jails such as those in Baltimore and Newark do not.

Panelists also discussed aging in prison, HIV/AIDS in the correctional population and the effect on families and communities.

Soffiyah Elijah, Executive Director of the Correctional Association of New York, which monitors conditions in state prisons, was accompanied by Muhjahid Farid, who spent time in the corrections system and started the program Release of Aging People in Prison (RAPP) to advocate for the release of elderly and sick prisoners.

Elijah noted the high cost of care – approximately $240,000 annually per prisoner – to imprison elderly patients, while Farid spoke about the emotional costs of being separated from family while incarcerated, old and sick.

"If the risk is low, let them go," he said.

*Cara Tabachnick is Managing Editor of* The Crime Report. *An earlier version of this article appeared in* The Crime Report *(www.thecrimereport.org), the nation's most comprehensive source of criminal justice news and resources, on October 11, 2013. It is reprinted with permission, with minor revisions.*

# Ninth Circuit Affirms Finding that Claim Accrues Each Time a Request for Conjugal Visits is Denied

On November 21, 2012, the Ninth Circuit Court of Appeals affirmed a district court's finding that a prisoner's challenge to the denial of his request for conjugal visits was not barred by the statute of limitations, notwithstanding the fact that 1) the prisoner had been denied a similar request six years earlier and 2) the denial was based on the same regulation in effect at the time his previous request was denied.

Madero L. Pouncil, a California state prisoner serving a sentence of life without parole, submitted a request for conjugal visits with his wife in 2002. His request was denied pursuant to a regulation (currently codified as CCR 3177(b)(2)) that prohibits certain prisoners, including those serving life without parole, from participation in the California prison system's family visiting program.

Pouncil later divorced and remarried, and again applied for conjugal visits in 2008. That request also was denied.

Pouncil grieved the denial, then filed suit in 2009 alleging violations of his rights under the Religious Land Use and Institutionalized Persons Act (RLUIPA) and the First Amendment, because a tenet of his Islamic faith requires him to marry, consummate his marriage and father children.

The defendant prison officials filed a motion to dismiss on statute of limitations grounds, arguing that Pouncil's claims had accrued when he was notified in 2002 that, pursuant to regulation, he could not participate in the family visiting program due to his sentence.

The magistrate judge agreed with this argument and recommended that the motion to dismiss be granted.

After Pouncil filed objections, the district judge rejected the magistrate's recommendation, concluding that the 2002 and 2008 denials of Pouncil's requests for conjugal visits constituted separate incidents. The latter was actionable, in the district court's view, because the claim only accrued when Pouncil's request was denied in 2008 – roughly one year before he filed his § 1983 complaint, which was well within the statute of limitations for such claims in California.

The case was then stayed in 2010 as the defendants pursued an interlocutory appeal on the question of whether Pouncil's claims were barred by the statute of limitations.

In a thoughtful opinion, the Ninth Circuit noted that "two different lines of authority appear to lead to different conclusions." Relying on one line of precedential authority, the defendants argued that the 2008 denial of Pouncil's request for conjugal visits was simply the inevitable consequence of the denial of his initial 2002 request, as it was based on the same regulation. Relying on a different line of authority, Pouncil, represented on appeal by pro bono counsel, contended that the 2008 denial was an independent, discrete act that reset the clock on the statute of limitations.

The Court of Appeals held that whether the circumstances in Pouncil's case were properly treated as falling under one or the other of the two lines of authority was a question of fact, to which the district court's decision was entitled to deferential review.

The appellate court found that the record supported the district court's determination that the denial of Pouncil's request for conjugal visits in 2008 was "a separate, discrete act" rather than a consequential effect of the 2002 denial. The fact that both denials resulted from the same regulation was not determinative.

The defendants petitioned the U.S. Supreme Court for a writ of certiorari, which was denied in October 2013. This case remains pending with the district court appointing counsel to represent Pouncil following remand. See: *Pouncil v. Tilton*, 704 F.3d 568 (9th Cir. 2012), *cert. denied*.

# California Supreme Court Addresses CDCR Gang Associate Validation

In October 2012, the California Supreme Court reversed a grant of habeas relief by the Court of Appeal, which had interpreted a California Department of Corrections and Rehabilitation (CDCR) regulation regarding the validation of a prisoner as a gang associate. The Supreme Court held the appellate court had failed to accord due deference to the CDCR's interpretation of its own regulations. On remand, the appellate court again granted habeas relief.

The CDCR validated state prisoner Elvin Cabrera as an associate of the Mexican Mafia (EME) in 2008, following an assault on prison employees in which Cabrera was not involved. By regulation (Cal. Code Regs., tit. 15, § 3378), the validation of a prisoner as an "associate" requires at least three independent source items indicative of association with a known gang member or associate, with at least one of the sources providing a "direct link" to a current or former gang affiliate.

Cabrera's validation was based on the discovery of four photocopied drawings in his cell that contained symbols distinctive to EME; two of the drawings were signed by validated EME members. Cabrera, who was enrolled in a hobby craft program, possessed "a large quantity of drawings from a variety of artists." He denied gang membership and did not have gang-related tattoos.

Cabrera filed a petition for writ of habeas corpus challenging his gang validation; however, the Kern County Superior Court held that the drawings signed by EME members constituted "direct links" to gang affiliates.

The Court of Appeal disagreed, holding that a "direct link" in this context requires a "reciprocal (i.e., mutual or two-way) interaction between the two individuals forming the relationship" – and that the CDCR had failed to provide evidence of any such mutual relationship involving Cabrera and validated gang affiliates. Thus, the appellate court granted habeas relief and directed the CDCR to expunge Cabrera's validation as an EME associate and to remove him from SHU housing based on his validation.

On review, the California Supreme Court held that the regulation at issue was a quasi-legislative rule promulgated by the CDCR pursuant to the department's lawmaking power delegated by the legislature. The Court of Appeal's "decision to grant relief rested on a disagreement with the CDCR over the interpretation of the

CDCR's own regulation," the Supreme Court found, yet such quasi-legislative rules are subject to "very limited" judicial review.

According to the CDCR, "the regulation's requirement of a direct link does not require evidence of a reciprocal or two-way interaction between the inmate and the validated gang affiliate in these circumstances"; however, the appellate court had "offered neither deference to the [CDCR's] view nor acknowledgement of the agency's expertise in prison management." As the Court of Appeal's decision "rested on the erroneous assumption that a direct link in this context required proof Cabrera had a mutual relationship with a validated gang affiliate," the Supreme Court reversed.

The case was remanded to the appellate court to consider whether the evidence was sufficient, under the regulation as properly construed, to uphold Cabrera's validation as a gang associate. See: *In re Cabrera*, 55 Cal. 4th 683, 287 P.3d 72 (Cal. 2012).

Following remand, the Court of Appeal reconsidered the regulatory requirement regarding a "direct link" and again granted habeas relief. "Applying the deferential 'some evidence' standard of judicial review," the appellate court wrote on June 11, 2013, "we conclude that two of the photocopied drawings, containing part of the names of EME affiliates as the artists, do not support a finding that Cabrera had an 'association' (i.e., a loose relationship) with a gang-affiliate artist that constituted a 'direct link' (i.e., a connection without interruption) as required by section 3378, subdivision (c)(4)."

Accordingly, the Court of Appeal ordered the CDCR to "(1) void and expunge the 2008 validation of Elvin Cabrera as an associate of the Mexican Mafia prison gang, (2) report the expungement to all gang-related law enforcement databases and clearinghouses to which the original validation previously was reported, and (3) cease housing Cabrera in the security housing unit based on the gang validation." See: *In re Cabrera*, 216 Cal. App. 4th 1522 (Cal. App. 5th Dist. 2013), *as modified*, 2013 Cal. App. LEXIS 523 (Cal. App. 5th Dist. July 1, 2013), *rehearing denied*.

# Ninth Circuit Reinstates Disabled Prisoner's Deliberate Indifference Claim

On November 5, 2012, the Ninth Circuit reversed a district court's dismissal of a lawsuit filed by a disabled prisoner with limited English proficiency who alleged that prison officials violated his constitutional rights by failing to honor a doctor's order to house him in a ground-floor cell.

In December 2008, Javiad Akhtar, a disabled California state prisoner at Mule Creek State Prison, was informed that he was being moved from his cell to a triple bunk in a dayroom dormitory. Akhtar refused after showing staff documentation signed by a doctor indicating that his various medical conditions, as well as his mobility impairment, limited the locations in which he could safely be housed.

After twice being disciplined for refusing to move, Akhtar was moved to a triple bunk in the dayroom, around 75 feet from the nearest urinal. He subsequently fell from the bunk bed and broke his wrist. Further, he suffered embarrassment and humiliation on several occasions when, unable to reach the restroom in time, he urinated on himself.

Akhtar filed suit in federal court in October 2009, alleging deliberate indifference to his serious medical needs. He attached exhibits to his complaint indicating that he had exhausted his administrative remedies.

After the complaint was "screened out" pursuant to 28 U.S.C. § 1915A(b), Akhtar filed an amended complaint to which he appended various medical documents, but not the grievances and administrative denials he had previously submitted to the court with his original complaint.

When the defendants responded with a motion to dismiss, Akhtar did not file a response. Concluding that Akhtar had waived any opposition to the motion, the magistrate judge recommended that the complaint be dismissed on the grounds that Akhtar had failed to exhaust administrative remedies or, alternatively, failed to state a claim under the Eighth Amendment.

Akhtar filed objections to the magistrate's report and recommendations, attaching copies of the administrative appeals he had submitted with his initial complaint. He asked the district court to construe his objections as constituting an opposition, albeit belated, to the defendants' motion to dismiss.

The district court declined Akhtar's request and, after adopting the magistrate's recommendations, dismissed the amended complaint with prejudice.

The Ninth Circuit held on appeal that, considering Akhtar's status as a pro se litigant, as well as his disabilities and limited English skills, the district court's refusal to consider the evidence that Akhtar had likely exhausted his administrative remedies constituted an abuse of discretion, notwithstanding his failure to present that evidence at the appropriate time; i.e., when he had an opportunity to file an opposition to the defendants' motion to dismiss.

The Court of Appeals held that Akhtar's grievance had been sufficiently detailed to put prison officials on notice of his Eighth Amendment claim, and therefore that he had exhausted his administrative remedies. It also held that his complaint set forth sufficient facts to state a claim for relief. Finally, the Ninth Circuit found the district court had erred by not providing Akhtar, then proceeding pro se, adequate notice of the requirements for opposing the motion to dismiss pursuant to *Wyatt v. Terhune*, 315 F.3d 1108, 1120 n.14 (9th Cir. 2003).

Accordingly, the order of dismissal was vacated and the case remanded for further proceedings. Akhtar was ably represented on appeal by the students and faculty of the UC Davis Civil Rights Clinic. See: *Akhtar v. Mesa*, 698 F.3d 1202 (9th Cir. 2012).

The defendants filed another motion to dismiss following remand, which was denied by the district court on June 7, 2013. This case remains pending.

# Kansas Supreme Court Holds Inpatient Drug Treatment Time Counts as Jail Time in Consecutive Non-Drug Case

The Supreme Court of Kansas has held that a prisoner is entitled to have time spent in an inpatient drug treatment facility while on probation count as jail time in a consecutive non-drug case.

Heather Hopkins was convicted of possession of cocaine and sentenced to 18 months on probation with an underlying sentence of 11 months and a requirement that she complete mandatory inpatient substance abuse treatment. She was subsequently convicted of attempted aggravated robbery and obstruction of legal process, and received a consecutive sentence of 36 months on probation with an underlying sentence of 41 months.

Hopkins absconded and her probation in both cases was revoked. The district court then ordered her to serve the underlying sentences consecutively and denied her request to credit her non-drug sentence with the time she spent in the inpatient drug treatment facility prior to the revocation. Hopkins appealed.

The Court of Appeals affirmed the judgment of the trial court, finding there was no evidence that inpatient treatment had been recommended by Hopkins' probation officer or imposed as a condition of probation in the non-drug case.

On review, the Kansas Supreme Court held that the right to jail time credit is statutory and covered by K.S.A. 21-4614a(a). Although Hopkins admitted that she was barred by statute from receiving jail credit for drug treatment time in her drug case, the clear language of the statute gave her the right to such credit in the non-drug case. There is no requirement that drug treatment be a condition of probation in the case for which the jail time is sought; rather, jail time credit is mandated in "'any criminal action in which probation ... is revoked ... for the time which the defendant has spent in a residential facility while on probation.'"

Therefore, the Supreme Court reversed the judgment of the Court of Appeals and remanded the case with directions to resentence Hopkins with credit for the inpatient drug treatment time as jail time in her attempted aggravated robbery case. See: *Kansas v. Hopkins*, 295 Kan. 579, 285 P.3d 1021 (Kan. 2012).

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# Eighth Circuit Initially Allows Non-Delegation Challenge to SORNA, then Reverses Course

*by Derek Gilna*

Another challenge to the federal Sex Offender Registration and Notification Act (SORNA) initially met with limited success, but ultimately failed.

Lindon Roy Knutson pleaded guilty to failing to register as a sex offender under SORNA stemming from a 1974 rape conviction but reserved several issues on appeal, including a challenge under the non-delegation doctrine as well as challenges to the validity of the Attorney General's interim rule and accompanying guidelines related to SORNA. The Eighth Circuit, after rejecting the latter arguments, remanded the case for consideration of Knutson's non-delegation challenge.

SORNA, which went into effect in July 2007, requires "those convicted of certain sex crimes to provide state governments with (and to update) information, such as names and current address, for inclusion on state and federal sex offender registries." *Reynolds v. United States* 132 S.Ct. 975 (2012) [*PLN*, Aug. 2012, p.20]. The Court of Appeals noted that it had "previously held that pre-Act offenders lack standing to challenge SORNA," a position that was reversed by *Reynolds*.

The appellate court declined, however, to adopt Knutson's argument that the interim rule promulgated by the Attorney General under the "good cause" exception of the Administrative Procedure Act was inappropriate, holding that the interim rule did not apply to him because he had pleaded guilty after the final rule went into effect. Knutson did not assert that the final rule was defective under the Administrative Procedure Act; the case was remanded for consideration of his non-delegation argument. See: *United States v. Knutson*, 680 F.3d 1021 (8th Cir. 2012).

Following remand Knutson moved to dismiss the indictment, which was denied by the district court upon a finding that "Congress has provided intelligible principles to guide the Attorney General's exercise of the delegated authority." The district court's order was upheld by the Eighth Circuit on August 7, 2013, with the appellate court citing its interim ruling in *United States v. Kuehl*, 706 F.3d 917 (8th Cir. 2013).

# Wyoming Sheriff Granted Qualified Immunity for Jail Guard's Sexual Assault

The Wyoming Supreme Court has held that a county sheriff was improperly denied qualified immunity on claims that a guard in his employ sexually assaulted a female prisoner.

While working as a jail guard in Utah, Todd Hoover underwent back surgery, became addicted to pain pills and stole prisoners' medication. He then moved to Wyoming and was hired as a detention officer by Uinta County Sheriff Louis Napoli in 2006. Hoover's addiction and medication thefts were not known at the time he was hired.

Hoover overdosed while on duty, leading to an internal investigation which revealed his history of addiction and theft. Nevertheless, Sheriff Napoli and Hoover agreed that Hoover would only be suspended without pay for two weeks, undergo counseling and urinalysis testing, serve an extended probationary period and disclose his medical records as part of a disciplinary plan.

After returning to work, Hoover met Uinta County Detention Center prisoner Judee Pennington, who had been terminated from a drug court program and was awaiting placement in a treatment program. Hoover gave Pennington drugs and sexually assaulted her, resulting in his termination, prosecution and a prison sentence.

Pennington filed suit in U.S. District Court, but the court dismissed her federal claims and refused to retain jurisdiction over her state law claims. The Tenth Circuit affirmed the dismissal in a 2011 unpublished ruling. See: *Pennington v. Uinta County*, 442 Fed.Appx. 409 (10th Cir. 2011). Pennington then sued Hoover, Napoli, Uinta County and the Board of County Commissioners in state court; the trial court denied qualified immunity to Sheriff Napoli and the county, and they filed an interlocutory appeal.

The Wyoming Supreme Court reversed. "There are four requirements that must be established by the record when a public official asserts qualified immunity," the Court explained in its detailed ruling. "The first factor is not an issue. The factors in dispute are whether Sheriff Napoli acted in good faith, whether he acted reasonably when he opted not to terminate Hoover's employment but to retain him under the disciplinary plan, and whether he was acting in a discretionary manner."

The Supreme Court found that "the good faith and reasonableness depend on whether Sheriff Napoli should have anticipated that Hoover was likely to assault an inmate." However, "the record contains nothing that should have alerted the Sheriff to this risk." Additionally, "Sheriff Napoli was supervising and training an employee, which is a discretionary act." Therefore, the Court held that the trial court improperly denied qualified immunity to Napoli, and because he was entitled to qualified immunity, "the ruling against the County and the Board must also be reversed." See: *Uinta County v. Pennington*, 2012 WY 129, 286 P.3d 138 (Wyo. 2012).

# No Summary Judgment on Claim that Guard Stole Prisoner's Wedding Ring

The Oklahoma Supreme Court has held that factual disputes about a guard's alleged theft of a prisoner's wedding ring precluded summary judgment in a lawsuit that has been pending for the past eight years.

In November 2004, Oklahoma Department of Corrections (DOC) staff at the John Liley Correctional Center (JLCC) confiscated prisoner Sonny L. Harmon's wedding ring, watch and other personal property. Prison guard Paul Cradduck placed the ring in a desk, where it disappeared.

Harmon's efforts to informally resolve the loss of his ring were unsuccessful and he filed a grievance on January 5, 2005. His grievance was rejected on January 28 for failure to comply with DOC procedures. The response directed Harmon to appeal within 15 days but his appeal was rejected as premature, with directions to resubmit the initial grievance. The resubmitted grievance was then rejected, however, because Harmon had failed to correct the original grievance within 10 days of the January 28 response.

Harmon filed suit in state court, seeking the return of his ring or compensation for its value. On April 18, 2006 the defendants filed an affidavit from Cradduck in which he stated the ring had been placed in an unsecured desk and stolen by an "unknown person or persons." The defendants also produced a disciplinary letter in which Cradduck was reprimanded for violating DOC policy in connection with mishandling Harmon's ring; the letter referenced several prior disciplinary actions taken against Cradduck, including two incidents involving lost prisoner property.

The trial court granted the defendants' motion to dismiss due to Harmon's failure to exhaust administrative remedies or provide a tort claim notice before filing suit.

The Court of Appeals reversed in 2007, finding that Harmon had exhausted his administrative remedies and that "a trier of fact, based on documentation uncovered during DOC's internal investigation, could 'conclude that a JLCC property room officer intentionally diverted [Harmon's] property.'" The appellate court also allowed Harmon to amend his pleadings to comply with Oklahoma's tort claim notice provisions.

On remand, Harmon amended his complaint to assert a conversion claim against Cradduck and conspiracy claims against other defendants. The defendants moved for summary judgment, rearguing that Harmon failed to exhaust his administrative remedies and relying on a second affidavit from Cradduck in which he denied taking Harmon's ring. However, a supplemental internal investigation revealed that Cradduck had received another letter of reprimand related to the loss of Harmon's watch. The trial court granted summary judgment to the defendants and the Court of Appeals affirmed.

The Oklahoma Supreme Court reversed, holding first that "the settled-law-of-the-case doctrine does not allow for reconsideration of Harmon's compliance with the administrative exhaustion requirements." Rather, the Court of Appeals was bound by its initial decision that Harmon had exhausted his administrative remedies.

The Court also reversed the grant of

summary judgment to Cradduck, finding that his "repeated disciplinary history for displaced inmate property, the admitted loss of the gold ring with stones, and Cradduck's undisputed access to the ring, provide sufficient evidence to create discord over the essential elements of Harmon's conversion claim." The Supreme Court noted that while "he denied misappropriating the ring, Cradduck's self-serving affidavit alone does not eliminate the existence of a factual dispute on the issue," which precluded summary judgment. Harmon's constitutional claims, related to denial of due process in connection with the loss of his ring, were dismissed. See: *Harmon v. Cradduck*, 2012 OK 80, 286 P.3d 643 (Okla. 2012).

Following remand, the case settled in October 2013 for $500 plus $7,000 in Harmon's attorney fees. While Harmon is to be commended for his fight to receive compensation for his stolen ring, it unfortunately took him almost 9 years to receive that modicum of justice.

## Ninth Circuit: Residential Reentry Center Walkaway is Not Escape

The Ninth Circuit Court of Appeals has held that walking away from a residential reentry center does not constitute escape under 18 U.S.C. § 751(a).

In 2008, Anthony E. Burke was convicted of federal offenses in Washington State and sentenced to 37 months in prison and 36 months of supervised release. On March 19, 2010, Burke entered the Spokane Residential Reentry Center (SRRC) to comply with a supervised release condition that he serve 180 days in a reentry center. The following month, Burke checked out of SRRC and did not return.

He was arrested in Montana the next day.

Burke was charged with escape from custody in violation of § 751(a). However, the district court granted his motion to dismiss the indictment, finding he was not in custody while at SRRC. The government appealed and the Ninth Circuit affirmed.

The Court of Appeals held "that Burke was not in 'custody' when he left the SRRC. He was not serving a prison sentence, nor was he confined to SRRC under conditions equivalent to custodial incarceration." In fact, the appellate court found, "the conditions of his release 'were much more analogous to probation than they were to imprisonment.'"

"Like an individual on probation, Burke was conditionally released from incarceration," the Ninth Circuit explained. "His failure to return to SRRC was a violation of his release conditions punishable by revocation of release, not an escape from 'custody' within the meaning of § 751(a)." Burke was sentenced to a year in prison and 9 months of supervised release for violating the conditions of his release.

Circuit Judge Consuelo Callahan dissented, stating that she "would hold that Burke was in custody" at the time he walked away from the residential reentry center, and thus committed the offense of escape. See: *United States v. Burke*, 694 F.3d 1062 (9th Cir. 2012).

# Possession of Cell Phone Doesn't Violate Nevada Escape Device Statute

The Nevada Supreme Court has held that a statute prohibiting prisoners from possessing escape devices does not encompass possession of a contraband cell phone.

Pursuant to NRS 212.093(1), prisoners are prohibited from having "any key, picklock, bolt cutters, wire cutters, saw, digging tool, rope, ladder, hook or any other tool or item adapted, designed or commonly used for the purpose of escaping."

Pershing County jail prisoner Nickolas Mark Andrews was charged with violating NRS 212.093(1) when guards discovered a cell phone hidden in a box under his bunk. The trial court agreed with Andrews, however, that the statute does not prohibit cell phone possession. The charge was dismissed and the state appealed.

The Nevada Supreme Court affirmed, finding that the statute's plain language "does not prohibit the possession of cell phones." Therefore, the district court had correctly dismissed the charge against Andrews. Nevertheless, the state argued "that the phrase 'designed or commonly used for the purpose of escaping' brings cell phones within the scope of the statute."

Rejecting this "overambitious reading," the Court held it is "clear that the aim of the statute is to prohibit the possession of devices used to forcibly break out of, or physically flee from, a jail cell." The Supreme Court found that "In stark contrast to the items enumerated in NRS 212.093(1), it would be virtually impossible to use a cell phone" to forcibly escape from custody.

"In the broadest sense, a cell phone could arguably be used to assist in an escape as it could be used to help enlist a third party to provide a getaway ride once an inmate has already fled from his or her jail cell," the Court acknowledged. "But by this rubric, virtually any item – even shoes or spectacles – could fall within the scope of the statute because it could help an inmate to escape or evade recapture. Thus, if the State's argument were credited, then practically any item could fall within the scope of the statute."

Instead, the Nevada Supreme Court concluded "that by its plain and unambiguous language, NRS 212.093(1) does not prohibit county jail inmates from possessing cell phones." The Court noted that a separate statute, NRS 212.165(3), prohibits state prisoners from having a "portable telecommunications device" without authorization, but the legislature did not extend that prohibition to jail prisoners. See: *Sheriff, Pershing County v. Andrews*, 286 P.3d 262 (Nev. 2012).

# Kansas Supreme Court Vacates Attorney Fee Reimbursement Order

The Kansas Supreme Court vacated a sentencing court's order requiring a criminal defendant to reimburse Board of Indigents' Defense Services (BIDS) attorney fees, for failing to make appropriate findings on the record.

Morgan Wade was convicted of killing his former girlfriend and the mother of his son. His convictions were reversed, however, and the case remanded for a new trial. See: *State v. Wade*, 284 Kan. 527, 161 P.3d 704 (Kan. 2007).

On remand, Wade was again convicted and the trial court sentenced him "to a hard 25 life sentence" on one charge and a consecutive 55-month sentence on another. "The court also ordered that Wade reimburse BIDS attorney fees of approximately $6,400 based on the BIDS fee table."

The Kansas Supreme Court affirmed Wade's convictions but vacated the BIDS reimbursement order. Under K.S.A. 22-4513, a sentencing court may require a defendant to reimburse BIDS for attorney fees. However, the court "must consider on the record at the time of assessment the extent of the defendant's financial resources and the burden upon the defendant that will result from such a payment order." See: *State v. Robinson*, 281 Kan. 538, 132 P.3d 934 (Kan. 2006).

The state agreed that the sentencing court had failed to satisfy the *Robinson* requirements before ordering Wade to reimburse BIDS attorney fees. "Although the court ascertained that Wade is employable and does work when he is not in prison, it did not ascertain his financial resources or the burden such reimbursement would cause him," the Supreme Court wrote. As such, the Court vacated the sentencing court's order requiring Wade "to reimburse BIDS for attorney fees," and instructed the lower court on remand "to support any subsequent reimbursement order with explicit findings on the record." See: *State v. Wade*, 295 Kan. 916, 287 P.3d 237 (Kan. 2012).

# Minnesota: Favorable Resolution of Charges Establishes Rebuttable Presumption of Expungement

The Minnesota Supreme Court held that the favorable resolution of criminal proceedings establishes a rebuttable presumption in favor of expungement under state law.

In May 2009, a defendant identified only as RHB was charged with first- and third-degree assault for injuring a young child. He was found not guilty by a jury and the trial court entered a judgment of acquittal. In January 2011, RHB petitioned the court for an order of expungement to seal his criminal records.

Minnesota's expungement law, Minn. Stat. § 609A.03(5)(b), mandates that the court "'shall grant the petition' unless the party opposing the petition 'establishes by clear and convincing evidence that the interests of the public and public safety outweigh the disadvantages to the petitioner of not sealing the record.'"

The court granted RHB's petition, concluding that the "'State has failed to prove by clear and convincing evidence' that the public's interests outweigh RHB's interests."

The Court of Appeals, however, held the trial court had abused its discretion by

failing to identify any specific disadvantage that RHB would suffer in the absence of expungement. It also held that a petitioner cannot rely solely upon the fact that criminal proceedings were resolved in his or her favor.

The Minnesota Supreme Court reversed, rejecting both findings. The Court stated "that once a petitioner meets the 'legal threshold' contained in Minn. Stat. § 609A.02, subd. 3, he or she is 'presumptively entitled to expungement.'" That presumption "is a 'rebuttable statutory presumption' that 'shifts the burden of ... persuasion' to the opposing party." The statute's plain wording dictates that "a prior acquittal is sufficient to justify expungement unless the party opposing expungement affirmatively meets its burden of persuasion." Moreover, "a petitioner is not required to prove specific disadvantages that he or she will suffer if the petition is denied."

The Supreme Court noted that "the State presented almost no evidence that sealing RHB's criminal record would present a unique or particularized harm to the public." Indeed, the affidavits submitted by the state in opposition to RHB's petition were "unremarkable and generalized, and could be submitted in nearly every expungement case."

Accordingly, the Court found the trial court did not abuse its discretion when it concluded the state had failed to overcome the presumption of expungement to which RHB was entitled. See: *Minnesota v. RHB*, 821 N.W.2d 817 (Minn. 2012).

# Massachusetts Warden Removed After Eight Months on the Job

The superintendent of the Souza-Baranowski Correctional Center in Shirley, Massachusetts was removed from his job only eight months after being promoted to the position.

Anthony Mendonsa started as a guard in 1978 and worked his way up through the ranks; he was appointed superintendent at Souza-Baranowski in November 2011, then removed on June 8, 2012.

"Superintendents like Mr. Mendonsa serve at the pleasure of the commissioner," said Terrel Harris, a spokesman for the state's Executive Office of Public Safety. "The commissioner received information that led to Mendonsa being detached with pay pending an investigation. After that, he was removed and [retired on] June 30, 2012."

State officials called Mendonsa's removal a personnel matter and declined to comment further. Other officials and prisoner advocates who requested anonymity said Mendonsa's abrupt departure was related to allegations of sexual harassment involving a female employee.

It is hoped that positive change will come with a new superintendent at Souza-Baranowski. "Massachusetts prisons are grossly overcrowded and at a breaking point," said Leslie Walker, the executive director of Massachusetts Correctional Legal Services. "Idleness and violence reign. If any prison in Massachusetts needs a leader who is fair, wise, and respectful to prisoners and staff, it is this facility."

First opened in 1998, Souza-Baranowski, named after two guards killed during an escape attempt, is the state's newest and most secure prison. It has a keyless security system that remotely opens and closes 1,705 doors. It is also an extremely violent place.

When double bunks were added in 2009, the number of assaults jumped nearly 50% from the previous year, accounting for a third of all assaults in the state's prison system. Guards reported using force 377 times that year.

In 2010, the facility had 43 prisoner-on-staff assaults, three of which resulted in serious injuries. There were also 97 prisoner-on-prisoner assaults with 25 causing serious injury. According to Thomas Dickhaut, a former Souza-Baranowski superintendent who was stabbed in the face by a prisoner in 2009 – one of three superintendents who have been assaulted at the facility – there are three to five daily emergency warnings announced over the prison's public address system.

"It's a very difficult inmate population," he said. Perhaps it would be less difficult if the facility was not overcrowded and had competent, professional leadership.

Three weeks after Mendonsa was removed as superintendent at Souza-Baranowski, a violent incident occurred in which a guard, Nathan Beauvais, 28, was stabbed in the neck and 6 or 7 other guards were injured.

Rarn Pak, the prisoner who used a shank to stab Beauvais, pleaded guilty to charges related to the attack and was sentenced in March 2013 to 42-45 years in prison. Pak's cellmate, Soksoursdey Roeung, charged with armed assault with intent to murder and assault and battery on a corrections officer in connection with the incident, was convicted and sentenced to 18-23 years on November 5, 2013.

Bruce Gelb has been named the new superintendent at Souza-Baranowski; he previously served as superintendent of MCI Concord.

Sources: *Boston Globe, Associated Press, www.nashobapublishing.com, www.telegram.com*

# Iowa Voting Rights Restoration Process Becomes Slightly Less Onerous

Iowa is one of the toughest states in the nation for disenfranchised felons who want to obtain reinstatement of their voting rights, a review by the Associated Press found.

When Republican Governor Terry Branstad took office in 2011, he reversed a six-year-old policy instituted by former Governor Tom Vilsack, a Democrat, which had automatically reinstated felons' voting rights upon their release from prison or discharge from community supervision. [See: *PLN*, Aug. 2011, p.37].

More than 8,000 felons in Iowa have completed their prison sentence or been released from supervision since Branstad took office, but less than a dozen had regained their voting rights as of mid-2012.

"Wow – that seems pretty low," observed Rita Bettis, a lobbyist for ACLU Iowa.

Branstad, who was Iowa's governor from 1982 to 1998, implemented a policy similar to one that preceded Vilsack's administration. Under Branstad's policy, former offenders must navigate an onerous bureaucratic process to obtain reinstatement of their citizenship rights, including the right to vote.

The process includes a 31-question application; one of the questions requires the applicant to supply the current address of the judge who handled his or her conviction. A criminal history report, which costs $15 and takes weeks to obtain, must be submitted. The most controversial requirement is the submission of a full credit report. The review of the application can then take up to six months.

Even with the assistance of counsel, the process is not always navigable. Henry Straight, 40, lost his voting rights as a result of a conviction for stealing a soda machine as a teenager and fleeing while on bond. He hired an attorney and spent a year trying to obtain his voting rights. Branstad's office rejected his application because Straight failed to submit a full credit report; the summary he provided failed to show that he had paid off decades-old court costs.

"They make the process just about impossible," said Straight. "I hired a lawyer to navigate it for me and I still got rejected. Isn't that amazing?"

Governor Branstad's stringent voting rights reinstatement policy contravenes a national trend that began in 1996, to make it easier for felons to regain their ability to vote. Kentucky, Florida and Virginia are the only other states that require the governor's permission for reinstatement of voting rights, though they don't require a credit report. Voting rights are automatically re-

stored to felons in 38 states, sometimes after they have completed their terms of parole or probation. Only Maine and Vermont never disenfranchise felons – even while they are incarcerated. The other states set waiting periods for restoration of rights.

"Iowa is in a dwindling minority of extremely restrictive states," noted Marc Mauer, executive director of The Sentencing Project, a national organization that advocates for policies that make it easier for former offenders to regain their voting rights. For felons, Governor Branstad is "making your right to vote contingent on your financial status," Mauer stated.

Republican Secretary of State Matt Schultz had urged Branstad to reinstate the onerous application process to "send a message to Iowa's voters that their voting privilege is sacred and will not be compromised."

In December 2012, however, Governor Branstad indicated that he would streamline the application process for reinstatement of felons' voting rights after the NAACP raised concerns as part of its "Restore the Votes" campaign. A new version of the state's restoration of rights application has simplified the instructions, includes a detailed checklist to ensure applicants provide all of the required documentation and, most importantly, dispenses with the credit report requirement.

The five-page application still requires applicants to provide the current address of their sentencing judge, to answer questions about child support and alimony obligations and whether they have filed state or federal tax returns, and to provide a copy of their criminal history record.

"When an individual commits a felony, it is fair they earn their rights back by paying restitution to their victim, court costs, and fines," Governor Branstad stated. "Iowa has a good and fair policy on the restoration of rights for convicted felons, and to automatically restore the right to vote without requiring the completion of the responsibilities associated with the criminal conviction would damage the balance between the rights and responsibility of citizens."

In February 2013, the NAACP Iowa State Conference paid for a billboard near the state capitol that advocated for "restoring the votes of people with former felony convictions who have completed all the terms of their sentences."

According to NAACP senior director for voting rights Jotaka Eaddy, "The faces on the billboard represent millions of citizens whose voices are silenced because of past felony convictions. These are parents, taxpayers, students, employees, and in some cases employers who are expected to reintegrate and function normally in a society where they cannot cast a vote."

Sources: *Associated Press, The Gazette, http://wqad.com*

# Elder Abuse in Prisons: The Call for Elder Justice and Human Rights Protections Behind Bars

*by Tina Maschi, Ph.D., LCSW, ACSW*

*"Prison is a hard place. Pure Hell! As long as you are in khaki, you are considered non-human. The elder suffer the most because there isn't much for them, us. I have the start of osteoporosis and seeing how some people young and old are treated makes me suffer and deal with it. Overall it's horrible and wouldn't wish this on my worst enemy." – Mary, a 64-year-old incarcerated woman serving a 20-year sentence*

As the movements for elder justice and human rights of older persons are gaining national and international momentum, we must not neglect the safety and protection of older adults in prison. So what is meant by elder abuse? According to the World Health Organization, elder abuse is defined as "a single, or repeated act, or lack of appropriate action, occurring within any relationship where there is an expectation of trust which causes harm or distress to an older person." Elder abuse may take many forms and consists of physical, sexual, psychological or emotional abuse, financial exploitation and intentional or unintentional neglect, including medical neglect.

Most of the elder abuse prevention, detection and intervention efforts are geared towards community-dwelling older adults who are abused, neglected and exploited in their family homes, neighborhoods and long-term care or nursing home settings. However, much less attention is given to older adults who are incarcerated.

What differentiates elders in prison is that they have been convicted of crimes, including drug, sex and violent offenses. I argue that regardless of older adults' past criminal histories they deserve equal rights and protections from elder abuse. Most of the information about elder abuse in prison has been anecdotal. In this article, I provide findings from my 2010-2011 survey of 677 adults aged 50 and older in a northeastern prison system. Many of the experiences described by older adults in prison can be classified as elder abuse, neglect or mistreatment.

## Elder Abuse in the Social Context of Prison

In the survey, many incarcerated older adults reported some of the harsh realities of incarceration, ranging from being a victim of and/or witnessing minor to severe trauma, abuse, violence and exploitation. As in the case of Joseph, a 72-year-old man who experienced sexual assault, mistreatment by staff and separation from his family: "I am 72 and I am afraid of being assaulted again. I get stressed out because we are treated like pieces of garbage and always threatened with harm from officers. I have a sister in the rest home and have no contact with her. My son is in prison."

Some older prisoners also described "being picked on for petty things by guards," "constant shakedowns," "canceled recreation" and "being denied medical/medical help and phone privileges for no reason at all"; "being punished for other people's actions"; and "being accused of things you didn't do and your job taken away." Some older adults reported being a victim of and/or witnessing violence and abuse, including being "raped," a "male guard feeling on my body," "seeing killings in prison yard and mess hall and guards killing inmate[s]," and being "beaten by corrections officers" and seeing "corrections officers stomping inmates into comas." Other older prisoners said they experienced "aggression from other inmates," "being assaulted by a young mental patient" and "being robbed."

## Solitary Isolation and Other Forms of Cruel and Unusual Punishment

Older adults also described experiences of isolation or being victims of and/or witnesses to forms of torture or cruel and unusual punishment. Their comments included: "prison officers confine inmates in 2 cages 15-20 minutes 25 at times..."; "I've been locked up in a room for 23 hours a day for the past four months without an explanation from administration"; "locked up in a cell 22 hours a day and not enough recreation time"; "there's a lack of programs to keep the mind active"; and "there are searches where property becomes destroyed or stolen." Others reported an environment of "constant noise" and cells that are "constantly lit up."

## Medical Neglect and Healthcare Abuse

Many older adults reported poor nutrition and inadequate healthcare within the prison. Some of their statements included: "food nutrition – poor, variety – poor, balance – none, lack of use of utilities, water – no water to drink for 2 days, food, meat not cooked, not getting out to yard enough," and "everyone chain smokes around me all the time." Others reported staff apathy and medical neglect with the following comments: "there is indifference to my need for medical care"; "medical department ignoring medical complaints"; "there's a failure of medical personnel, malpractice, a failure to treat, negligence, abuse, denial of vital medication, heart meds"; "a failure to follow specialists' recommendations for treatment of hypertension and pain"; "having to wait 2 to 4 years to participate in a prison program"; and "mismanagement of prison and neglect of serious health issues."

## The Trauma of Family Separation

Most older adults reported separation from family and the community as a form of abuse or mistreatment. Some reported: "I am confined like an animal and kept away from family, treated badly by officers," "being here away from my family and not having freedoms," "being transferred to a prison where my loved ones couldn't visit because of the distance" and "I cannot contact family, I think about my children, grandkids, children in [the Department of Youth Services]." Other barriers to family contact included "poor mail delivery" and "the lack of phones."

Several survey participants who were close to being released from prison described their bleak options for future employment and economic earning power. They stated, "I worry about when I get out – getting [my] kids a place to live"; "keeping a job to make ends meet"; "job opportunities upon my release, rebuilding relationships with my children" and "not being able to support them." One respondent wrote, "I believe the intent is for us to die in here."

## "Policy" Abuse and Mistreatment

Some older adults reported a type of policy trauma in response to how sentencing and parole policies impacted their state of physical and mental well-being. Their comments included being put in solitary

confinement for 14 years, the use of "malicious disciplinary charges used to lock me up in closed custody illegally," "waiting endlessly for my court appeal" and" being denied parole eight times."

### Stigma as a Precursor of Abuse and Mistreatment

Other older prisoners described the stigma of incarceration and the loss of identity that heightens the risk of elder abuse or effective responses to such abuse. Their comments included: "you're identified as a number, and not as a human being" and "as long as you're in khaki, you are considered non-human." Several older adults shared significant concerns about how staff often had their own unfair, informal rules and did not enforce formal protective policies. One survey participant noted about correctional officers, "they seem to lack a 'higher power' to address prison abuse and neglect."

### Towards Elder Justice and Human Rights for Older Persons in Prison

Based on the World Health Organization's definition of elder abuse, most of the experiences described above can be classified as a form of elder abuse, neglect or mistreatment. Some existing laws that can be used to protect the rights of older adults in prison include the Prison Rape Elimination Act, compassionate release or medical parole statutes and the Americans with Disabilities Act. However, the application of mandated reporting laws (i.e., requiring certain officials and licensed professionals to report incidents of abuse or suspected abuse) has not been extended to incarcerated older adults as a tool for prevention, assessment and intervention responses to elder abuse.

A recent report issued by the United Nations High Commissioner for Human Rights has urged that special consideration be given to older adults in prison due to the accumulated or aggravated disadvantages inherent in their carceral status and grave human rights conditions. Fundamental to human rights values are dignity and respect for all persons, and the indivisible and interlocking holistic relationship of all human rights in civil, political, economic, social and cultural domains. In the Convention on the Rights of Older Persons, rights are framed by conceptions of equality, respect, autonomy and dignity.

Areas of protection of older persons that are underscored for those in prison include age discrimination, legal capacity and equal recognition before the law, conditions of institutional and home-based long-term care, violence and abuse, access to productive resources, work, food and housing, social protection and the right to social security, right to health and palliative and end-of-life care, disabilities in old age, access to justice and legal rights. The United Nations classifies "older prisoners" as a special needs population – along with racial/ethnic minorities, persons with disabilities or terminal illnesses, GLBT prisoners and death row prisoners – with specific, non-binding guidelines for their treatment that include care transitions.

Existing United Nations documents, such as the Standard Minimum Rules for the Treatment of Prisoners and the Handbook on Prisoners with Special Needs, set forth non-enforceable guidelines that address the rights and needs of incarcerated older adults, including access to prison rehabilitation, physical and mental health care, geriatric-specific care, and family programming and linkages to community services. The community reintegration or resettlement of older prisoners with their families is a critical issue that requires attention from corrections officials and others involved in reentry. The collateral consequences of incarceration, such as lack of access to housing, healthcare, employment and social security and benefits, make it challenging for older adults to readjust following their release from custody – especially those who have served lengthy prison terms.

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# New York City's Revised Indigent Defense Services Plan Upheld

The New York Court of Appeals – the state's highest court – held last year that changes to New York City's system of indigent defense, which permit the assignment of conflict cases to institutional providers without the involvement of county bar associations, do not violate state law.

In response to *Gideon v. Wainwright*, 372 U.S. 335 (1963), the 1965 New York legislature enacted County Law § 722, which mandated the creation of an indigent defense plan. Under the established plan, the Legal Aid Society was the primary indigent defense provider for New York City. When a conflict of interest among co-defendants existed, the court would appoint counsel, known as conflict counsel, from a list of qualified attorneys identified by the county bar associations. At the time, the Legal Aid Society was the only institutional provider of indigent legal services in the City.

In 1996 the City began contracting with other institutional providers to provide indigent defense services, but conflict counsel was still selected in accordance with the 1965 plan.

New York City did away with portions of the 1965 plan in January 2010 and allowed institutional providers to supply conflict counsel. Under the revised plan, the county bar associations no longer have control over the selection of counsel in conflict cases.

The New York County Lawyers' Association and the New York Criminal Bar Association initiated a "hybrid CPLR article 78 and declaratory judgment proceeding" in state court, challenging the City's 2010 indigent defense services plan. They argued that the plan violated County Law § 722 because that statute "neither contemplates nor allows the City's assignment of conflict cases to institutional providers."

The New York Court of Appeals disagreed, holding "that the City's 2010 plan for indigent defense constitutes a valid combination plan under County Law § 722(4). Construed as a whole, section 722 affords the City the flexibility to appoint institutional providers to represent indigent defendants where a conflict of interest precludes representation by the primary provider." In short, the City's plan "allows for the defense of indigent criminal defendants by the Legal Aid Society, other institutional providers and the private bar, as a combination plan that serves the needs of the clients but also recognizes fiscal realities to be borne by the City."

Chief Judge Jonathan Lippman and two other appellate judges dissented, noting that "[t]he City may have very sound policy reasons for the change it proposes, but as it goes about altering, perhaps irretrievably, the network of indigent defense service providers that has been in place for some 47 years, it would seem more than ordinarily important to insist upon compliance with the limitations contained in County Law § 722...." See: *In the Matter of The New York County Lawyers' Assn. v. Bloomberg*, 979 N.E.2d 1162 (N.Y. 2012), *reargument denied*.

# British Court Blocks Sex Offender's Extradition to U.S. Due to "Draconian" Civil Commitment Policies

In June 2012, Britain's High Court of Justice blocked the extradition of a defendant wanted in Minnesota for sex crimes, stating a "flagrant denial" of his human rights would result if he were subjected to civil commitment under U.S. law.

Shawn Sullivan, 43, a dual U.S.-Irish citizen, is wanted for indecent assault of two 11-year-old girls; he also allegedly had unlawful sex with a 14-year-old girl. The crimes occurred between 1993 and 1994. Shortly after being questioned about the indecent assaults, Sullivan fled the United States and traveled to the UK. He wasn't arrested on the charges until June 28, 2010.

The U.S. requested Sullivan's extradition and a lower British court found there was "no question" that he should be returned to face prosecution. On appeal, the only issue was whether Sullivan's extradition would be incompatible with Article 5 of the European Convention on Human Rights or breach the rule against specialty (which provides that a person who is extradited may only be prosecuted for the crimes specified in the extradition request).

Although civil commitment is a process available in 20 states, including Minnesota, it is unknown in European justice systems. "Minnesota's law is said to be more draconian than many others," the High Court wrote. It relied heavily on the testimony of William Mitchell College of Law Dean Eric Janus, who has considerable experience with persons subject to civil commitment in Minnesota – mostly sex offenders. [See, e.g., *PLN*, Oct. 2013, p.38; Sept. 2013, p.48].

The High Court said it would be "most unfortunate from the point of view of the victims and of justice" should Sullivan escape trial in the U.S. due to his risk of being subject to civil commitment following his extradition.

The evidence showed that of the more than 600 offenders civilly committed in Minnesota, none has been permanently released since the program went into effect in 1994. Only one offender has received a provisional discharge from the state's civil commitment program – Clarence Opheim, 64, who was released to a halfway house in March 2012.

The issue before the High Court centered on whether an order for civil commitment constituted "lawful detention" for a person of unsound mind. Looking to the foreseeable consequences of extradition, the Court concluded that Sullivan would be subject to civil commitment should he be returned to Minnesota.

That consequence would be realized if Sullivan was found to have a sexual disorder or dysfunction under the state's civil commitment law. "Since it is not necessary to prove that amounts to an inability to control his sexual impulses, it is plain that the criteria fall far short of proving he is of unsound mind," the High Court wrote.

The Court further observed that should Sullivan face civil commitment, his 1996 suspended jail sentence for indecent assaults on two 12-year-old girls in Ireland would be admissible. The Court found that under Minnesota's civil commitment statute, there is "no requirement that the offences took place recently, nor, indeed, that the misconduct resulted in conviction, provided that the misconduct is substantiated by credible evidence" rather than a higher

standard of proof.

While the High Court said it was "plainly in the interests of justice" that Sullivan face trial on the sex charges in Minnesota, it held the risk of civil commitment would be a "flagrant denial" of his rights under Article 5 of the European Convention on Human Rights. Accordingly, U.S. officials were given one week to guarantee that Sullivan would not face civil commitment should he be returned to Minnesota; no such assurance was made, however, and the extradition proceeding was dropped.

Sullivan thus remains free in the UK, but faces prosecution and possibly civil commitment should he ever return to the United States or travel to any other country willing to extradite him. See: *Sullivan v. Government of the United States*, High Court of Justice, Queen's Bench Division, 2012 EWHC 1680 (June 6, 2012).

"The European courts are starting to view U.S. courts as being so draconian that it violates human rights," former federal prosecutor Jeffrey Cramer was quoted as saying in a January 14, 2013 news article. "They've always felt this way pertaining to death penalty cases, but now we are seeing it more in fraud and sexual abuse cases."

There are presently 698 offenders civilly committed to the Minnesota Sex Offender Program. A state task force has been considering changes to the state's civil commitment process, including a central state court that will decide how offenders are selected for commitment and when they are released. Additionally, a higher standard of proof – beyond a reasonable doubt – has been proposed before offenders can be civilly committed, as well as "regular periodic reviews" of civil commitment cases.

"It's not an exaggeration to say the [program] is a de-facto life sentence," noted Eric Janus, who serves on the task force. "What we're saying is, before we spend a huge amount of money to lock people up, we better be really sure that these people need this super level of protection."

Minnesota is currently facing a class-action federal lawsuit that challenges the constitutionality of the state's civil commitment statute, including the indefinite detention of committed offenders. See: *Karsjens v. Minnesota Department of Human Services*, U.S.D.C. (D. Minn.), Case No. 0:11-cv-03659-DWF-JJK.

Sources: *Fox News, www.telegraph.co.uk, Star Tribune, www.dailymail.co.uk*

# News in Brief

**Arizona**: On May 28, 2013, a former staff member at FCI Phoenix was convicted of six counts of sexual abuse of a ward. A federal jury found that Jose Arnulfo Martinez, 49, sexually abused a prisoner on three separate occasions in 2008 and victimized another prisoner three times in 2010. Each conviction carries a prison sentence of up to 15 years and/or a $250,000 fine.

**Arizona**: Alcohol appears to have been a factor in a single-vehicle rollover accident on June 14, 2013 that injured five off-duty prison guards from ASPC-Yuma. The accident occurred in a personally-owned vehicle in the desert near the city of San Luis, in an area where people commonly go off-roading. The crash trapped one of the occupants inside the vehicle, requiring rescue workers to use the Jaws of Life. The incident is under investigation and ADOC spokesman Andrew Wilder said the names of the employees involved would not be released.

**Arizona**: On June 4, 2013, Cochise County Sheriff's detention officer Mario Serrano was arrested and charged with 17 other suspects as a result of a year-long Drug Enforcement Agency investigation into a narcotics distribution ring. The group, including Serrano, would import kilos of cocaine from Mexico, transport them to locations in Tucson and then distribute the drug to street-level dealers. They are charged with conspiracy to import, transport, sell and possess cocaine; money laundering; sale and transportation of a narcotic drug for sale; and use of a wire or electronic communication in a drug offense. Serrano had already resigned from his position with the Sheriff's Office.

**Arkansas**: Several hours after Bethany Nicole Williams, 24, was released from the Baxter County jail on May 19, 2013, she called jail staff to ask if she could return to pick up something she left behind. The "small container" she had left in the pocket of her jail uniform was located by guards, who found that it contained eight Trazodone pills and a clear rock that tested positive for methamphetamine. Williams returned to the jail to claim the container; she tested positive for meth when her probation officer was called to the jail, and subsequently charged with felony possession of a controlled substance and furnishing prohibited articles.



**Colorado**: On June 11, 2013, the Colorado Department of Corrections conducted the largest full-scale prison evacuation in recent history. Just over 900 prisoners, starting with a group confined to the infirmary, were moved from the Territorial Correctional Facility near Colorado Springs to the East Canon Correctional Complex due to the danger posed by a spreading wildfire. Officials were concerned not only about the fire but also about possible air quality issues. No injuries were reported during the move.

**District of Columbia**: Paul Mannina was a senior U.S. Department of Labor attorney known as a family man and respected lawyer. He was found dead on June 18, 2013 with his throat slashed in a D.C. jail cell following his arrest for a brutal sexual assault involving an attorney co-worker. The victim, who was beaten so severely that she required facial surgery, initially told police that the attack was random but later identified Mannina, whom she had known for 21 years, as her attacker who had brutalized her with a stun gun, handcuffs and pepper spray. Mannina's death has not been determined to be either a homicide or suicide.

**Florida**: Prosecutors say Bernard Beliard, 27, used his position at the South Florida Reception Center to steal lists containing the personal information of 805 prisoners, allegedly for the purpose of committing tax fraud. Beliard pleaded guilty on May 7, 2013 to aggravated identity theft and fraud charges; he met four times with an FBI informant, who gave him $9,600 for the lists. Beliard is no longer employed at the prison.

**France**: Local officials in Corsica, a French island located off the coast of Italy, announced on May 24, 2013 that a heavy guard detail will accompany an undisclosed number of prisoners who will be allowed out of jail to cycle a stage of the famed Tour de France bicycle race. The prisoners – and guards – have been training on roads and home-trainers in the jails to develop the physical stamina necessary to take on the steep hills of the island.

**Georgia**: In early February 2013, former guard Lance D. Driggers was caught trying to smuggle four quart-sized and two gallon-sized bags of loose tobacco, plus 15 packages of cigarette rolling papers, into the Augusta State Medical Prison. Driggers, 25, pleaded guilty on May 23, 2013 and was sentenced under the First Offender Act to more than two years of probation.

**Georgia**: On May 25, 2013, prisoner Tony Criswell escaped the Twiggs County Jail through a hole he was accused of making in a shower wall. Two guards on duty at the time have been fired by Sheriff Darren Mitchum for failure to follow the jail's security protocols. They did not perform hourly cell block checks when Criswell allegedly

ripped out a shower head, slipped through the hole and climbed a fence to escape. He spent three days on the run before being captured. Mitchum said there was no evidence the guards had actively assisted Criswell in the escape.

**Guatemala**: Thousands of Guatemalans were intentionally infected with STDs in the 1940s by U.S. public health researchers. [See: *PLN*, June 2011, p.30]. An appeal in their lawsuit against the U.S. government over the medical experiments was dismissed in June 2013. The experimentation was exposed by a U.S. researcher in 2009 and a legal battle ensued, with attorneys representing an estimated 5,000 Guatemalan victims who were used as medical guinea pigs – including prisoners, soldiers, sex workers, mental health patients and school children. Archived records of notes taken by the American research team describe how subjects were deliberately infected without their consent. President Obama had apologized to the Guatamalan government in October 2010 and called on a special commission to look into the experiments.

**Hawaii**: On May 28, 2013, a former Waiawa Correctional Facility guard was sentenced to one year of probation after pleading guilty to reckless endangerment. Damon Pavao was involved in a March 2012 incident in which he fired multiple gunshots from his Pearl City home, causing a three-hour shutdown in the area while police negotiated with him to surrender. Under the terms of his plea agreement, Pavao cannot own firearms or ammunition but is eligible to have his record wiped clean if he stays out of trouble for five years. He was fired from the Department of Public Safety following the shooting incident.

**Indiana**: Heath L. Burgess, incarcerated at the Tippecanoe County Jail, was charged on June 3, 2013 with fraud and being a habitual offender after it was discovered that he filed a false grievance claiming his property, valued at $1,260, had been misplaced by jail staff. In reality, Burgess had learned that his property was inadvertently released to an acquaintance, and asked the man to hold on to the property in a recorded phone call. The charges were filed when it was discovered that Burgess knew where his property was all along.

**Kentucky**: In June 2013, after an informant told police that Suboxone strips had been smuggled into the Whitley County Detention Center, Major Steve Lundy and jail officials decided the best way to handle the situation was to test prisoners for drug use. As a result, 21 prisoners who tested positive for illicit substances now face new charges. Investigators hope this sends a clear message that contraband drugs will not be tolerated at the facility.

**Louisiana**: Jason Giroir, 35, a former guard at the Louisiana State Penitentiary in Angola, faces a maximum sentence of 25 years after pleading guilty to participating in a plot to cover up the beating of a handcuffed prisoner. On May 29, 2013, Giroir admitted to falsifying records in a federal investigation and making a false statement to the FBI. Federal prosecutors say Giroir witnessed another officer beating the prisoner in January 2010, but submitted a false report that denied the assault had occurred.

**Maine**: On July 11, 2013 a woman filed a federal civil rights lawsuit claiming that a former jail guard had coerced her into sexual activity at least three times while she was incarcerated at the Knox County Jail. The complaint also alleges there were other incidents involving male guards having sex with female prisoners. Former jail guard Adam Grierson, 26, was arrested in October 2013 and charged with three counts of gross sexual assault. He previously had been charged with trafficking contraband after allegedly giving a cigarette to the prisoner he is accused of sexually abusing, though the trafficking charge was later dismissed. A second Knox County jail guard, Richard S. Wellington, 60, was arrested in late October 2013 for engaging in sexual misconduct with a female prisoner in exchange for candy bars and a shaving razor.

**Maine**: Walter Wagner, 30, an off-duty guard at the Maine Coastal Regional Reentry Center, was hospitalized on June 4, 2013 after his personal firearm discharged, wounding him in the thigh. His wife called to report the injury, which occurred on Wagner's day off. The .40 caliber Glock handgun was Wagner's own weapon and

not a work-issued gun. He did not appear to be seriously injured, according to Chief Deputy Jeff Trafton of the Waldo County Sheriff's Office.

**Michigan**: David Gladstone is a Lansing-area jail guard who allegedly assaulted a prisoner on March 8, 2013. He was formally charged with misdemeanor assault and battery stemming from the incident, and suspended and placed on paid administrative leave on March 22, 2013. If convicted, Gladstone faces up to 93 days in jail and $500 in fines. He was previously involved in a 2009 lawsuit filed against a group of guards who assaulted another prisoner at the Lansing detention facility; that suit, which named the City of Lansing and four officers as defendants, including Gladstone, settled for $46,500.

**Michigan**: On June 3, 2013, a federal judge recommended that former Michigan Supreme Court Justice Diane Hathaway serve her one-year prison sentence for bank fraud at "Camp Cupcake" – the federal prison camp in Alderson, West Virginia where Martha Stewart and former Detroit City Councilwoman Monica Conyers served time. When Hathaway's attorney was asked if he thought the camp was a suitable facility for his client, he commented that the Alderson facility isn't exactly a prison. "It's an adult day care," he said. Although he had argued for community service, federal prosecutors disagreed, stating that Hathaway should have known better than to commit fraud.

**New York**: Rensselaer County Jail Master Sergeant Anthony Patricelli turned himself in on June 7, 2013 and was arrested for illegally accessing a state-maintained computer database. Patricelli was arraigned and then released on two felony counts of falsifying business records and computer trespass after using the E-Justice database to check the criminal history of a former girlfriend's new boyfriend. The security breach was revealed in a May 2013 audit of the system. It was unclear whether the Sheriff's Department internal investigation has concluded or if Patricelli will face additional disciplinary action.

**New York**: Christopher Clavell, a Rikers Island jail guard, was a suspect in the August 2000 shooting death of his ex-girlfriend, Barbara Perez, for over a decade. He was arrested and finally charged in 2011, convicted of second-degree murder on June 6, 2013 and sentenced to 25 years to life. Perez's body was found shot eight times in the head and once in the chest; Clavell had reportedly said he would rather kill her than pay child support for their then 2-year-old son. District Attorney Richard A. Brown credited investigators who continued to work the cold case as they pursued Clavell.

**North Carolina**: On May 13, 2013, William Neville Dowe, a former guard at the Federal Correctional Institution in Butner, was sentenced to three years in prison for taking bribes from prisoners. Investigators say that from July 2011 to June 2012, Dowe received bribes totaling around $15,000 in exchange for contraband that he smuggled into the facility and sold to prisoners, including cigarettes, alcohol, marijuana, pornographic magazines and cell phones. Dowe will serve an additional three years of supervised release upon completion of his prison term.

**Pennsylvania**: A former administrator at the Chester County Prison is facing charges stemming from the sexual abuse of two of his young foster children. Officials say that Leroy Mitchell, 60, and his wife have fostered more than 50 children over the past few decades, and that a search for additional victims continues. The initial victims were between the ages of 7 and 9 at the time of the assaults. Mitchell was arrested on May 31, 2013 and housed at the Montgomery County Prison due to his prior employment at the Chester County facility. The investigation is ongoing.

**Pennsylvania**: On May 30, 2013, an Erie County prison guard was suspended indefinitely without pay pending an administrative hearing. Authorities allege that 29-year-old guard Brent Carr bought a car stereo and big-screen television from a prisoner who was trying to raise bond money. Carr, who allegedly had telephone and text message communications with the prisoner's girlfriend as well as the prisoner himself, admitted that he understood what he did was wrong.

**Pennsylvania**: Christopher M. Ganues, 40, was arrested on June 4, 2013 on

charges of felony involuntary deviate sexual intercourse by forcible compulsion, felony criminal attempt of a rape threat, felony sexual assault and other related charges. Ganues, a guard at SCI Graterford, is accused of forcing a prisoner to perform sexual acts by threatening him with the loss of visitation privileges. The prisoner sent a letter to the State Police that included a sample of Ganues' semen as evidence.

**Puerto Rico**: An employee of Canteen Correctional Services, a private contractor that provides prison food services, was arrested in June 2013 for allegedly delivering heroin to a prisoner. The case, which is being investigated by the U.S. Attorney's office and the FBI, alleges that Abimael Bello Burgos received $1,000 in cash from an undercover agent to smuggle the narcotics into Bayamon State Prison. Burgos was charged with conspiracy and possession with intent to distribute 100 grams of heroin.

**Puerto Rico**: Prison guard Angel Marrero Hernandez was arrested on May 17, 2013 on child pornography charges for encouraging a 15-year-old girl to exchange nude cell phone photos with him. He was ordered held in the federal jail in Guaynabo to await trial.

**Russia**: The fate of a black and white feline is unknown after it was caught in April 2013 sneaking into Russian Prison Colony Number One carrying cell phones and chargers taped to its body. Officials at the prison colony stated that various attempts to smuggle contraband into the facility have been foiled before, but this was the first attempt involving a cat. A cat was also used to smuggle heroin into a prison in South Russia's Rostov Region in August 2012, and into a Brazilian prison in January 2013. [See: *PLN*, May 2013, p.56].

**Texas**: Following a six-week internal investigation, two guards at the Bexar County Jail have been placed on administrative leave. Alvaro Ramirez III and Michael Smith allegedly punched and beat prisoner Shawn McHazlett inside his cell on March 31, 2013; Ramirez entered the cell and instigated the beating, while Smith allegedly tried to cover up the assault. A third guard who witnessed the attack resigned three days later, stating that the beating solidified his decision to quit. The former guard, who asked not to be identified, said "I felt like I can't work in this type of environment."

**Texas**: Prisoner Joe Hernandez was brutally killed by four fellow prisoners who kicked and punched him to death on July 29, 2012 at the West Texas Intermediate Sanction Facility. For reasons that were unclear in news reports, the four suspects in Hernandez's death – Manuel Leal, Jose Rafael Valdez, Jr., Christopher McDonough and Arthur Maldonado – were released from custody after the attack. They were arrested in June 2013 and face manslaughter charges; bail for the men was set at $100,000 each.

**Texas**: McLennan County Jail Administrator John Kolinek and his staff have determined that serving prisoners powdered milk instead of regular milk in a carton will save the county nearly $30,000 a year. The prisoners began receiving powered milk in May 2013. As the jail's population continues to rise, county officials have begun paying LaSalle Southwest Corrections, a for-profit prison company, to house the overflow of prisoners from McLennan County. County Commissioner Kelly Snell said the county was $6 million over budget in the past two years and is seeking ways to cut costs.

**Thailand**: In a move to improve the country's human rights record, Thailand's Corrections Department began a pilot program on May 15, 2013 to remove heavy ankle chains from prisoners at the

Bang Kwang Central Prison in Bangkok. Prime Minister Yingluck Shinawatra told reporters that Thailand wants to rehabilitate rather than simply punish prisoners. "We aim to change and develop inmates' behavior instead of using chains," she stated. Some prisoners expressed appreciation for the policy change. One, who had been required to wear the ankle chains, said, "It made me feel worse than an animal. I never chained my dog."

**Washington**: Prison guard Brandy Boyer was running late for work on May 18, 2013 when she spotted David Daniel McElroy, 28, wearing a prison-issued shirt and pants outside the Larch Corrections Center. She called the prison and learned that guards were in the process of confirming an escape. Boyer then called 911 for backup. McElroy, who was serving time for burglary and drug possession, attempted to run but was quickly apprehended. Larch officials said they believe he stood on a garbage can and used a sheet and pillow to shield himself from razor wire as he scaled a 10-foot fence.

**West Virginia**: Former prison guard Franklin Bayard Gibson, Jr. was ordered to serve consecutive sentences after admitting to bringing tobacco into the Huttonsville Correctional Center for his incarcerated cousin. His guilty pleas to charges of bribery and conspiracy to commit bribery resulted in prison terms of two to 15 years when he was sentenced on May 3, 2013. Gibson stated he had made $600 to $700 by smuggling the contraband. His attorney pointed out that Gibson had no criminal record and said of the tobacco, "it's not as if it were heroin."

# 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

### *Centurion Ministries*

Works to exonerate the wrongfully convicted, in both cases involving DNA evidence and those that do not. Centurion only takes 1-2 new cases a year involving actual innocence. They do not consider accidental death or self-defense murder cases, he said/she said rape cases, or child abuse or child sex abuse cases unless there is physical evidence. All case inquiries must be from the prisoner involved, in writing. Contact: Centurion Ministries, 221 Witherspoon Street, Princeton, NJ 08542 (609) 921-0334. www.centurionministries.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

### *The Exoneration Project*

The Exoneration Project is a non-profit organization dedicated to working to free prisoners who were wrongfully convicted. The Project represents innocent individuals in post-conviction legal proceedings; typical cases involve DNA testing, coerced confessions, police misconduct, the use of faulty evidence, junk science and faulty eyewitness testimony, and ineffective assistance of counsel claims. Contact: The Exoneration Project, 312 North May Street, Suite 100, Chicago, Illinois 60607 (312) 789-4955. www.exonerationproject.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: JDI, 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

### *Prison Activist Resource Center*

PARC is a prison abolitionist group committed to exposing and challenging all forms of institutionalized racism, sexism, able-ism, heterosexism and classism, specifically within the Prison Industrial Complex. PARC produces a free resource directory for prisoners, and supports activists working to expose and end the abuses of the Prison Industrial Complex and mass incarceration. Contact: PARC, P.O. Box 70447, Oakland, CA 94612 (510) 893-4648. www.prisonactivist.org

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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 Celling 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. **$35.00**. Written by Missouri prisoner Jon Marc Taylor, the *Guerrilla Handbook* contains contact information and descriptions of high school, vocational, paralegal and college courses by mail. ***Holiday Special!*** 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

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**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

**Criminal Law in a Nutshell**, by Arnold H. Loewy, 5th edition, 387 pages. **$43.95**. Provides an overview of criminal law, including punishment, specific crimes, defenses & burden of proof. 1086

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**Spanish-English/English-Spanish Dictionary**, 2nd ed. Random House. **$15.95**. Spanish-English and English-Spanish. 60,000+ entries from A to Z; includes Western Hemisphere usage. 1034a

**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

**Webster's English Dictionary**, Newly revised and updated, Random House. **$8.95**. 75,000+ entries. Includes tips on writing and word usage, and has updated geographical and biographical entries. Includes recent business and computer terms. 1033

**Everyday Letters for Busy People**, by Debra Hart May, 287 pages. **$18.99**. Hundreds of sample letters that can be adapted for most any purpose, including letters to government agencies and officials. Has numerous tips for writing effective letters. 1048

**Roget's Thesaurus**, 717 pages. **$8.95**. Helps you find the right word for what you want to say. 11,000 words listed alphabetically with over 200,000 synonyms and antonyms. Sample sentences and parts of speech shown for every main word. Covers all levels of vocabulary and identifies informal and slang words. 1045

**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

**The Habeas Citebook: Ineffective Assistance of Counsel**, by Brandon Sample, PLN Publishing, 200 pages. **$49.95**. This is PLN's second published book, written by federal prisoner Brandon Sample, which covers ineffective assistance of counsel issues in federal habeas petitions. Includes hundreds of case citations! 1078

**Complete GED Preparation**, by Steck-Vaughn, 922 pages. **$24.99**. This useful handbook contains over 2,000 GED-style questions to thoroughly prepare students for taking the GED test. It offers complete coverage of the revised GED test with new testing information, instructions and a practice test. 1099

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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 ☐

**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 ☐

**Sue the Doctor and Win! Victim's Guide to Secrets of Malpractice Lawsuits**, by Lewis Laska, 336 pages. **$39.95**. Written for victims of medical malpractice/neglect, to prepare for litigation. Note that this book addresses medical malpractice claims and issues in general, not specifically related to prisoners. 1079 ☐

**Advanced Criminal Procedure in a Nutshell**, by Mark E. Cammack and Norman M. Garland, 2nd edition, 505 pages. **$43.95**. This text is designed for supplemental reading in an advanced criminal procedure course on the post-investigation processing of a criminal case, including prosecution and adjudication. 1090 ☐

**Our Bodies, Ourselves**, by The Boston Women's Health Book Collective, 944 pages. **$26.00**. This book about women's health and sexuality has been called "America's best-selling book on all aspects of women's health," and is a great resource for women of all ages. 1082 ☐

**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 ☐

**Soledad Brother: The Prison Letters of George Jackson**, by George Jackson, Lawrence Hill Books, 339 pages. **$18.95**. Lucid explanation of the politics of prison by a well-known prison activist. More relevant now than when it first appeared 40 years ago. 1016 ☐

**Criminal Procedure: Constitutional Limitations**, by Jerold H. Israel and Wayne R. LaFave, 7th edition, 603 pages. **$43.95**. Intended for use by law students, this is a succinct analysis of constitutional standards of major significance in the area of criminal procedure. 1085 ☐

**A Dictionary of Criminal Law Terms** (Black's Law Dictionary® Series), by Bryan A. Garner, 768 pages. **$33.95**. 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 help navigate your way through the maze of legal language in criminal cases. 1088 ☐

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