PRISON

Legal News

VOL.11 No.7
ISSN 1075-7678

Working to Extend Democracy to All

July 2000

Prison Realty/CCA Verges on Bankruptcy

by Dan Pens

On March 31, 2000, Prison Realty Trust, Inc. announced operating losses of $62 million for the year ended December 31, 1999. Its largest subsidiary and chief tenant, Corrections Corporation of America (CCA), reported a net loss of $203 million for 1999. Independent auditors of both Prison Realty and CCA indicated that "there is substantial doubt about the ability of either company to continue as a going concern."

According to some industry analysts, CCA's troubles began in July 1997 when it spun off a new corporation, CCA Prison Realty Trust Inc., which was structured as a real estate investment trust (REIT) [See: The Poor Get Poorer -- The Rich Get Prisons, PLN Dec. '97]. At that time CCA was a darling of Wall Street, its stock having doubled in value in the first six months of 1997 alone.

In its initial public offering, Prison Realty sold 18.5 million shares at $21/share, raising a whopping $388 million. The newly formed REIT immediately shelled out $308.1 million to purchase nine prisons from its parent, CCA, which it then leased back to CCA.

Some Wall Street analysts expressed concern about the incestuous relationship between Prison Realty (whose stock ticker letters are PZN) and its parent CCA. Their concerns centered on a potential conflict of interest stemming from the fact that many of CCA's chief executive also were named to top PZN posts (CCA's co-founder, Doctor R. Crants was both CCA's Chairman and PZN's CEO). Those concerns failed to deter eager investors, though, who were keen to jump on the profitable prison bandwagon.

Nine months later, in April 1998, the parent corporation, CCA, announced plans to sell itself to its REIT subsidiary. The announcement set off alarm bells on Wall Street. Several investment analysts downgraded CCA's stock. And one firm, Paine Webber, criticized the proposed merger and stated it would result in a "shell of a corporation with very little capitalization behind it." [See: CCA Sells Self, *PLN*, Aug. '98].

In the weeks following, CCA's stock lost 25 percent of its value. A number of shareholders filed suit, claiming that the proposed merger put the financial gain of CCA corporate officers above the interests of shareholders.

By year's end all but the most strident dissenters had been mollified by CCA's corporate PR machine. The ill-fated merger was approved in December 1998 by a majority of both CCA and PZN shareholders [See: CCA/Prison Realty Merger Approved, *PLN*, June '99].

The merger, which took effect January 1, 1999, transformed Prison Realty Trust into Prison Realty Corp. (still aka PZN). And CCA became a subsidiary of PZN. Thus, the parent corporation was gobbled up by its child. As a result of the restructuring, the CCA subsidiary ended up a separate privately-held company owned partly by PZN's senior management. Again, concerns about potential conflict of interest were largely ignored.

In May 1999, PZN announced that it would increase the payments it makes to CCA for marketing and filling the new facilities that PZN owns. The increased payments were made retroactive to January 1, 1999. Analysts estimated the increased payments would shift an estimated $90 million annually into CCA's coffers, at the expense of PZN shareholders. And, remember, the same PZN decision-makers who arranged the payment increase were part owners of the privately-held CCA subsidiary that reaped the benefit.

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Prison Realty (continued)

PZN's shareholders immediately cried foul. Few could now fail to recognize a "potential" conflict of interest stemming from PZN's and CCA's interlocking management structures. Several Wall Street analysts such as Davenport & Co.'s Robert Norfleet said that the increased payments to CCA indicate that PZN's management suffered from "credibility problems."

More shareholder lawsuits were filed, some claiming that PZN senior management secretly decided to increase payments to CCA before releasing PZN's first quarter earnings statements, but waited until *after* filing the earnings statement to announce the decision.

In the week following the revelation of PZN's "credibility problems," its stock plunged 35 percent, from $22 to $14.50 a share. Looking to boost investor confidence, Doctor R. Crants was ousted from CCA's management and was replaced by J. Michael Quinlan. But the stock slipped. further, to $11/share, amid concerns that PZN was facing higher interest costs to acquire badly needed operating capital. Because its stock was now in the proverbial toilet, the corporation could no longer easily issue more stock to raise capital. Instead, PZN announced plans for a $100 million bond issue at 12% interest (considerably higher than the 91/4 - 91/2 percent rate anticipated).

By November 1999 Prison Realty/ CCA was low on cash and losing money. Standard and Poor's put the corporation on its Credit Watch with "developing implications." The company hired Merrill Lynch & Co. to "help it consider strategic alternatives including a restructuring or merger" (business-speak for "call in Wall Street's vultures to circle over the carcass").

On December 27, 1999, Prison Realty announced an agreement with a leveraged buyout group to infuse up to $350 million into the company. The investors included The Blackstone Group and Fortress Investment Group and Bank of America. Under their plan Prison Realty would give up its REIT status and re-merge with CCA to form a single corporation. The new investors would assume a 30 to 40 stake in the restructured company.

That same day, December 27 1999, Doctor R. Crants resigned as PZN's chairman and CEO. His son, D. Robert Crants III stepped down as PZN's president. Stockholders would have to approve the deal, and if they did it was expected that CCA would get a new $1.2 billion credit line from Credit Suisse First Boston and Lehman Brothers.

The day the plan was announced, however, PZN's stock fell from $6.15 to an all-time low of $4.50 before bargain hunters sent it back up to $5.25 at day's end. More lawsuits ensued, claiming the proposed transaction was unfair to stockholders whose holdings and control of the company would be diluted.

On February 25, 2000, one of PZN's largest shareholders, Pacific Life Insurance Co., put forward a competing $200 million equity investment, corporate and debt-restructuring and management reorganization plan. Under the Pacific Life plan, which was agreed to in April, PZN retains its REIT status for 1999; with shareholders slated to receive 1999 dividends in preferred stock rather than cash. By retaining its 1999 REIT status, the Pacific Life plan avoids more than $140 million in taxes that would have been due under the competing Blackstone Group plan (which would have "de-REITed" PZN retroactive to 1999). Even though the Blackstone group's restructuring plan was ultimately rejected, the group still collected $22.7 million in fees. Not a bad consolation prize.

PZN's stock rose 94 cents to $3.38 a share on April 7, the day the Pacific Life plan was adopted. As part of the plan's management reorganization, PZN executives D. Robert Crants III and Michael Devlin resigned, collecting a hefty $1.3 million in severance and other payments in the process.

The pair each received $233,750 in severance pay; payments of $300,000 each in exchange for 150,000 shares of CCA stock they owned, representing 75% of their ownership interest in CCA; $100,000 each to buy the remaining 25% of their CCA stock after the new Prison Realty-CCA merger transaction closes. None of these payments were made in cash. Instead, the money was applied to settle about $1million in loans each received from CCA in 1997.

Prison Realty/CCA has more than 73,000 prison beds under contract, or

under development in the United States, Puerto Rico, Australia, and the United Kingdom. The lion's share of CCA's 39 U.S. prisons are located in Texas, which has nine. Kentucky and Oklahoma are the next largest U.S. customers, with four CCA prisons apiece, followed by Colorado, New Mexico and Tennessee which each have three.

The $200 million restructuring plan had federal and state authorities breathing a collective sigh of relief. Nobody seemed to know what would happen to CCA's prisons if the company defaulted on its estimated $1.2 billion in loans and was unable to pay guards' salaries and other operating expenses. Colorado and Wisconsin state officials admitted to drawing up contingency plans in the event of a breakdown in CCA's operations, but for "security reasons" were not willing to offer details of those plans.

Wall Street also seemed more optimistic after the Pacific Life bailout. Analysts even predicted that PZN's red ink would turn black in the first quarter of 2000. The mean estimate of analysts surveyed by First Call/Thomson Financial predicted first quarter PZN earnings of 49 cents a share.

On May 15, however, the company posted a net loss of $27.8 million (or 25 cents a diluted share). First quarter revenue fell to $17.3 million, compared to $72 million for the first quarter of 1999. The company said first quarter revenue was reduced to reflect $71.2 million in "uncollectable lease payments" from its primary tenant, CCA. On the heels of that news, PZN's stock tumbled to $2.13/share (on May 15th) --less than a tenth of what it sold for just one year previous.

The PZN/CCA re-merger has to be approved by shareholders. It remains to be seen whether the world's largest private prison corporation will remain healthy enough to attract investors and retain employees and customers (i.e. state and federal jurisdictions willing to ship "product" to the corporation). Turnover has always been a big problem with CCA because its guards receive lower pay and benefits than their government-employed counterparts. The lower pay and lack of retirement or other benefits was offset by a "lucrative" (until a year ago, that is) employee stock option plan. The loss in stock value must have a negative effect in regards to attracting and retaining employees in a tight labor market.

CCA continues to lose money and is plagued by plummeting crime rates, a slowdown in imprisonment growth and a resulting low occupancy rates at some of its prisons. For instance, fewer than half of the 820 beds in its three-year-old Kit Carson prison in Colorado are filled. And the state says it plans to transfer 1,000 of its prisoners out of Kit Carson and other CCA prisons back to a newly-built state prison in Sterling.■

Sources: *Dow Jones Newswire, Wall Street Journal, PRNewswire, Bloomberg News, Associated Press, Rocky Mountain News, Milwaukee Journal Sentinel, Nashville Tennessean*

$820,000 Awarded to Informant and Wife for Assault

A federal district court in New York issued pre- and post-verdict opinions in a negligence action brought by a prisoner and his wife against jail officials. In the pre-verdict ruling, the court held that the plaintiffs were entitled to amend their pleadings during trial and that jail officials have a non-delegable duty to keep prisoners safe. In the post-verdict ruling the court reduced the jury's awards for future pain and suffering and loss of services, finding the awards to be excessive.

While acting as a confidential informant for the Nassau County Sheriff's Department, Neville Rangolan made a controlled buy from Steven King that resulted in King's arrest and conviction. Soon after assisting in King's arrest, Rangolan was also arrested for selling drugs. An entry was placed in the Nassau County Correctional Center (NCCC) computer warning that King and Rangolan must be housed separately. But the entry was overlooked and they were placed in the same jail pod.

The next day, Rangolan was severely beaten by King, requiring emergency brain surgery. Rangolan remained in a coma for three days, suffering from a skull fracture, bleeding from the brain, organic brain damage, seizures and headaches.

Rangolan and his wife, Shirley, sued the sheriff's department, alleging deliberate indifference and negligence. They sought damages for Neville's past and future pain and suffering and for Shirley's loss of services of her husband.

During trial, the Rangolans moved to amend their pleadings to allege that defendants have a non-delegable duty to keep prisoners safe from foreseeable risks of harm. The court granted the motion, finding that the amendment was in the furtherance of justice and would not unfairly prejudice the defendants.

The court also held that defendants were subject to one of the highest non-delegable duties to keep Neville safe. Accordingly, the court concluded, that defendants were not entitled to apportion the liability to King. See: *Rangolan v. County of Nassau*, 51 F.Supp.2d 233 (E.D.N.Y. 1999).

At the close of the evidence the court granted judgment to the defendants on the deliberate indifference claim because plaintiffs failed to prove that anyone at NCCC actually knew that King and Rangolan were housed together. The court granted judgment to plaintiffs on the negligence claim. A jury then awarded Neville $300,000 for past pain and suffering and $1.25 million for future pain and suffering. Shirley was awarded $60,000 for the loss of services of her husband.

Defendants filed a motion for new trial, challenging all three awards. The court denied the motion with respect to the past pain and suffering award but granted it with respect to the other awards.

The court reduced the future pain and suffering award to $500,000, finding that the award was excessive because Neville's primary future injury was the potential for other seizures and there was no evidence that he would be unable to lead a normal and healthy life after his release from prison.

The court also reduced Shirley's loss of services award to $20,000, noting that plaintiffs offered no evidence of any services Neville performed for his wife. Accordingly, the court found that the award was excessive for such unproved and speculative loss of services. See: *Rangolan v. Nassau County*, 51 F.Supp.2d 236 (E.D.N.Y. 1999).

Married prisoners who sustain injuries may want to consider including spouses in suits seeking damages for loss of consortium or loss of services.■

From the Editor

by Paul Wright

On May 16, 2000, the Prison Activist Resource Center in Berkeley sponsored a fundraiser party for *PLN* in San Francisco. The hip hop/dance party featured DJ Neta, Bamudhi, Local 1200 DJs, Vine Folks and Emma Said. *PLN* co-founder Ed Mead spoke at the party and *PLN* contributing writer Mark Cook appeared via video. The party was a success in that everyone had a good time and it raised $341.00 for *PLN*'s matching grant fundraiser. We would like to thank the folks at PARC and everyone who helped make the fundraiser party happen.

As noted before, a *PLN* supporter has pledged a $15,000 matching grant to *PLN*. The matching grant matches donations from non prisoners and fundraisers dollar for dollar, up to $500 per donor. Donations from prisoners are matched $2 to $1. To date *PLN* has received $326.58 from prisoners and $3,452 from non prisoners. We have until January 15, 2001 to meet the $15,000 matching grant. If each of *PLN*'s subscribers donated just $5 above and beyond the cost of their subscription we would be more than able to meet the matching grant. This additional money is essential for *PLN* to fund its second staff position on a permanent basis. If you haven't donated to *PLN*'s matching grant fundraiser yet, please do so this month.

As *PLN*'s editor, the only thing I dislike more than asking readers for money each month is noting the passing of our friends and supporters. Unlike big publications where obituaries tend to be impersonal., *PLN* is small enough that we have a lot of personal contact with many of our readers and supporters. So that when they die the loss is felt personally by those of us at *PLN* as well as within the larger activist community.

On April 28, 2000, Albert "Nuh" Washington died of liver cancer at the Coxsackie Correctional Institution in New work. Nuh had been imprisoned for 28 years as part of a 25 to life sentence for allegedly killing two New York city policemen. A lifelong fighter against racism and capitalism, Nuh was a member of the Black Panther party and later the Black Liberation Army. As such he was among those targetted for "neutralization" by the U.S. government. He was convicted of the two murders along with fellow BPP/BLA members Herman Bell and Anthony Bottom, together known as the New York Three. These men are among the longest held political prisoners in the United States as well as the world.

New York governor George Pataki refused to release Nuh from prison due to his terminal illness. Despite his captivity, Nuh never ceased his activism on behalf of human rights and the struggle for progress. As political prisoner Sundiata Acoli said: "Nuh is beloved by all of us PP/POWs and he's highly respected." Nuh was a longtime *PLN* supporter as well. Nuh's loss is mourned by his family, friends and the larger progressive community.

As a final reminder to *PLN*'s prisoner readers, on August 1, 2000, we are increasing *PLN*'s prisoner subscription rates to $18 per year or $9 for six issues. This breaks down to $1.50 per issue of *PLN*. Before August 1, 2000, prisoners can subscribe, renew their subscriptions or extend existing subscriptions at the current rate of $15 per year. After August 1 we will pro-rate our subscriptions at $1.50 per issue, i.e. $15 will get 10 issues instead of the 12 it gets now. So take advantage of the lower rates now!

One thing that would help *PLN* keep its rates down in the future is increasing its circulation. *PLN* currently has around 3,400 subscribers. Once our circulation reaches 5,000 subscribers, our per issue printing costs begin to significantly decrease. Two of *PLN*'s biggest monthly expenses are printing and postage. A higher circulation would allow *PLN* to reduce its per issue costs on both items. Since the cost of printing and postage are constantly going up, this translates into being able to hold our subscription rates where they are now. Since *PLN* is almost entirely reader supported, we need to increase our circulation. You, our readers are the best sales force we have for new subscribers. Encourage your friends, family members and collegues to subscribe to *PLN*. This will broaden *PLN*'s impact, keep subscription rates down and raise awareness around prison issues. If you need *PLN* subscription flyers let us know. You can also use the subscription card in each issue of *PLN* for this purpose. We can also send bundles of *PLN*s to distribute at events, in law libraries, etc. Just send $7 and a mailing label.

Increasing the number of advertisers is another way to keep subscription rates down. *PLN* has never been, and probably never will be, an advertiser supported publication. But there are a number of businesses offering products and services that are of interest to *PLN*'s readership. If you do business with a company that offers services or products that may be of interest to *PLN*'s readership, encourage them to contact *PLN* for advertising information. Or, send us their contact information and *PLN* will follow up on it. This is all stuff each of our readers can assist us with. Enjoy this issue of *PLN*.■

Louisiana Sheriff Busted in Private Prison Scheme

In 1990, Dale Rinicker, then Sheriff of East Carroll Parish (county), Louisiana, saw a lot of money being made in the private "rent-a-jail" business and decided he wanted a piece of the action. So cooked up a scheme that would eventually net him close to half a million dollars before landing him in federal prison.

In April 1990, Sheriff Rinicker asked local attorney and businessman "Captain Jack" Wyly to finance the construction of a private prison in the parish to house state prisoners. Wyly agreed and later that month he formed a corporation, East Carroll Correctional Systems, Inc. (ECCS), which issued 100 shares of stock to Wyly cronies and family members. Thirty-five of the 100 shares were issued to 62-year-old Dorothy Morgel, Wyly's legal secretary of 35 years. Five of those shares were hers, the other thirty were earmarked for Sheriff Rinicker.

Soon after its incorporation, ECCS borrowed money from another of Wyly's corporations, purchased an abandoned school building, and began renovating it into the East Carroll Detention Center (ECDC). That same day, ECCS and the Sheriff's Office entered into a lucrative lease agreement whereby the latter would pay the former from the funds it received from the Louisiana Department of Public Safety and Corrections for housing state prisoners.

A few months later, in August 1990, ECDC began housing prisoners. And the money started rolling in. Until May of 1993, ECCS repaid the construction loans, making no shareholder distributions (except token amounts to cover required tax payments). But after May of 1993, the gravy really began flowing.

Because Sheriff Rinicker's interest in the corporation was blatantly illegal, the parties went to elaborate lengths to conceal the distribution of money to him. Initially, from May 1993 through August 1995, ECCS made payments to Morgel based on her 35% interest (her 5% and Rinicker's 30%).

Although Morgel had a checking account at a Lake Providence bank, where she lived, in May 1993 she drove 15 miles to Oak Grove where she opened another account. She deposited her ECCS checks in the Oak grove account. She then wrote checks totalling $286,025 (generally for less than $10,0000 to avoid currency transaction reporting requirements) payable to Glen Jordan, a friend of Rinicker's. Jordan cashed the checks at a bank in Monroe, Louisiana, where Rinicker's sister, Myra Jackson, worked. Rinicker received the proceeds, giving Jordan a small amount from each check.

After August 1995, the process was streamlined. ECCS started cutting checks (six checks totaling $54,116) payable directly to Jordan. It was apparently these payments that drew the attention of authorities.

When questioned about these payments by state auditors and the FBI, Jordan, Morgel, and Wyly lied their asses off. But then the authorities "flipped." Jordan and he started cooperating, explaining in detail his role in funneling the illegal payments to his pal the sheriff.

Wyly, Morgel, ECCS, Rinicker and Jackson (but not Jordan) were indicted on federal charges of mail fraud, conspiracy to launder money, and money laundering.

In a pre-trial deal Rinicker pleaded guilty (the charges against his sister were then dismissed) and testified at trial for the Government.

A jury convicted Wyly, Morgel, and ECCS on all counts. Part of the verdict subjected to forfeiture property that had also been charged. Forfeited were: all of ECCS' assets and property, including approximately $2.8 million in rental payments from the Sheriff's Office; the funds in Morgel's Oak Grove bank account; the approximately $340,000 paid Rinicker; and the ECDC facility.

Wyly was sentenced to 4 years imprisonment and a $17,500 fine. Morgel got a year and a day imprisonment and a $12,500 fine. ECCS was fined $4.8 million. The court denied the Government's request to be lenient with Rinicker, and sentenced him to 5 years and a $10,000 fine.

Wyly, Morgel and ECCS appealed, raising a number of issues, including challenging the admission of Rinicker's testimony and the forfeiture order. The appellants argued that Rinicker's testimony violated 18 U.S.C. § 201(c)(2) (prohibiting giving, offering, or promising anything of value to a witness for or because of his testimony), a claim that was swiftly dismissed.

Morgel and Wyly claimed at trial that Rinicker had a violent temper, masterminded the scheme, and essentially "extorted" them through fear and intimidation into going along. However, the Government presented evidence showing that Morgel and Wyly cheated Rinicker out of $195,000 and argued that they couldn't have been terribly frightened of Rinicker because they "didn't have a problem clipping him out of $195,000 of his share," noting that "there is no honor among thieves, obviously, because the thieves were stealing from the thief." Because counsel for Morgel and Wyly failed to object to these arguments at trial, the appellate court dismissed these claims.

As to the fines and forfeitures, the court ruled that the issue of the $4.8 million fine levied against ECCS was mooted by the fact that all of the corporation's assets were forfeited. The court upheld the forfeitures and vacated the $4.8 million fine.

The Government, apparently through oversight, failed to present any evidence at trial as to the amount of money seized in Morgel's Oak Grove bank account (said by her counsel at trial to be $5,840.57 and then later $15,000) or the source of this money. The court therefore reversed the forfeiture of Morgel's bank account.

Wyly and Morgel's convictions and prison sentences were upheld. Rinicker filed a separate appeal, which was voluntarily dismissed.

There is no mention in the court record as to what became of the East Carroll Detention Facility or its prisoners. Perhaps that will be a story for another day. See: *U.S. v. Wyly*, 193 F.3d 289 (5th Cir. 1999).■

Habeas Hints

by Kent Russell

This column is intended to provide "habeas hints "for prisoners who are considering or handling habeas corpus petitions as their own attorneys ("in pro per'). The focus of the column is habeas corpus practice under the AEDPA - the 1996 habeas corpus law which now governs habeas corpus practice throughout the U.S.

1. Rely on the recent "Williams" decisions from the U.S. Supreme Court to argue for meaningful federal habeas corpus review under the AEDPA.

It was like Christmas in April! The U.S. Supreme Court (USSC), for the past many decades the source of almost nothing but bad news for habeas corpus petitioners, issued two decisions during the 2000 term which suggest that habeas corpus is still alive and well, even under the AEDPA. Both decisions were delivered on April 18, 2000 by the U.S. Supreme Court and, conveniently enough, both are entitled *Williams v. Taylor.*

Of the two cases, the one which puts the most meat on the table is *Terry Williams v. Taylor,* 2000 U.S. Lexis 2837, where the USSC interpreted the crucial test which has to be passed under the AEDPA in order to win on federal habeas corpus. By the time a prisoner gets to federal habeas corpus, s/he has usually made the same basic claim on state habeas corpus ("exhaustion") but has lost there, and is now filing for federal habeas corpus relief in the U.S. District Court. Because of "federalism", the denial by the state courts is entitled to some respect ("deference"). The question is, how much? Under the law prior to the AEDPA, the petitioner simply had to show that the state court's decision was "wrong" as a matter of federal law. That was not necessarily a piece of cake, but it was possible if you could find a federal case which applied federal constitutional law more favorably to your habeas claim than what the state court had done in rejecting the claim. Under the AEDPA, in order to overcome the state court's denial of your claim, you now have to show that the state court decision was "(1) contrary to", or (2) "involved an unreasonable application of... clearly established Federal law, as determined by the Supreme Court of the United States". Just how much did this AEDPA language change the prior law? That was the important question which the *Terry Williams* case tackled.

Everyone agrees that the AEDPA created at least one obstacle that wasn't there under the old law: the need to show that the state court's decision wrongfully applied principles set forth in a decision by the *U.S. Supreme Court,* rather than just a decision from any one of the federal circuit courts. However, most federal constitutional law is the same throughout the country, and can be traced back to a USSC decision at its source. Therefore, except for those very few instances in which constitutional law differs from one circuit to another, if you've found a federal case that shows the state was wrong in denying your claim on state habeas corpus, the AEDPA simply requires you to trace that decision back to the USSC case that was the basis for the decision in the first place.

What did sharply divide the parties in *Williams* was the rest of the AEDPA language: What did Congress mean by "contrary to" and "unreasonable application of federal law"? First, lawyers for the State of Virginia argued that "contrary to" meant that the prisoner had to somehow find a case in which the USSC had reached a legal result different from the state court in a case involving the *same facts*. Because the Supreme Court only decides a few cases a year, and because the facts of one case are almost always different form another, even if you managed to find a USSC decision that was favorable to your habeas corpus claim on the law, it's almost inconceivable that this USSC case would also happen to involve the same *facts* as your own case. Second, the State's attorneys argued in *Terry Williams* that demonstrating an "unreasonable application" of federal law meant having to show that state court had not only been wrong in applying USSC law, but *so wrong* that no "reasonable" federal judge anywhere would have decided the case that way. This definition of "unreasonable" virtually required you to get inside the head of any federal judge who agreed with the state court's denial and demonstrate that the judge was not only wrong, but had reached that conclusion frivolously, or in "bad faith".

Had these arguments by the State's attorneys carried the day in *Terry Williams*, winning on federal habeas corpus under the AEDPA would have become about as common as winning the jackpot in the state lottery. Scary as that scenario is, that's pretty much where many of the federal appeals courts were heading, and that's why there was so much riding on the outcome of *Williams*. Fortunately, although it was a wafer-thin majority by a fractured court, the USSC rejected the crippling AEDPA interpretations the State's attorneys were arguing for, and instead held that federal courts must continue to grant federal habeas corpus relief wherever the state court decisions either "conflicted with federal law" or "applied federal law in an unreasonable way". In other words, "unreasonable" in the AEDPA context means "objectively unreasonable", so it is enough to show that the state court denial was "wrong" without also having to demonstrate that the state judges acted in "bad faith" or were "so wrong" that no judge in their right mind would have come out that way. Therefore, when fighting a motion to dismiss on federal habeas corpus:

Use *Terry Williams* to argue that, under the AEDPA, federal courts still have the power and the duty to disregard state habeas corpus denials that can be shown to be "wrong" under applicable USSC precedent.

The other Williams case, *Michael Williams v. Taylor*, 2000 U.S. Lexis 2836, solidifies the right to evidentiary hearings in federal court under the AEDPA. The AEDPA prohibits evidentiary hearings in federal court where there has been a "failure" to develop the factual basis for the claim in state court. However, *Michael Williams* makes clear that such a "failure" requires some "negligence" or "fault" by the prisoner in not developing the claim in state court. Thus, if the prisoner can

show "due diligence" in attempting to present the factual basis for the claim in state court, even if the state court denies a hearing on the claim, that won't preclude a hearing in federal court pursuant to the AEDPA. Therefore, in regard to evidentiary hearings:

Do the best you can to develop the facts on state habeas corpus and ask for an evidentiary hearing there, even though you're probably not going to get one. As long as you have been diligent in presenting your factual claim on state habeas corpus, even if the state court denies you a hearing, the AEDPA won't prevent you from getting an evidentiary hearing on federal habeas corpus.

2. Be "safe" in computing the AEDPA statute of limitations.

The statute of limitations under the AEDPA is one year from the date your state conviction becomes "final" on direct appeal. But exactly when does your conviction become "final" so that the one-year period begins to run? In nearly all federal jurisdictions, in order to allow you to apply for certiorari review by the USSC, you are allowed 1 year, plus an "extra" 90 days after the date your conviction is affirmed by the state's highest court, whether or not you actually file a cert application in the USSC. However, keep these warnings in mind when you are computing the AEDPA statute of limitations: First, don't just assume you will get the 90 extra days in all cases. Note these exceptions to the general rule allowing the 90 extra days: (1) Unless you actually petition for review of your conviction in your state's highest court, you can't apply for cert in the USSC, so your conviction will become "final" when it is affirmed by the state court of appeal, and you won't get the extra 90 days. For California prisoners, this means that, if you don't file a "petition for review" in the California Supreme Court, the AEDPA 1-year statute of limitations will start to run as soon as the "mandate" issues from the Court of Appeal, which is typically 30 days after your conviction is affirmed by the appellate court. (2) Even if you do file a petition for review in the state's highest court, you are not necessarily entitled to the extra 90 days to file for federal habeas corpus unless you have actually raised "federal constitutional claims" in your state petition for review. In other words, if your petition for review in the state's highest court contained only claims based on state law, but did not raise federal constitutional issues, in many circuits (including the 9th Circuit, which governs California and the Western states), you can't count on getting the extra 90 days over and above the basic 1 year you have from the date your conviction is affirmed by the state's highest court. Therefore, to maximize your AEDPA time and to compute a "safe" AEDPA statute of limitations date:

- **If you appeal your state conviction and lose in the intermediate appellate court, file for review in the state's highest court regardless of how slim your chances may be, and include federal constitutional claims. If you did not file a petition for review in the state's highest court during your appeal, assume that the AEDPA 1-year statute of limitations will start to run immediately from the date the appellate court's opinion affirming your conviction becomes final.**
- **Even if you did apply to the state's highest court for review on your direct appeal, don't assume you'll get the extra 90 days to file under the AEDPA statute of limitations unless your petition for review contained the federal constitutional claims that you are going to present on federal habeas corpus. If not, to be safe, you should file for state habeas corpus within the 1-year period itself, without adding in the extra 90 days.**

Finally, although the AEDPA statute of limitations technically applies only to the time within which you must file a petition for *federal* habeas corpus, keep in mind that AEDPA also significantly affects the timing of state habeas corpus as well. As a practical matter, you will almost always have to file for *state* habeas corpus in order to exhaust your state remedies *before* you file for federal habeas corpus. The AEDPA statute of limitations is "tolled" (the time doesn't run out) while you are properly proceeding through the state courts on state habeas corpus, but you can't get any tolling if the statute of limitations has already run out. Therefore, to preserve your right to file for federal habeas corpus, be sure to file for state habeas corpus when there is still enough time left in the one-year statute of limitations bank to allow for the preparation and filing of a federal habeas corpus petition after your state habeas corpus petition is denied in state court. Accordingly, I recommend:

File for state habeas corpus an additional 2 to 4 weeks before the AEDPA 1-year statute of limitations is going to run. That way, if and when your state habeas corpus petition is denied, you'll still have that 2-4 weeks left to do the revisions necessary to prepare and file a timely petition for federal habeas corpus.■

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$1,800 Awarded in PA Retaliation Suit

On June 25, 1999, U.S. district court judge James McClure Jr. awarded $1,800 in damages to a Pennsylvania jail prisoner who was retaliated against for complaining about jail conditions. The judge also awarded $1 in nominal damages to another prisoner with a similar claim.

In 1993 a class action suit was filed challenging conditions of confinement at the Lackawanna county jail in Scranton, Pennsylvania. That suit was settled with the county agreeing to build a new jail. The plaintiffs' claims for compensatory damages went to a jury trial in June, 1.999. The jury returned a verdict of $1,800 in damages to Mark Tourscher and $1 in nominal damages to Jerome Boykin. The jury held that the jail warden, Thomas Gilhooley, had retaliated against both prisoners for complaining about jail conditions.

The court entered judgment in favor of Tourchser and Boykin and awarded them $1,800 and $1 in damages, respectively. The plaintiffs were represented by Angus Love of the Pennsylvania Institutional Law Project. The ruling is unpublished. See: *Hunt v. Gilhooley*, USDC MDPA, Case No. 3:CV-93-0846.■

Czech Prisons Reverberate as Thousands Protest

by Julia Lutsy

An uprising at 21 of the Czech Republic's 33 prisons was touched off on January 10, 2000, when a guard turned off prisoners' television an hour early in the Vinarice prison in Central Bohemia. This gave rise to a hunger strike and, two days later, the protests escalated to include the destruction of bunks, bedding and furniture.

No confrontations with guards were reported, but prisoners' windows soon were festooned with banners proclaiming, "We are people, not animals" and "On hunger strike for our rights." Leaders presented a list of prisoners' grievances. Of 37 demands, the authorities conceded 15 almost immediately as the protests began to spread. The most important were related to severe overcrowding, followed by those related to the lack of work opportunities, poor food, unhygienic living conditions and severe new restrictions which had been instituted at the beginning of the year with respect to the receipt of parcels from families. At the peak of the protests, on January 12, 6,000 prisoners were on the hunger strike.

Though Czech President Vaclav Havel issued an amnesty in 1990 emptying the prisons of their 20,000 prisoners, they are now filled to excess with 23,000. Even the authorities concede that the prisons hold over 17 percent more prisoners than the regulations stipulate; some cells, constructed to hold six persons now hold up to ten. Of the 23,000 Czechs imprisoned, approximately a third are remand prisoners, i.e., they have not been tried. Remand prisoners were among the protesters; they spend nearly twice as much time in prison now as they did before Havel's 1989 "Velvet Revolution." The present prison overpopulation can be traced to the huge crime wave which followed upon the re-introduction of unbridled capitalism in 1998. It is the petty criminals who fill the prisons: Two thirds of convicted Czech prisoners are completing sentences of less than two years. The majority of them are first offenders.

The vast majority of all Czech prisoners have no work and are poorly fed, receiving the equivalent of about $1 worth of food per day. Frequently they must make do with one change of clothing every other week; they are prohibited from washing clothing in their cells. Hot water for showering is available for only 20 minutes a day in some prisons. All of them had previously been allowed to receive two five kilogram packages (something over 22 pounds) a week. The new regulations cut the ration for convicted prisoners to two five-kilogram packages a *year*. Ostensibly, the reason for the change was to end the flow of drugs to the prisons. After the protests started the government proposed extending the new regulations to include the remand prisoners.

Another general amnesty is not presently under consideration: President Havel is of the opinion that "truth and love" prevail now that "communist oppression" is ended.

Source: *The New Worker*, 28 January 2000, Great Britain

Tele-net

Restrained Washington Prisoner Exonerated in Assault on Guard

by Terry A. Kupers and Marybeth Dingledy

Rodney Gitchel had been in 4-point restraints for two months inside the Special Offenders Center (S.O.C.) at the Monroe Correctional Complex in Washington when he struggled free of the restraints and assaulted the next guard who entered his cell. He faced the possibility of five additional years in prison as he stood trial in Everett, Washington, February 27 through March 3, 2000, for assault on a guard. After hearing testimony from Dr. Fred Davis, the prison psychiatrist who ordered Gitchel placed in restraints as part of an experimental "treatment" designed to cure angry outbursts and repetitive rule violations; testimony from fellow prisoners who reported the defendant had suffered unusually harsh deprivations and brutality; and testimony from psychologist Dr. Lee Gustafson and psychiatrist Dr. Terry Kupers, for the defense; the jury voted nine to three in favor of acquittal.

Gitchel had been in prison for approximately four years when the assault occurred. During the first year he had three disciplinary infractions, in the second year he had six, including the one that led to his transfer to the Intensive Management Unit at the Clallam Bay Corrections Center. During his first year in punitive segregation he had 63 infractions, and in the year ending with the assault he had 139. When asked why so many infractions, Gitchel explained: "Once they put me in a strip cell, I don't know what happened, I just kept getting in trouble .... They never told me what I could do to get out, I believed I'd be in there forever." Then, a few days after the assault, he was transferred to another facility in Shelton, WA, and had no infractions for the ensuing year, or until the trial began.

The defense focused on diminished capacity. According to Dr. Kupers, the defendant suffered from SHU Syndrome, a psychiatric condition often seen in prisoners subjected to longterm, punitive solitary confinement. Symptoms include massive anxiety, perceptual distortions, difficulty concentrating, unreality feelings, confusion and intense anger that is difficult to contain. In addition, the defendant was placed in restraints. Dr. Kupers testified that clinical and ethical standards prohibit continual use of restraints. Finally, there was disorientation from sleep deprivation, since staff woke him every hour to adjust the restraints and the lights were always on. Dr. Kupers explained that all of these factors combined to create greatly diminished capacity and prevent Gitchel from forming the intent to harm. The defendant did not even remember the assault. And the fact that the defendant received no further write-ups after being transferred to another prison and placed in general population, lent credence to the notion that the defendant is quite capable of getting along with others and programming successfully if he is not brutalized and provoked.

According to Ms. Marybeth Dingledy, Snohomish County Asst. Public Defender and Rodney Gitchel's attorney, the problem was that Rodney got caught in a vicious cycle. "Because of his emotional make up, Rodney would react to provocation in a way that many of the other prisoners would not. When the guards would get mad at him and punish him, Rodney would fight back with whatever he had, causing further punishment and more problems. The 'treatment' of Rodney was basically what you would do to a dog as a last resort. How could you not expect a person treated in such a fashion to lash out at whomever was around?"

Ms. Dingledy continued: "There are a number of things that bother me about this case. First and foremost is the way Rodney was treated by the system. Second, that this case went to trial at all. What was the point? Putting him in solitary confinement, taking away everything, including good time, and tying him down for two months wasn't enough? They wanted to keep him in the system for another five years?" The District Attorney announced there will be no new trial.■

Washington Jail Settles Exercise Suit

On October 12, 1999, the King County (Seattle) jail in Washington settled a class action suit concerning the amount of outdoor exercise provided to ultra high security (UHS) prisoners and detainees.

In 1997 a class action suit was filed challenging the classification process and conditions of confinement for prisoners designated by King County jail officials as ultra high security. The practice of ring County jail officials was, and remains, to classify as USH those detainees accused of offenses that receive widespread media attention. USH is a form of administrative segregation where USH prisoners are kept confined to their cells at least 23 hours a day and have no contact with other prisoners. Also challenged in the lawsuit was the fact that USH prisoners did not receive any fresh air or outdoor exercise and were handcuffed whenever they were out of their cells. The suit was .filed in ring county superior court in Seattle, Washington.

The settlement applies to the King county jail in downtown Seattle. As part of the settlement, the jail immediately agreed to provide USH prisoners with access to an outdoor exercise yard for one hour per day, three days per week. Effective December 31, 2000, the jail agrees to remodel its exercise yard. and provide UHS prisoners with one hour of outdoor exercise a day, five days a week.

King County denied any liability or wrongdoing. The settlement resolves only the exercise issue. The suit sought only declaratory and injunctive relief. The settlement does not preclude any other UPS prisoner from filing suit seeking money damages or relief on any issues not raised in the complaint. Enforcement and monitoring of the suit will be by the law firm that filed the suit, Browne and Ressler, 821 Second Ave. Penthouse Suit, Seattle, WA 98104-1540. (206) 624-7364.

The challenge to the classification process for UPS prisoners was not pursued due to negative changes in the governing law on this topic. See: *Bachmeir v. King County*, King County Superior Court, Case No. 97-2-289050-SEA.■

Another Texas Prison System Lockdown--Politics As Usual?

by Matthew T. Clarke

For the second time in two years, the entire Texas prison system was locked down in a delayed response to isolated incidents in two Texas prisons, once again raising the specter of political motivation for the lockdown. The previous lockdown was reported in the May 1999 issue of *PLN*.

This year's lockdown began on March 16, 2000. According to TDCJ spokesmen, the incident which triggered the lockdown was the murder of a Hispanic prisoner by another Hispanic prisoner at the Coffield Unit which occurred two days before the lockdown. TDCJ's official line was that the prisoner who was killed was a member of a prison gang known as the Texas Syndicate and the prisoner who killed him was a suspected member of another prison gang known as the Pistoleros and the lockdown was necessary to remove any weapons from the prison system and prevent an all out gang war between the two prison gangs. However, a prison system spokesman later admitted that they "still aren't certain whether the killing was a gang-oriented hit or a personal spat" and they don't even know if the prisoner who is charged with the murder really is a gang member.

It is generally accepted as fact that the systemwide lockdown and shakedown had been planned more than a week in advance of the killing. Therefore, the killing is probably more of a convenient excuse than a reason for the lockdown.

As was the case in 1999, the lockdown came in the wake of scathing criticism of Texas Governor and Republican Presidential Candidate George W. Bush and the prison administration in the mainstream media following highly-publicized incidents on Death Row. This year's criticism was sparked by a series of incidents which included: (1) a prisoner spitting out a handcuff key as he was being executed at the Terrell Unit the week before the lockdown; (2) the same prisoner who spit out a handcuff key (who had also been among the prisoners who attempted to escape from Death Row in November 1998) along with another Death Row prisoner taking a Death Row guard hostage at the Terrell one month before the lockdown; (3) the murder of prison guard Daniel Nagel at the McConnell Unit in December, 1999; and (4) an unrelated disturbance in the administrative segregation section of the McConnell Unit in which one prisoner freed 80 other segregation prisoner who caused extensive damage to the segregation cell block.

These are the only two systemwide lock downs of the Texas prison system in well over a decade. Both came as news media began to question whether the prison system was "out of control". Both were ineffective and inappropriately delayed responses to isolated incidents by a few prisoners in a couple of prisons. Both were probably motivated by a desire of Governor Bush and the prison administration to appear to being "doing something--anything" about the media's fictional "out-of-control" prisons.

Adding to the proof of political motivation behind the two systemwide lockdowns are the serious incidents which have occurred in TDCJ-ID and did not result in an immediate lockdown, These include the following:

® May 6, 2000, a prisoner armed with sharpened sheet metal, took two female medical workers hostage in the medical department at Styles Unit in Beaumont, demanded $100, cigarettes, and improved conditions of confinement. He wounded an assistant warden, a captain and another guard before being overpowered by guards when they stormed the area.

® April 25, 2000, one prisoner was killed and 31 injured when 300 prisoners armed with gardening tools riot at the Smith Unit outside Lamesa.

® April 13, 2000, a prisoner at William P. Clements Unit in Amarillo held a guard hostage for seven hours before surrendering.

® Feb, 21, 2000, two death row prisoners, armed with sharpened pieces of metal, took a guard hostage at the Terrell Unit in Livingston and held her hostage for 13 hours before surrendering.

® Jan. 15, 2000, a Huntsville guard was stabbed with a pencil which must be surgically removed.

® December 1999, a prisoner at McConnell Unit in Beeville injured a guard and freed 80 prisoners who rioted in the administrative segregation cellblock, causing extensive damage.

® December 1999, a guard was killed by a prisoner at McConnell Unit.

® April 1999, a nurse was held nine hours by two prisoners armed with homemade knives at the Monfort Unit in Lubbock after overpowered guards.

® April 1999, 13 prisoners were stabbed and 4 others taken to a hospital in Wichita Falls after a riot involving nearly 90 prisoners at Allred Unit

® November 27, 1998, six Death Row prisoners attempted to escape and made it as far as the outer prison fence at the Ellis Unit in Huntsville. One escaped the perimeter, but is later found drowned.

® August 1998, a guard was held about an hour by a prisoner with handgun at Holiday Unit in Huntsville.

® June 1997, a prisoner took three hostages at Canton psychiatric facility. He was caught later that day while holding 15-year old boy hostage.

® February 1996, a naked prisoner held a guard hostage for ten hours at a Palestine prison.

® March 1995, a riot involving 400 to 500 prisoners broke out at a Dilley prison. Four prisoners were hospitalized.

All of the above-listed events were serious incidents. Most were much more serious than the official reason for the 1998 systemwide lockdown--a guard being raped at the Robertson Unit in Abilene--and many were more serious than the official reason for the 1999 lockdown--a prisoner killing another prisoner at the Coffield Unit. This indicates alterior motivation for the lockdowns. In seeking the actual motivation for two similar events when the official reason is implausible, one should ask what the two events have in common. In this case it is: (1) Texas Governor George W. Bush was openly running for President; and (2) the national televised media had picked up on local Texas media stories reporting Texas prisons as "out-of-control" and

stating that the Texas prison system was not being competently run. Within ten days of the national media coverage, the prisons were locked down. In both cases, the official reason for the lockdown seems like an excuse. One can imagine the Bush campaign, in light of the bad national publicity, meeting and deciding "the next time something happens in a Texas prison, lock 'em down. That way it will look like we're doing something. That way the voters will know we're in control."

The political motivation theory is also supported by the results of the lockdowns. The prison system was locked down to search for weapons and other contraband; however, the search revealed little of either. According to a prison system spokesman, the search netted "just routine and heavily nuisance contraband--overage of necessities, like too many (necessities, such as) more pairs of undies than (the prisoner) is supposed to have." In the entire 145,000-man, 116-unit prison system, only one weapon was found.

The circumstantial evidence strongly suggests an improper political motivation behind the systemwide lockdown. Neither the official reason for the lockdown nor the results justify closing the entire prison system for weeks. To Texas prisoners, there is no mystery to why they were locked down. When national television network news began talking about Ponchai Wilkerson spitting out a handcuff key in defiance while being executed and hyperbolated on the incompetent way the "out-of-control" Texas prison system was being run, all knew an ill wind was blowing their way. A governor who is a presidential candidate can hardly afford national publicity about the incompetence in his largest state department. Something, anything, had to be done--even if it made no sense and produced no positive result. One has to wonder what kind of national leader Bush would make if he is willing to distract the public at the expense of helpless people under his control. One shudder to think what might happen is an elected Bush determines a war is necessary to distract the public. We might have another storm in the desert.

Since the lockdown began, Robert Lynn Pruett has been charged with the murder of guard Daniel Nagel. It has also been announced that the morbidly obese guard did not die by bleeding to death through multiple stab wounds--as initially claimed by the prison system--but rather died of a heart attack after receiving two superficial stab wounds to the neck.

Texas Governor and Republican Presidential Candidate George Bush is not the only person using the prison lock down for personal gain. The Texas guards' union has used the incident to help push through demands for a pay rise. Texas guards are among the lowest paid in the nation, a fact which recently led to chronic understaffing and contributed to the incidents which sparked the lock down according to guards' union spokesmen. The governor and various state legislators have promised to take up the issue of a pay raise for the guards when the Texas Legislature reconvenes in 2001. The prison system has promised to use funds from the operational budget to effect a pay raise as early as September of this year.

The systemwide lockdown was reduced to "warden's discretion" on March 23rd. Most units remained locked down at least part of the week of March 26th through April 1st, some were still locked down four weeks later.

In truth, the Texas prisons are not "out-of-control." Over the past decade, Texas engaged in a prison building spree, expanding the system fourfold. Now, with more than 145,000 prisoners in the system and many more up in the county jails awaiting transfer to the prisons, the Texas media and public seem unwilling to face the fact that, when you incarcerate more than an eighth of a million people--many with long sentences and little hope of parole--in understaffed prisons, you invite problems. The wonder is that this powder keg of a prison system, paid for by the taxes of the citizens of Texas, loaded by the Legislature's harsh new sentencing laws, and lit by TDCJ's chronic staffing shortage and lack of professionalism, hasn't yet exploded.■

Sources: *Houston Chronicle, Austin-American Statesman, San Antonio Express-News*

$1.5 Million Awarded in Arizona Jail Medical Neglect Suit

On April 15, 1999, a Maricopa County Superior Court jury awarded $1.5 million in damages to former Maricopa County (Phoenix, Arizona) jail detainee Timothy Griffin. Griffin was imprisoned for driving on a suspended license. Griffin has a history of ulcers. While in the jail Griffin suffered extreme abdominal pain and requested ulcer medication, to no avail. Eventually Griffin was seen by a jail doctor who prescribed Maalox.

At that point, Griffin was unable to eat and the next day began vomiting blood. After waiting two hours in the jail hospital he was taken to a local hospital for emergency surgery to repair a perforated ulcer. Griffin developed peritonitis that required additional surgeries and five hospitalizations. Griffin continues to suffer from bowel problems and chronic diarrhea.

Griffin filed suit in state court claiming jail officials were deliberately indifferent to his serious medical needs. The jury returned a verdict of $1.5 million in favor of Griffin on his claims of negligence and medical malpractice. The trial judge dismissed the claims against Gail Steinhouser, the jail's medical director and dismissed negligence claims against sheriff Joe Arpaio and Maricopa county. The court denied a motion by the defendants to reduce the damage award, holding the damage award was reasonable. The county has appealed the verdict. Griffin was represented by Maria Crimi Speth of Phoenix law firm Grant, Williams, Lake and Dangerfield. See: *Griffin v. Maricopa County,* Maricopa County Superior Court, Case No. CV-95-16461

The Maricopa County jail is run by Sheriff Joe Arpaio, who purports to be "America's toughest sheriff." Arpaio's antics of housing prisoners in tents, feeding them green baloney, clothing them in striped uniforms and pink underwear, etc., have gained widespread media attention. However, the steady diet of brutality and medical neglect, with the attendant lawsuit payouts, receive little attention outside the pages of *PLN.*■

Staff Representative in Medication Hearing Must Have Medical Knowledge

The court of appeals for the Fourth circuit held that federal prison officials can forcibly give a federal pretrial detainee psychotropic drugs without a court hearing. But, if the prisoner has a prison staff member acting as his representative at the hearing, the staff member must be knowledgeable about medical issues.

Richard Morgan was found mentally incompetent to stand trial on federal gun and drug charges. He was sent to a federal prison for psychiatric treatment. The Bureau of Prisons (BOP) issued an administrative order under 28 C.F.R. § 549.43 that Morgan be forcibly medicated. Morgan sought judicial review of the order. He claimed that § 549.43 does not adequately protect his due process rights because the forcible medication order should be given by a judge after a hearing, not by BOP staff. The district court upheld the administrative order. The court of appeals vacated and remanded.

The appeals court held that 28 C.F.R. § 549.43 was constitutional and substantially complied with the dictates of *Washington v. Harper*, 110 S.Ct. 1028 (1990). Under *Harper*, prisoners can be forcibly medicated after an administrative hearing by prison officials. A court hearing, and order, is not required.

The court vacated and remanded however, because it did not appear that the BOP had complied with 28 C.F.R. 549.43. The rule requires that, on request, prisoners may have a staff representative knowledgeable and educated enough to understand the psychiatric issues involved in the hearing, represent them. In this case, there was no evidence that the prison guard who acted as Morgan's staff representative "had the requisite credentials" or if Morgan suffered prejudice as a result of this shortcoming. The court noted the record showed minimal participation by the guard on Morgan's behalf and likened his role to that of a "lay witness."

"...Once the BOP established the administrative framework set forth in section 549.43, Springfield medical personnel were bound to follow it." The court observed that an agency's failure to provide individuals with the procedural safeguards mandated under its own regulations may invalidate the final administrative determination. Thus, if Morgan did not have an adequate staff representative at his hearing, the order to forcibly medicate him may be invalid. The court remanded the case for further development of a .factual record. The same argument may also be useful in cases involving disciplinary hearings where a liberty interest is also at stake. See: *United States v. Morgan*, 193 F.3d 252 (4th Cir. 1999).■

Brown Ad-Seg Due Process Claim Remanded For Hearing

By Ronald Young

The Court of Appeals for the District of Columbia circuit held that a prisoner who received ten months of administrative segregation during a housing reassignment hearing did not receive the minimal process required by the Due Process Clause. The court also held that remand was required to permit the district court to develop, the record to determine whether the prisoner's ten-month stay in ad-seg imposed an atypical and significant hardship on a prisoner serving a comparable sentence.

This case is a remand from the court of appeals for the D.C. circuit and was previously reported in the November 1998 *PLN*. See: *Brown v. Plaut*, 131 F.3d 163 (D.C. Cir. 1997). Ernest Brown, a prisoner at Lorton Prison, alleged that he was not given prior notification of a hearing before the Housing Board where he was found guilty of being in possession of a tooth brush fashioned into a shank. The district court originally dismissed Brown's claims, but the court of appeals vacated the dismissal and remanded it back to the lower court to determine whether, assuming that Brown did have a cognizable liberty interest, he had been afforded adequate due process under *Hewitt v. Helms*, 459 U.S. 460, 103 S.Ct. 864 (1983).

The court concluded that Brown did not receive adequate process under *Hewitt*, finding that he did not receive prior notice of the hearing or presented with the charges against him. This conclusion was supported by the finding that all parties agreed that the Housing Board hearing was never intended to address Brown's guilt or innocence of the disciplinary charges against him.

Because Brown did not receive the minimal process required by the Due Process Clause for deprivation of a protected liberty interest, the court stated that it must determine whether Brown in fact had a protected liberty interest in avoiding ten months of ad-seg. In order to do this the court said it would rely on the recent decision in *Hatch v. District of Columbia*, 184 F.3d 846 (D.C. Cir. 1999). Using the atypical and significant hardship standard of *Sandin v. Connor*, 515 U.S. 472, 115 S.Ct. 2293 (1995), the D.C. circuit held that whether an alleged restraint constituted an atypical and significant hardship must be determined by comparing the challenged restraint with the most restrictive confinement conditions imposed on prisoners serving similar sentences, as well as the duration of the restraint.

The court of appeals in *Hatch* chose ad-seg as its baseline for comparing the confinement at issue. The district court therefore found that the conditions of Brown's restraint in ad-seg did not impose an atypical and significant hardship because it meets the baseline standard. The court found that the only remaining question is whether the duration of Brown's ten-month ad-seg stay was an atypical and significant hardship on prisoners serving a comparable sentence. In order for the court to reach a reasoned and informed conclusion on this issue, it was found that supplemental evidence and perhaps an evidentiary hearing are required.

The court granted Brown's motion for partial summary judgement and ordered further proceedings on the issue of whether he had a protected liberty interest. See: *Brown v. District of Columbia*, 66 F.Supp.2d 41 (D.D.C. 1999).■

Administrative Exhaustion not Jurisdictional
Satisfied by Letters to Defendants

The court of appeals for the Sixth circuit reiterated that the Prison Litigation Reform Act (PLRA) requires administrative exhaustion in all cases, even where prisoners seek money damages not available via prison grievance systems. The court also held that the exhaustion requirement is not jurisdictional and that a prisoner exhausted his administrative remedies for PLRA purposes by writing letters to the prison official defendants instead of using the grievance system.

George Wyatt is an Ohio state prisoner who was raped by another prisoner. Wyatt sued various prison officials for money damages claiming they violated his Eighth amendment rights, first by placing him in a cell with a known rapist, and then denying him adequate medical and psychological care after the rape. 42 U.S.C § 1997e(a) of the PLRA states that "No action shall be brought with respect to prison conditions under section 1983 of this title, or any other federal law, by a prisoner confined in any jail, prison or other correctional facility until such administrative remedies as are available shall be exhausted." The district court dismissed the suit because Wyatt did not exhaust the prison grievance system. The appeals court reversed and remanded, finding that while exhaustion is required in all cases, Wyatt had substantively exhausted his claims administratively by writing the prison official defendants about the rape and subsequent lack of treatment.

The Fifth, Ninth and Tenth circuits have held that prisoners seeking only money damages are not required to exhaust administrative remedies if the prison grievance system does not provide for money damages as a remedy. See: *Whitley v. Hunt*, 158 F.3d 882 (5th cir. 1998); *Garrett v. Hawk*, 127 F.3d 1263 (10th Cir. 1997) and *Rumbles v. Hill*, 182 F.3d 1064 (9th Cir. 1999). Other circuits, including the Sixth, have held that administrative exhaustion is required in all prison cases, regardless of whether damages are sought or available via the grievance system. See: *Alexander v. Hawk*, 159 F.3d 1321 (11th Cir. 1998), *Perez v. Wisconsin* DOC, 182 F.3d 532 (7th Cir. 1999) and *Brown v. Toombs*, 139 F.3d 1102 (6th Cir. 1998).

In *Brown*, the Sixth circuit made it a pleading requirement that prisoners filing prison and jail condition lawsuits allege, and show, that they have exhausted all available administrative remedies. Prisoners should attach the actual grievance forms to their complaint. The court reiterated this opinion: "So long as the prison system has an administrative process that will review a prisoner's complaint even when the prisoner seeks monetary damages, the prisoner must exhaust his prison remedies."

"...we hold that prisoners must exhaust administrative remedies even in money damages cases if the prison system does not altogether refuse to review the prisoner's allegations on which the claim is based." The court held that § 1997e(a) is not jurisdictional, it governs the timing of when the suit can be filed, not whether the court can hear it. But, the exhaustion requirement is still mandatory.

"Because the exhaustion requirement is not jurisdictional, district courts have some discretion in determining compliance with the statute." In this case, Wyatt was raped before the PLRA's enactment but filed the lawsuit after the law was enacted, at which time a grievance would have been time barred. However, Wyatt sent prison officials numerous letters complaining about the rape and the lack of medical care afterwards.

The court held that under these circumstances Wyatt had "substantially complied with the exhaustion requirement." While he did not use the prison grievance system, he administratively exhausted his claims for PLRA purposes "by giving written notice on several occasions to prison officials." The defendant prison officials were aware of Wyatt's complaints and responded to them. The court reversed and remanded the case with instructions to the lower court to decide the merits of the case.

PLN has consistently advised its prisoner readers to exhaust all administrative remedies to avoid procedural delays, hurdles and dismissals. In addition to using the grievance system it is also a good idea to send letters to responsible prison officials in order to establish their liability and create a documentary paper trail for the ensuing litigation. As a general rule, prisoner litigants stand to benefit by administratively exhausting their claims before they file suit. See: *Wyatt v. Leonard*, 193 F.3d 876 (6th Cir. 1999).■

Texas Supreme Court Invalidates TDCJ-ID VitaPro Contract

The Texas Supreme Court reversed a lower appellate court's decision and held that the trial court had ruled correctly when it invalidated TDCJ-ID's contract with VitaPro Foods, Inc. of Montreal, Canada, for a soy-based meat substitute. The product was unpopular among prisoners and guards who claimed it made them sick.

The Texas Supreme Court ruled that only the original contract for a "trial" shipment costing $62,000 was legitimate. That contract was illegally amended four times until it reached a project cost between $33 million and $40 million. The trial court had held that the amendments, done without competitive bidding, were illegal and unenforcable. The Austin Court of Appeals had reversed the trial court, holding that, since "agricultural commodities" and raw materials were exempted from the competitive bidding requirement, VitaPro should be given a hearing on whether it was an agricultural raw material. The Texas Supreme Court held that VitaPro, which contains a mixture of soybeans, dehydrated vegetables, and flavoring, was clearly not an "agricultural commodity" or raw material. Thus, the trial court was correct in invalidating the contract.

Former Executive Director of TDCJ, James "Andy" Collins and VitaPro president Yank Barry were indicted on counts of federal felony conspiracy, bribery, money laundering and other charges stemming from the contracts and that VitaPro paid Collins $20,000 and a $1,000/day consulting fee while he was still employed by Texas. Collins's trial has been postponed indefinitely; Barry's is also pending. See: *Dept of Criminal Justice v. VitaPro Foods Inc.*, 8 SW.3d 316 (Tex. 1999).■

Sources: *Houston Chronicle. San Antonio Express*

Sixth Circuit Orders Retrial of Retaliation Suit

by Matthew T. Clarke

The Sixth Circuit court of appeals has ordered the retrial of a lawsuit by the surviving mother of a deceased ex-prisoner against a guard who allegedly retaliated against her son because the mother requested the guard's name and badge number.

In 1993, Stephen Neal was a Michigan state prisoner at a facility that allowed prisoners to leave the facility to work, to seek work, and for visits. On a Friday, Neal left to look for work, returning on time later that day. On Sunday, Neal arrived at the sign out desk where Harry Green, a guard, was working. Green accused Neal of having been AWOL since Friday. Neal asked Green to confirm Neal's presence at the prison since Friday with two other guards. Green refused, canceled the visit, but allowed Neal to go to the parking lot and explain the situation to his waiting mother, Marcellette Reynolds. Shortly thereafter, Reynolds approached Green and requested his name and badge number. Green refused to give them. The two guards who knew Neal had been at the prison then intervened and Neal was given his visit.

Green wrote two major disciplinary reports against Neal: for threatening behavior and incitement to riot. As a result, Neal was transferred to a higher-security prison. At a disciplinary hearing, Neal was found not guilty on the offenses charged by Green, but guilty of the minor offense of excessive noise. Despite his immediate eligibility for return to the lower-security prison, Neal was not returned for approximately one year.

Neal filed suit against Green under 42 U.S.C. § 1983 for filing false misconduct reports. Before trial, Neal died while on parole and Reynolds was substituted as the personal representative of his estate.

During the trial Reynolds attempted to introduce a report on the incident prepared by Christopher Oden of the Legislative Corrections Ombudsman's Office. The court ruled the report inadmissible due to "highly inflammatory, highly prejudicial statements that were not subject to cross-examination." Oden was allowed to testify about his conclusions regarding the misconduct reports during the trial.

After the close of evidence, the jury was given a instruction asking whether Reynold's statement to Green was *the* motivating factor behind Green's writing the disciplinary reports. Reynolds did not object to the instructions. The jury sent out a note asking whether this meant Reynold's statement was a factor or *the* factor. Reynolds requested a supplemental instruction clarifying that the jury need only find that Reynolds statement was a motivating factor, not the only motivating factor. The judge refused to clarify the instruction. The next day, the jury sent out another note, stating that they could not reach agreement on the motivating factor issue and requesting clarification. Again the judge refused to clarify, but did give the jury an instruction to work hard and try to reach a consensus. The parties later agreed to allow a verdict by six of the eight jurors. The third day, the jury sent out a final note requesting clarification by asking whether the judge or lawyer had written the instructions. Once again, the judge refused to give a supplemental instruction. Shortly thereafter, the jury returned a verdict against Reynolds, answering the question of whether Reynolds's statement was a motivating factor no.

Green appealed both the court's refusal to allow the ombudsman's report into evidence and the court's refusal to give a supplemental jury instruction. The Sixth Circuit held that, whereas Rule 51, Federal Rules of Civil Procedure requires that the party object to the instruction before it is given to the jury if the party wants to challenge it on appeal, it does not preclude the review of the unobjected-to instructions under the "plain error" doctrine. "Plain error is an obvious and prejudicial error that requires action by the reviewing court in the interest of justice." in this case, the jury brought to the court's attention a problem with the instruction which "misapplies the law as to a core issue in the case" which probably "caused the jury to deliberate under the wrong legal standard and probably affected the outcome of the trial." "Because the time at which the objection was made rendered the legal error curable by the district court without significant prejudice or inefficiency" it was plain error for the district court to fail to correct the instruction.

However, the Sixth Circuit held that it was not error for the district court to refuse to allow the ombudsman's report into evidence because it contained Neal's statements and speculations about Green's motivations and these statements lack reliability and could not be subject to cross-examination. The report also contained hearsay statements by Reynolds and the two guards who intervened. Such "hearsay within hearsay" is inadmissible unless both levels of hearsay fall within an exception to the hearsay rule which, in this case, they did not. Therefore, the case was returned to the district court for a new trial. See: *Reynolds v. Green,* 184 F.3d 589 (6th Cir. 1999).■

Showing Of Malice Under Eighth Amendment Excessive Force Test Not Required For Sexual Assault Claim Against Private Prison

By Ronald Young

The court of appeals for the Tenth Circuit held that it was plain error to instruct a jury that, to find a prison guard liable on an excessive force claim where the guard allegedly raped a prisoner, it had to find both that he forced the prisoner to have sexual intercourse and that the use of force was applied maliciously and for the purpose of causing harm. This was an appeal of a case previously reported in *PLN*. See: *Giron v. Corrections Corporation of America*, 14 F.Supp.2d. 1252 (D.N.M. 1998).

Tanya Giron, a prisoner at the New Mexico Women's Correctional Facility (NMWCF), brought a 42 U.S.C. § 1983 action against NMWCF prison guard Danny Torrez, Warden Thomas Newton, and Corrections Corporation of America (CCA) which operates the NMWCF under contract with the State of New Mexico. Ms. Giron alleged, among other things, that her being raped by Torrez "constituted excessive force in violation of her Eighth Amendment rights."

A jury returned a verdict for the defendants and the district court entered judgement. Ms. Giron appealed, contending among other things that the jury instruction on her § 1983 claim was improperly given by the district court. The jury instruction stated in pertinent part that in order to find Torrez liable under § 1983 "the jury must find: ... that the use of force was applied maliciously and for the very purpose of causing harm." The appeals court agreed with the defendants that Ms. Giron's attorney failed to make timely objection to the jury instructions and therefore failed to preserve the error. In this instance the appeals court found it necessary to use the "plain error" standard for review.

The appeals court "will only reverse under the plain error standard in an exceptional circumstance-one where the error was 'patently plainly erroneous and prejudicial.'" In Ms. Giron's case, however, the appeals court believed that "the trial court misconstrued the principles underlying the excessive force test articulated by the Supreme Court," see: *Hudson v. McMillan*, 503 U.S. 1, 112 S.Ct. 995 (1992); *Whitley v. Albers*, 475 U.S. 312, 106 S.Ct. 1078 (1986), and its confusing excessive force instruction resulted in fundamental injustice to Ms. Giron."

"Ordinarily, an excessive force claim involves two prongs: (1) an objective prong that asks 'if the alleged wrongdoing was objectively harmful enough to establish a constitutional violation,' and (2) a subjective prong under which the plaintiff must show that 'the officials acted with a sufficiently culpable state of mind'" (internal quotes omitted). "The subjective element of an excessive force claim 'turns on whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.'"

The appeals court found that based on the jury instruction, "the jury could have decided that ... Torrez forced Ms. Giron to have sex with him, but did not apply force maliciously and with intent to cause harm, and thus he was not liable under § 1983." The appeals court found such potential reasoning to be wrong and stated, "Where no legitimate penological purpose can be inferred from a prison employee's alleged conduct, including but not limited to sexual abuse or rape, the conduct itself constitutes sufficient evidence that force was used 'maliciously and sadistically for the very purpose of causing harm." The appeals court went on to hold that "since Ms. Giron had to prove that ... Torrez forced her to have sex with him, she should not have faced the additional hurdle of showing that the coercion involved malice under a test primarily designed for a prison guard's use of force to maintain order."

Therefore, the appeals court found plain error in the jury instruction "because it was confusing and patently prejudicial to the outcome of the excessive force claim." The judgement for Torrez on the § 1983 excessive force claim was reversed and remanded back to the district court for a new trial. See: *Giron v. Corrections Corporation of America*, 191 F.3d 1281 (10th Cir. 1999).■

Liberty Interest In New York Work Release

By Ronald Young

The court of appeals for the Second circuit held that aNew York prisoner has a protected liberty interest in her continued participation in a work release program, and entitled to a hearing which states the reason for her removal from the program, prior to her formal jurisdictional removal. The court also held that only the chairperson of the committee that held the hearing was liable for a due process violation, and was not entitled to qualified immunity. But the court also held that the prisoner was entitled to only nominal damages.

Young Ah Kim, a New York state prisoner, brought an action against several New York state Department of Correctional Services (DOCS) personnel, including Chairperson Delores Thornton and Chairperson Marjorie L. Hurston, both overseeing Temporary Release Committees. Hurston was at Parkside Correctional Facility and Thornton at Bedford Hills Correctional Facility.

After serving part of her sentence, Kim was placed in the Temporary Release Program (TRP). To participate in the program, Kim was transferred in January 1995, from Bedford Hills to Parkside, a TRP facility in New York City, where she was eventually permitted to be released from physical confinement and live at home while continuing to work. In February 1995, Kim failed a random urinalysis test required of all work release program participants. Her participation in work release was terminated and she was eventually sent back to Bedford Hills.

At the time of her transfer to Bedford Hills, Kim was suppose to be seeing the parole board. But she had not technically been transferred and was still under the jurisdiction of Parkside. To remedy this, Parkside held a hearing on April 10, 1995, to remove Kim from the jurisdiction of the Parkside TRP. The committee voted to remove Kim from the Parkside TRP because she was "medically unsuitable." Kim did not receive notice of the hearing, was not present at it, and received no statement of the reason for her removal.

In March 1996, Kim filed-suit contending that the defendants deprived her of a liberty interest without procedural due process. Kim won a favorable jury verdict against Hurston and Thornton, awarding her compensatory damages of $2,750 and punitive damages of $2,000 each against the two defendants. After the jury was excused, the district court judge granted a Rule 50 motion for judgement as a matter of law in favor of Hurston and Thornton so that Kim took nothing. She appealed.

The appeals court found that while Kim participated in the phase of the TRP in which she lived at home and worked at a job, she enjoyed a liberty interest, loss of which imposed a sufficiently "serious hardship" to require "at least minimal due process." This satisfied the "atypical and significant hardship" standard of *Sandin v. Conner*, 515 U.S. 472, 115 S.Ct. 2293 (1995), and paralleled a similar Oklahoma case as Kim's in which the U.S. Supreme Court found such programs to require the procedural protections outlined in *Morrissey v. Brewer*, 408 U.S. 471, 92 S.Ct. 2593 (1972) concerning parole revocations. See: *Young v. Harper*, 520 U.S. 143, 117 S.Ct. 1148 (1997).

The issue of liability was "somewhat confused" due to a failure during the trial to distinguish between the physical removal of Kim from the TRP after she failed the urinalysis on March 3 or 4, 1995, and the formal jurisdictional removal, which took place on April 10, 1995. The appeals court stated, "The distinction between physical and jurisdictional removal bears on the issue of liability because of the change that occurred in the reason for removal. Since the physical removal was prompted by the report of the urinalysis, there was no opportunity for prior notice. Kim had no procedural due process right to prior notice of the physical removal," since it occurred "in the context of an emergency."

Kim, however, "was entitled thereafter to a hearing" to dispute the ground for removal. Also, between the time of Kim's physical removal and jurisdictional removal, the reason for removal was changed from the positive urinalysis report to Kim's mental health classification that was downgraded after the physical removal.

"When procedural due process requires an explanation of the ground for termination of a liberty interest, it requires a statement of the actual ground, and if an initial ground is changed," as it later was in Kim's case, "the person deprived of liberty is entitled to know the new ground."

The appeals court concluded, "Liability thus exists for the lack of notice of the April 10, 1995, hearing and the failure to inform Kim of the correct reason for the removal from the TRP." However, only Hurston was found to be liable and her qualified immunity defense could not stand. The appeals court went on to determine that "the denial of due process in this case was a technical violation that resulted in no compensable damages. The punitive damage award was also vacated. See: *Kim v. Hurston*, 182 F.3d 113 (2nd Cir. 1999).■

No Pretrial Appeals of Motions to Dismiss

The Eighth circuit court of appeals held that it had no jurisdiction to hear interlocutory appeals on issues other than qualified immunity. The court also held it will review FRCP 60(b) motions for abuses of discretion.

Emmit Broadway was a pretrial detainee housed in a jail run by the Arkansas Department of Corrections (DOC). He filed suit claiming he was not provided with adequate medical care while in the jail. The defendants filed motions to dismiss on the basis of qualified immunity and arguing that under FRCP 12(b)(6), Broadway had failed to state a claim upon which relief could be granted. The district court denied both motions but did dismiss one defendant. The remaining defendants then filed a "motion for reconsideration," claiming the court erred in denying their other motions. The district court construed it as a FRCP 60(b) motion and denied relief. The defendants then filed an interlocutory appeal.

The court of appeals held that it had no jurisdiction to review the defendants' arguments regarding their respondeat superior and Rule 12(b)(6) claims because those issues cannot be raised on interlocutory appeals. Instead, the issues must be appealed only after a final order has been entered disposing of the entire case.

However, appellate courts can hear interlocutory qualified immunity appeals. The court held that the district court did not abuse its discretion in denying the defendants' "motion for reconsideration." "In their 'motion for reconsideration,' defendants did nothing more than reargue, somewhat more fully, the merits of their claim of qualified immunity. This is not the purpose of Rule 60(b). It authorizes relief based on certain enumerated circumstances (for example, fraud, changed conditions and the like). It is not a vehicle for simple reargument on the merits. This ground alone is sufficient to prevent a holding that the district court abused its discretion in denying the motion."

In its brief ruling the court did not discuss the details of Broadway's claims, nor the merits of the claims or the defendants' argument. See: *Broadway v. Norris*, 193 F.3d 987 (8th Cir. 1999).■

Individual Analysis Required For Diabetic Class Action Damage Award

By Ronald Young

The court of appeals for the Third circuit held that the lower court erred in holding that all members of the plaintiff class past, present, and future of insulin-dependent diabetic New Jersey prisoners alleged violation of their Eighth Amendment rights.

In 1990, Darryl Rouse, an insulin-dependent diabetic then incarcerated at the Adult Diagnostic and Treatment Center (ADTC) in New Jersey filed a 42 U.S.C. § 1983 action against William Fauver, Commissioner of the New Jersey Department of Corrections; William Plantier, Acting Superintendent of the ADTC; and several other doctors and nurses. "Rouse alleged that the defendants had subjected him to cruel and unusual punishment by failing to provide him with adequate medical care. In 1994, Rouse amended his complaint and sought class certification, declaratory and injunctive relief for class members, and monetary relief for present insulin-dependent diabetic" prisoners.

The district court, in 1996, certified a class consisting of all former, present, and future insulin-dependent diabetics incarcerated at the ADTC. For the purpose of classwide damages, a class consisting of all former and present insulin-dependent diabetics incarcerated at ADTC was also certified. After hearing expert testimony from both sides, the district court found that the plaintiffs "had demonstrated the existence of material fact issues on whether the plaintiffs as a class had received constitutionally adequate medical care and constitutionally appropriate diabetes meals; and that the defendants had been aware of the risks of such inadequacies but had disregarded them. On the issue of qualified immunity, the district court held that the defendants had failed to demonstrate the reasonableness of their actions since the right at issue was clearly established at the time. The court rejected their qualified immunity defense also.

The appeals court found that the lower court erred in concluding a wholesale violation of the plaintiff's Eighth Amendment rights. It also found that at least two distinct groups of diabetics existed-"stable" and "unstable"-and on remand the lower court should address the specific needs of each group, then consider the appropriate level of care due under the Eighth Amendment.

The appeals court further instructed the district court to "analyze separately the situation of each of the defendants who is sued in an individual capacity," and "determine whether each of the individual defendants acted in an objectively reasonable manner with respect to the particular needs of each relevant group of plaintiffs." See: *Rouse v. Plantier*, 182 F.3d 192 (3rd Cir. 1999).■

$97,500 Awarded in NY Prison Work Accident

On July 19, 1999, the New York Court of Claims awarded $97,500 in damages to Fred Thomas for an eye injury he suffered while imprisoned in a New York state prison in 1993.

Thomas, then a 33-year-old prisoner at the Elmira Correctional Facility, was injured when an electric drill bit shattered and a piece struck him in the right eye. He was taken to a hospital where a physician removed substantially all of the vitreous fluid, removed the drill bit fragment with a laser, and burned the immediate area of the retina where the fragment had been impregnated, leaving Thomas with 20/400 vision in the eye.

At a prior trial the State of New York was found 65% liable for the occurrence of the accident, with Thomas bearing the remaining liability. The court awarded $50,000 for past pain and suffering and $100,000 for loss of visual acuity; the total award was reduced by 35% to a total of $97,500. See: *Fred Thomas v. State of New York*, Binghamton County Court of Claims, Claim No. 90205.■

Source: *The New York Jury Verdict Reporter*

Field 'Sleep Out' Without Adequate Toilet Facilities States An Eighth Amendment Violation

By Ronald Young

The court of appeals for the Fifth circuit held that, for qualified immunity purposes, a prisoner who was forced to spend the night outdoors in a work field without adequate bathroom facilities and shelter demonstrated a violation of his clearly established Eighth Amendment rights. The court also held that the warden and assistant warden were not entitled to summary judgement based on qualified immunity.

Devlin L. Palmer, a Texas state prisoner, filed a 42 U.S.C. § 1983 action against TDCJ-ID Director Gary Johnson, Warden Bryan Hartnett, and Assistant Warden Oscar Mendoza. Palmer alleged that in retaliation for some profane remarks made to a field sargeant by members of a field squad he was in, Palmer and the rest of the squad were ordered by Assistant Warden Mendoza to remain seated in the field. Later that afternoon Warden Hartnett ordered the 49 prisoners in the squad to remain overnight in the field. They were confined to a 20-by-30-foot area. There were no toilet facilities and the prisoners were denied shelter, jackets, blankets, "or other means of keeping warm" even though the temperature dropped below 59 degrees that night.

"The district court dismissed with prejudice all of Palmer's claims against Johnson as well as his claims against Hartnett and Mendoza in their official capacities." Hartnett and Mendoza, however, were found "to be liable in their individual capacities for violating Palmer's rights under the Eighth Amendment." The district court "enjoined them from forcing Palmer to endure any future sleep-outs without adequate shelter or clothing," and ordered Palmer's claims for monetary damages against Hartnett and Mendoza in their individual capacities to proceed to trial." After their motion for reconsideration was subsequently denied, Hartnett and Mendoza appealed.

Palmer's allegations that he suffered insect bites and missed a meal did not rise to a "cognizable constitutional injury," according to the appeals court. However, it did find that depriving Palmer of the use of a bathroom for 17 hours, with his only option being "to urinate and defecate in the confined area" that he shared with 48 other prisoners, did "constitute a 'deprivation of basic elements of hygiene.'" The Fifth circuit has previously observed that such prison conditions "are so 'base, inhuman, and barbaric' that they violate the Eighth Amendment." See: *Novak v. Beto*, 453 F.2d 661 (5th Cir. 1971).

Prison officials attempted "to downplay the degree of the claimed deprivation," emphasizing that "the challenged conduct lasted only seventeen hours." The appeals court held, however, that "in addition to duration ... we must consider the totality of the specific circumstances that constituted the conditions of Palmer's confinement, with particular regard for the manner in which some of those conditions had a mutually enforcing effect." See: *Wilson v. Seiter*, 501 U.S. 294, 111 S.Ct. 2321 (1991).

The appeals court also found that "the totality of the specific circumstances presented by Palmer's claim-his overnight outdoor confinement with no shelter, jacket, blanket, or source of heat as the temperature dropped and the wind blew, along with the total lack of bathroom facilities for forty-nine inmates sharing a small bounded area-constituted a denial of 'the minimal civilized measure of life's necessities.'" See: *Farmer v. Brennan*, 511 US. 825, 114 S.Ct. 1970 (1994).

As for the question of qualified immunity, Palmer's assertion that the next morning "Warden Hartnett threatened another night outdoors to 'freeze again' if they refused to work" was sufficient for the required showing of deliberate indifference, and demonstrated a violation of Palmer's clearly established rights under the Eighth Amendment." This defeated Hartnett and Mendoza's claim of qualified immunity.

The district court's denial of Hartnett and Mendoza's motion for summary judgement based on qualified immunity was affirmed. Their challenges of the facts or the grant of summary judgement in favor of Palmer on liability were dismissed. The case was remanded back to the district court for further proceedings. See: *Palmer v. Johnson*, 193 F.3d 346 (5th Cir. 1999).■

Arizona Jury Acquits CCA Escapees

Two Alaska state prisoners on trial for a 1996 escape from a private prison were acquitted by an Arizona jury. The prosecution was undoubtedly stunned by the verdict in what was considered to be an open and shut case. However, the prosecutor in the case had no post-verdict comments for the press.

Jurors returned the not guilty verdicts on February 18, 2000, after Mark Hartvigsen testified that he had to escape from the Central Arizona Detention Center, run by Corrections Corporation of America, because his life was in danger, said his attorney Richard Gierloff.

Hartvigsen told jurors that he has a heart condition requiring medicine but that CCA guards would often withhold his medication for "disciplinary reasons." He also testified that CCA medical personnel gave him the wrong medication for a while, causing him to have a stroke.

Acquittals from escape charges are rare. The "duress defense" presented by Hartvigsen's attorney almost never succeeds. Under Arizona law, a prisoner has to convince the jury that he faced immediate life-threatening danger and that he had tried legal means to fix the problem.

The prosecutor in the case told the jury that Hartvigsen's allegations of medical mistreatment were not true, according to the Alaska Commissioner of Corrections Margaret Pugh. But the prosecutor made a "tactical decision" to not present evidence to the contrary, Pugh told the *Daily News*.

Hartvigsen's co-defendant, Edward L. Martin, was acquitted after offering an even rarer defense. In closing arguments, his attorney John Schaus pointed out to the jury that the prosecution failed to present any evidence that the defendant was the same "Inmate Martin" who escaped. Martin also had complaints about medical maltreatment, but he did not take the stand. "My argument to the jury was, you don't have to get to duress," Schaus told the *Daily News*. "They never established that he left."

Pugh said she and other state officials were astounded when they learned of the verdicts. She attributed them to the "unpredictable nature" of juries.■

Source: *The Daily News*

Iowa Supreme Court Holds Liberty Interest in Good Time Law

The Iowa supreme court held that Iowa prisoners have a due process liberty interest in their good time credits, but do not have a private cause of action under Iowa tort law for their negligent loss. Federal courts previously held that Iowa law did not create a liberty interest in prison good time credits.

Patrick Sanford, an Iowa state prisoner, was infracted on theft charges shortly before his scheduled release from prison. He was found guilty of the charges at a prison disciplinary hearing and sanctioned with 380 days in disciplinary segregation and the loss of 1,000 days of good time credits. After exhausting prison administrative remedies, Sanford filed suit in state court. The trial court upheld the infractions but ruled that the loss of 1,000 days of good time credits was excessive. It then remanded the case to the Iowa DOC for imposition of sanctions consistent with the ruling. The Iowa DOC then reduced Sanford's loss of good time credits to 465 days. The DOC did not appeal from that ruling.

Prior to the thefts, Sanford had a prison release date of May 28, 1994. With the trial court's reduction of the theft sanction, he should have been released from prison on February 6, 1995. However, that date had passed by the time the trial court ruled in his favor. Sanford was not actually released from prison until October 6, 1995.

Sanford then filed suit in state court seeking money damages for the time he spent in prison between February 6, 1995, when he should have been released, and October 6, 1995, when he was actually released. The trial court granted summary judgment to the prison official defendants by ruling that Sanford's claims were barred under *Heck v. Humphrey*, 114 S.Ct. 2364 (1994) and that Iowa code, section 903A.3(1)(1993) does not create a private cause of action for damages when good time credits are wrongly seized.

At the outset, the Iowa supreme court held that Sanford's claims were not mooted by his release from prison. Since the DOC did not appeal the original trial court ruling reducing the disciplinary sanction, they were barred from attacking that judgment in this action.

The court reaffirmed its prior precedent that Iowa prisoners have a due process liberty interest in their good time credits. In *Moorman v. Thalacker*, 83 F.3d 970, 973 (8th Cir. 1996) the federal court of appeals for the Eighth circuit suggested that after *Sandin v. Connor*, 115 S.Ct. 2293 (1995) this was no longer the case. Analyzing Iowa's good time scheme for prisoners the Iowa supreme court concluded that Iowa code chapter 903A creates "an interest of real substance" for the reduction of prisoners' sentences based on their good conduct.

The court was critical of the analysis in *Moorman* and stated that it based its own analysis finding a liberty interest "on the nature of the inmate's interest, not the state's assessment of that interest .... When viewed from the inmate's perspective, his interest in not forfeiting good conduct time is substantial and significant regardless of the degree of misconduct that might result in forfeiture." "Accordingly, we hold that Sanford has a liberty interest in his good conduct time that is protected by the due process clause of the Fourteenth amendment."

The court held that Sanford's due process rights had been violated because, while he had obtained a reduction in sanctions in the trial court, it occurred too late to remedy the harm that had already occurred, i.e., he was held in prison past the date ordered by the court. This distinguished the case from several Eighth circuit cases cited by the defendants.

The court held that *Heck* does not bar Sanford's claim for damages. *Heck* bars collateral attacks on criminal judgements via 42 U.S.C. § 1983. "Sanford's damages claim does not rest on the invalidity of his underlying convictions, it rests on the invalidity of the sanctions imposed. Those sanctions have been invalidated. Thus, the claim made in this § 1983 action does not exceed the scope of Sanford's success in the post conviction relief actions." The court concluded that Sanford's claims against the individual defendants were not barred by *Heck*.

Turning to Sanford's tort claim against the state, the court held that under the Iowa Tort Claims Act, Iowa code, chapter 669, state prisoners do not have a private cause of action for the negligent loss of good time credits.

The court affirmed dismissal of Sanford's claims against the state but reversed and remanded the claims against the prison official defendants back to the trial court for further proceedings. See: *Sanford v. Manternach*, 601 N.W.2d 360 (Iowa 1999).■

PLN On the Air

Every week *PLN* editor Paul Wright delivers prison news and commentary on radio station KPFA, 94.1 FM in San Francisco, CA. Titled *This Week Behind Bars* the show airs every Thursday or Friday between 5 and 6 PM as part of the *Flashpoints* program.

If your local radio stations aren't carrying any prison news or commentary ask them to carry *Flashpoints*. The show is available nation wide over a satellite feed. Straight out of the gulag. Radio stations interested in carrying the show should contact *Flashpoints* producer and host Dennis Bernstein at: (510) 848-6767.

Inmate Classified

Slave Labor O.K.

FLSA Does Not Apply to Detainees

by Matthew T. Clarke

The Third Circuit court of appeals has held that detainees who won their criminal appeals, but the state appealed further, are still "duly convicted" detainees for purposes of the Thirteenth Amendment's prohibition on slavery, even if the detainee ultimately prevails on appeal. The Third Circuit also held that the Fair Labor Standards Act (FLSA) does not apply to detainees or pretrial detainees so that they need not be paid minimum wage for the work they are forced to perform.

Mark D. Tourscher is a Pennsylvania state detainee who was forced to work in the prison's cafeteria during the pendency of his appeal, after the appeal had been decided in his favor by the intermediate court of appeals and Pennsylvania appealed further and after the Pennsylvania Supreme Court refused to hear the state's appeal. Alleging that this was slavery in violation of the Thirteenth Amendment to the United States Constitution, Tourscher filed suit against the prison officials under 42 U.S.C. § 1983.

The Thirteenth Amendment forbids slavery except as punishment for persons "duly convicted" of a crime. Tourscher alleged that he was not "duly convicted" while his case was pending on appeal, after the intermediate court of appeals reversed his case, but it was pending on the state's discretionary appeal, and after the petition for discretionary appeal was denied. Tourscher also alleged that the FLSA applies to him and requires that the state pay him minimum wage for the work he was required to perform in prison. The magistrate judge recommended that the district court dismiss the complaint either for failure to state facts showing a federal constitutional violation or because the law regarding whether a pretrial detainee could be compelled to work was not so clearly established that the prison officials could reasonably know their conduct was unlawful and were thus entitled to qualified immunity. The district court adopted the magistrate's recommendation without stating the basis of the adoption. Tourscher appealed.

Initially, the Third Circuit decided that there was no difference between a detainee who was finally convicted and a detainee whose conviction had been overturned by an intermediate court of appeals, whose decision was pending on review by a higher court. When the state filed their petition for discretionary appeal to the state supreme court, it stayed the decision of the intermediate court of appeals and the initial conviction remained in full force until the state supreme court denied discretionary appeal. Therefore, during that time period, Tourscher was still "duly convicted" for Thirteenth Amendment purposes. Under the Thirteenth Amendment, "duly convicted" detainees could be subjected to involuntary servitude. The obvious logic flaw in this line of reasoning is that, if the higher appeal stays the effect of the lower appeal, why didn't the lower appeal stay the effect of the conviction?

After the state supreme court denied discretionary appeal, Tourscher unquestionably reverted to pretrial detainee status and the Thirteenth Amendment's prohibition of slavery applied to him. Therefore, the court went on the determine whether Tourscher was entitled to FLSA minimum wage for the work he performed as a pretrial detainee.

Noting that all ten circuits which have addressed the issue have held that detainees producing goods and services used by the prison were not "employees" under the FLSA, the Third Circuit held likewise. The court noted that the Fifth Circuit had held that a pretrial detainee required to work for an outside construction company in competition with other private employers was an employee for FLSA purposes, but that was not the case here. Tourscher was not working outside the prison and his work was not similar to traditional free-market employment. Therefore, the court joined the Eleventh Circuit in holding that a pretrial detainee was not an "employee" under the FLSA and could be required to perform work within the prison without minimum wage compensation.

The Third Circuit also held that it could not decide whether Tourscher's constitutional right of freedom from involuntary servitude had been violated by his being required to work during the period he was a pretrial detainee because he did not state in his complaint how many hours and what type of work he was required to perform during that period. Therefore, the case was returned to the district court for service of the complaint on the defendants and determination of the nature and amount of work performed by Tourscher during the eleven days he was a pretrial detainee between his first and second convictions. See: *Tourscher v. McCullough,* 184 F.3d 236 (3d Cir. 1999).■

Douglas Wade

Mailbox Rule Applies to Section 2254/2255 Motions

The Tenth Circuit Court of Appeals held that a prisoner's pleadings were filed at the time he mailed them, even though he used the prison's regular mail system instead of its legal mail system.

While incarcerated at the Federal Correctional Institution in El Reno, Oklahoma, Steven Gray filed a motion to vacate, set aside or correct his sentence, pursuant to 28 U.S.C. § 2255.

Gray's motion was due on or before April 24, 1997 - one year from the effective date of the Antiterrorism and Effective Death Penalty Act, (AEDPA). He mailed the motion on April 21, 1997, but the court did not received it until April 30, 1997.

Because Gray used the prison's regular mail system instead of its legal mail system, the district court rejected his argument that the motion was filed the day he mailed it. Accordingly, the court denied the motion as untimely.

The court of appeals concluded that Gray should not be barred from the benefit of the mail box rule because El Reno's legal mail system does not provide a log or other record of receipt by prison authorities of all legal mail sent from the prison. Because Gray's motion was accompanied by a certificate of service, containing a declaration that he gave his motion to prison authorities on April 21, 1997, and there was no evidence to the contrary, the court concluded that it was timely. See: *U.S. v. Gray*, 182 F.3d 762 (10th Cir. 1999).

In a related case, the First Circuit Court of Appeals held that the prison mailbox rule applies to the filing of motions under 28 U.S.C. § 2255 and § 2254, provided that any available system of recording legal mail is utilized.

Augustin Morales-Rivera's § 2255 motion was due before April 24, 1997. He alleged that he placed it in the prison's internal mail system before the last day of filing but the court did not receive it until August 5, 1997.

The district court rejected Morales-Rivera's argument that the motion was timely filed under the prisoner mailbox rule and dismissed the motion as untimely. The court concluded as a matter of law that the prison mailbox rule applies only to pleadings with filing periods shorter than the AEDPA's one-year period.

The court of appeals vacated the district court judgment, holding that there was no practical or principled justification for refusing to apply the prisoner mailbox rule to § 2255 and § 2254 motions. See: *Morales-Rivera v. U.S.*, 184 F.3d 109 (1st Cir. 1999).

Finally, the Ninth Circuit Court of Appeals held that the AEDPA limitations period was equitably tolled by a state prisoner's reliance on prison authorities to timely submit his § 2254 petition. The court also noted that the mailbox rule would appear to apply because the petition was delivered to prison authorities for mailing before the limitations period expired. See: *Miles v. Prunty*, 187 F.3d 1104 (9th Cir. 1999).■

Private Prison Contract May Be Invalid

The Colorado state court of appeals remanded a case to the trial court for a determination of the validity of a private prison contract. The court implied that the contract may be invalid but failed to indicate what, if any, remedy may exist if it is.

William Arnold, was transferred from a Colorado Department of Corrections (CDOC) facility to a privately operated prison in Dickins County, Texas. He was then moved to a private prison in Karnes County, Texas, and finally to a private prison in Colorado.

Arnold filed a motion in the trial court asserting numerous challenges to his transfer, but the court summarily denied the action, finding that Arnold had been transferred to Texas under the Interstate Corrections Compact, (ICC).

The court of appeals found that there was no evidence in the record to support the trial court's finding that Arnold was transferred pursuant to the ICC. The court also observed that the ICC relates to agreements between states, not to agreements between a state and a county of another state.

The court rejected Arnold's argument that the CDOC Executive Director lacked the authority under Colorado law to enter into contracts with counties of other states. The court also rejected Arnold's claim that neither Karnes nor Dickins counties had authority under Texas law to enter into contracts with the Executive Director for the confinement of prisoners convicted of Colorado offenses.

Arnold claimed that the contract with Karnes County was invalid for not containing the approval of the Controller of the State of Colorado, as required by the express language of the contract. But the court of appeals was unable to review this claim because the trial court made no findings when it denied Arnold's challenge.

The case was remanded for a determination of whether a valid contract existed when Arnold was transferred. The court of appeals suggested that if the contract was invalid, the trial court should then consider the remedy, if any, that Arnold might be entitled to.

See: *Arnold v. Colorado Dept. of Corrections*, 978 P.2d 149 (Colo.App. 1999).■

Mag Wizard

Retaliation Claim Remanded For Hearing On Qualified Immunity

By Ronald Young

The court of appeals for the Second circuit held that a district court's denial of summary judgement to prison guards on grounds of qualified immunity required remand to reconsider whether action against prisoner would have taken place in the absence of any retaliatory motive. The court also held that pendent appellate jurisdiction did not exist over the prisoner's interlocutory cross-appeal on issues unrelated to those qualified immunity issues raised by the guards.

Ronald Davidson, a New York state prisoner, was bench-warranted to New York City pursuant to a writ of habeas corpus ad testificandum signed by a federal judge to testify at another lawsuit he had pending in federal court. During this time, Davidson spent five days at the Metropolitan Correctional Center (MCC), a federal jail run by the Bureau of Prisons (BOP). Davidson filed a *Bivens* suit and alleged that several BOP guards violated his First and Eighth Amendment rights by, among other things, denying him a kosher diet and the opportunity to exercise in retaliation for his filing a lawsuit against a former MCC employee. Davidson also claimed that the denial of a kosher diet violated the Religious Freedom Restoration Act (RFRA). The RFRA, though ruled by the U.S. Supreme Court to be unconstitutional when applied to the states, is still valid for claims against the federal government.

The district court granted defendants' motion for summary judgement as to all claims and all defendants, except for those claims asserted against prison guards Melvin L. Chestnut, Byron Goode, and Ecliffe Govia for retaliatory denial of a kosher diet; and a claim against prison guard Valerie Smith for retaliatory denial of the opportunity to exercise. The prison guards appealed.

On appeal the government argued that the district court, in evaluating whether summary judgement was warranted, erred by failing to consider whether the prison guards would have taken the same actions absent the alleged retaliatory motive. In a claim for retaliation for exercise of a constitutional right, the plaintiff bears the burden of showing that the conduct at issue was constitutionally protected and that the protected conduct was a substantial or motivating factor in the prison officials' actions. See: *Graham v. Henderson*, 89 F.3d 75 (2nd Cir. 1996).

Once the plaintiff has satisfied that burden, the burden then shifts to the defendants to show that they would have taken the action even in the absence of the plaintiff's protected conduct. At the summary judgement stage, if the undisputed facts demonstrate that the challenged action clearly would have been taken on a valid basis alone, defendants should prevail.

The defendants argued that even if retaliation against Davidson was a motivating factor for denying him a kosher diet, there was a BOP policy in place that would have caused them to deny Davidson a kosher diet until his application to the chaplain for a special religious diet was approved. The appeals court felt that it was unclear as to whether or not the district court took this into consideration when it denied qualified immunity summary judgement to the defendants. It vacated the district court's denial of summary judgement to the defendants and remanded to the district court for reconsideration.

Likewise, the appeals court found that it was not clear whether the district court had considered the defendants' arguments that circumstances other than the retaliation factor were cause for Davidson being denied the opportunity to exercise. This, too, was vacated and remanded for reconsideration.

The appeals court also stated that it would not decide matters of evidence sufficiency on interlocutory appeal, even though all parties had urged it to do so. It also held that Davidson's cross-appeal did not overlap with any of the issues raised by the defendants' appeal and therefore pendent appellate jurisdiction was not available for the issues raised by Davidson. See: *Davidson v. Chestnut*, 193 F.3d 144 (2nd Cir. 1999).■

Prison Riots in Peru

On Monday, February 7, 2000, prisoners from the Communist Party of Peru (PCP, or "Shining Path" in the media) led an uprising at the maximum-security prison of Yanamayo in Puno, taking over 30 hostages. Seven guards and police were wounded, and one prisoner was killed, identified as Carlos Celso Ponce Torres.

The next day army troops and police under the command of general José Villenas Arías took over operations. At least six efforts to retake the pavilion by force failed, and negotiations under tight secrecy were begun. It was reported that the PCP prisoners were demanding the presentation of Abimael Guzmán (AKA Chairman Gonzalo), the imprisoned leader of the PCP, because they fear he has been killed by the regime. For some time supporters of the PCP have been raising the demand that Chairman Gonzalo be allowed to appear live on television.The prisoners hung banners and a red flag from the windows, shouting slogans until at least 8:00 PM on Monday.

The hostages were released around midday on Monday, but the prisoners continued their agitation and demanded the presence of Red Cross members to avert a massacre by the army troops surrounding the pavilion. According to unofficial sources, the communist prisoners had signed an agreement with two generals Andrés Bernardo Pineda and Gustavo Bravo Vargas, and Nancy Arias (head ofINPE, the National Prison Institution), in order to release the hostages in exchange for preventing the troops from violently storming the pavilion to crush the uprising.

Peru's President, Alberto Fujimori, stated that the prisoners' had been demanding talks with Abimael Guzmán, to be classified as prisoners of war, and the closing down of the maximum security prison at the naval base in Callao. He denied that any negotiations had occurred. However, this was contradicted by the an INPE report written on February 8 which revealed that the riot was not crushed but ended after an agreement was reached by both parties. The PCP prisoners had been demanding an end to the isolation of Abimael Guzmán and his public presentation; that they be recognized as "political prisoners" and not "terrorist delinquents"; the closing down of the prisons at the naval bases of Callao and Challapallca, in Puno, along with the repeal of Supreme Decree #005-97-JUS, which imposes severe prison conditions for all those convicted of terrorism and "treason to the fatherland".

The prison uprising had been foreshadowed by earlier riots on January 21 when prisoners' relatives were not allowed to visit after reaching the remote prison. Since that time visits had been suspended, and the uprising followed a surprise inspection on Sunday, Feb. 6 by a group of police after they tried to enter the pavilion occupied by the PCP prisoners. After meeting resistance from the PCP prisoners armed with homemade weapons, many of them fled, among them 27 who took refuge in the pavilion occupied by MRTA prisoners.

According to MRTA Tupac Amaru Revolutionary Movement prisoners, the riot began after around 60-70 anti-riot police, armed with shotguns and tear gas, began their inspection and a fight broke out. PCP prisoner Carlos Ponce Torres was shot in the face and Alberto Ramirez was wounded. At that point hostages were taken and some of the police took refuge in the MRTA's pavilion, who did not support the uprising.Conditions in Peru's prisons are known to be particularly harsh; Yanamayo is located at 3,870 meters above sea level, and it is very difficult for prisoners' relatives to visit. In June 1986, the Peruvian government massacred some 300 prisoners in the prisons of El Fronton, Lurigancho and Callao during a prison revolt by the communist prisoners.

Similarly in May 1992, over 100 prisoners at Canto Grande prison were massacred after a prison uprising was put down.■

Sources: *La Republica* 2/8/2000, 2/9/2000, 2/10/2000, *Sol Rojo*

IN Jail Settles Victim Suit for 1650,000

On September 10, 1999, the Howard County jail in Indiana settled a lawsuit by crime victims for $650,000. A mother, 44, and her 9 year old daughter were physically and sexually assaulted by a prisoner who escaped from the jail by using a maintenance key to access a utility shaft.

The plaintiffs sued the board of commissioners and jail defendants for negligently allowing the prisoner's escape, thereby creating a foreseeable risk of harm and danger to people outside the jail. The plaintiffs also claimed the defendants .failed to take adequate security precautions because another prisoner had gained access to the same utility shaft three years before this incident. The plaintiffs claimed defendants failed to supervise the escapee, properly maintain the jail and hire, train and supervise qualified security staff.

The defendants denied any wrongdoing or liability and paid the plaintiffs $650,000 to settle the lawsuit. See: Doe v. US DC, SD IN, Case No. IP98-0073-CH 43 ATLA 57 (2000).■

Source: ATLA Law Reporter

Inmates Aid

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$12,000 Awarded in NY Slip and Fail

On July 15, 1999, the New York court of claims awarded pro se New York state prisoner Hamilton Thompson $112,000 for past pain and suffering. In 1996, while imprisoned at the Oneida Correctional Facility, Thompson slipped and fell in a puddle of water in his cell.

Prior to falling in the water Thompson had noticed the cell roof was leaking when it rained and prison officials were aware of the leak but did not fix it. The court held that Thompson had established a prima facie case of negligence by prison officials, which was not rebutted at trial.

Thompson suffered a broken nose in the fall as well as minor facial cuts. The court awarded $112,000 in damages. See: *Thompson v. State of New York*, Claim Number 94295, Court of Claims, Saratoga Springs.■

Source: *New York Jury Verdict Reporter*

The Western Prison Project

The Western Prison Project exists to help build a movement for progressive prison and criminal justice reform in our region (OR, WA, ID, MT, WY, UT, NV). We help support grassroots organizations working on prison issues (through research, coordination of joint projects, and technical assistance), and reach out to the public with information about the prison crisis in our region, to mobilize citizen action for reform. We publish "Justice Matters", a quarterly newsletter for members ($7 membership for prisoners, $15 others). Contact:

The Western Prison Project
P.O. Box 40085, Portland, OR 97240
(503) 335-8449
wpp@teleport.com

Marriott Cancels Prison Protest Concert

Sodexho-Marriot is a huge transnational corporation mainly consisting of hotel and food service operations. Marriott Dining Services, a subsidiary of Sodhexo-Marriott, operates the American University Tavern on the Washington D.C. campus of AU.

On February 15, 2000, a hip-hop concert was booked at the Tavern by AU Students for Sensible Drug Policy (SSDP). The show, "No More Prisons," was scheduled to coincide with many other events held around the country to protest the U.S. prison and jail population reaching two million, which had been estimated to occur on or about that date.

But a few minutes before the show was supposed to begin, AU SSDP vice president Dave Epstein announced from the stage that the management staff of the Tavern would not allow the show to happen.

Earlier that day AU and George Washington University's chapters of SSDP held an anti-drug war vigil in front of the U.S. Capitol. At the Tavern, several representatives from both AU's and GW's SSDP, as well as the Drug Reform Coordination Network, were distributing pamphlets outlining the increased cost of imprisonment and the decrease in spending on education.

"We had a hip-hop show planned," Epstein told a packed house from the stage of the Tavern, "But Marriott Dining Services, a company that invests highly in private prisons, has determined that the show is not going to happen."

Epstein was referring to Sodexho's 11 percent shareholding in the Corrections Corporation of America, the worlds largest private imprisonment firm. He said the cancellation "smacks of conspiracy."

Sodhexo-Marriott representatives said there was no bias against the concert's anti-prison theme that influenced their decision to stop the show. Rather, the paperwork necessary to hold the concert had not been filed on time.

The concert was quickly relocated to SSDP President Kate Sander's house; cars and volunteer drivers were rounded up to transport the audience and the artists and the show went on.

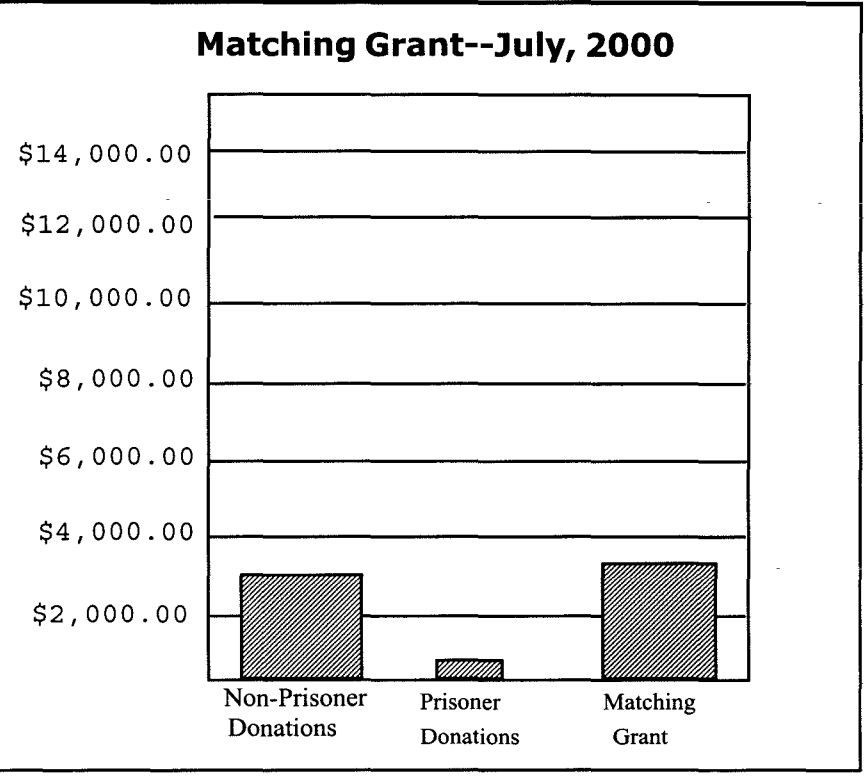
Was this a simple paperwork snafu, as Marriott officials claimed, or a blatant example of corporate repression of political speech?

"Obviously SSDP has no knowledge of any conspiracy by Sodhexo-Marriott against us," GW SSDP president Kristy Gomes said. "In order to uncover a conspiracy would take years of legal fighting... but it raises a lot of questions."■

Source: *The Eagle American U-Wire*

Contribute to PLN's Matching Grant Campaign

A PLN supporter will provide a matching grant for all individual donations made to PLN between March 1, 2000 and January 15, 2001, up to and including $15,000. The matching grant does not apply to money sent to PLN to pay for subscriptions, buy books or to grants from foundations. It applies only to individual donations. Donations by non prisoners will be matched dollar for dollar up to $500. Donations by prisoners will be matched at the rate of two dollars for every dollar given. All donations are tax deductible. New, unused stamps and embossed envelopes are fine. If you haven't donated to PLN's Matching Grant Campaign yet, please do so now. No amount is too small and every little bit helps. We will announce the amount raised in our February, 2001 issue unless we meet the $15,000 goal before then.



News in Brief

CO: On April 26, 2000, Bobby Fowler, 24, a captain at the Kit Carson Correctional Center in Burlington, was arrested and charged with felony criminal mischief for punching walls and knocking over a metal detector at the prison. The prison, operated by for profit Corrections Corporation of America, is chronically understaffed. Fowler was reprimanded when a surprise inspection by the Colorado Dept. of Corrections found nine guards, instead of 11, guarding 400 prisoners. Fowler claimed his outburst was the result of working 15 days in a row, which caused him to miss taking the medication he uses to control his bipolar disorder.

CA: On April 27, 2000, an unknown person fired a large caliber weapon into the Santa Clara probation department's work release facility in Mountain View. An unidentified 20 year old male prisoner was killed by the gunshot and an unidentified female counselor was cut by flying glass from the shot. The prisoner was serving a sentence for a non violent offense and was due to be released within a week of his death. Police are investigating the shooting.

CA: On April 6, 2000, Viola Cisneros, a medical worker at the California Medical Facility in Vacaville was taken hostage in the prison print shop by John Cantazarite, 50. Cantazarite had threatened to set Cisneros on fire if he was not allowed to place three phone calls outside the prison. Two hours later a Special Emergency Response Team broke down the print shop door and subdued Cantazarite. No injuries were reported. Cantazarite is serving time for rape and robbery.

CA: On March 1, 2000, six prisoners were injured in a fight between black and Hispanic prisoners at the Victor Valley Community Correctional Facility. The minimum security prison is operated by Marantha Private Corrections, a private, for profit prison company, on behalf of the California Department of Corrections. Ten to fifteen prisoners were involved in the brawl.

CA: On March 2, 2000, Kedrin Kizzee, 26, escaped from the West Valley Detention Center in Rancho Cucamonga by impersonating another prisoner scheduled for release. Kizzee was awaiting trial on charges of possessing marijuana, 20 kilos of cocaine, hundreds of false credit cards and machines with which to make them. Police said this was the third escape from the jail involving switched identities. Kizzee was caught two days later in Buena Park. Police later arrested Lya Manuela Bernard, 33, a jail custody specialist, and charged her with allowing Kizzee to be released from the jail.

CA: On March 25, 2000, Nevada prisoners James Prestridge, 39, and John Doran, 26, escaped in Chula Vista while being transported to other state prisons by private, for profit, transport company Extraditions International. The men escaped by overpowering and disarming one guard while they used the bathroom, then returning to the van and disarming the other guard. The men then put the guards into the back of the van with the other prisoners and drove around before abandoning it. Prestridge, serving a sentence of life without parole for murder, was being transferred to a North Dakota prison. Doran, serving a six year robbery sentence, was being extradited to face additional criminal charges in Colorado. Extraditions International planned to pick up additional prisoners in San Diego before returning East.

Colombia: On April 28, 2000, rioting by right-wing paramilitary prisoners at the El Modelo federal prison in Bogota left 26 dead. The rioting started on April 26 when guards found the body of a missing paramilitary prisoner chopped up in a garbage bag in a sewer pipe. In retaliation for the murder, paramilitary prisoners attacked the cell block housing the presumed attackers, mainly social prisoners convicted of murder and robbery. Using guns and grenades the paramilitary prisoners killed 26 and wounded 18 social prisoners before negotiating with police to return to their cells.

Colombia: On March 1, 2000, James Springette, 39, an American awaiting extradition to the United States on drug smuggling and murder charges, escaped from la Picota prison in Bogota. Springette requested a new mattress, wrapped himself in the old one and was carried past seven checkpoints out of the prison. Fifteen prison guards were suspended after his escape, which purportedly could not have happened without guard collusion. Springette is described by police as an expert in mapping drug smuggling routes in the Caribbean. Apparently he can map escape routes as well.

DC: On April 17, 2000, Hilton Coleman, 48, a U.S. Marshal supervisor, pleaded guilty to stealing $6,500 intended for people in the Witness Protection Program. Coleman would forge the witnesses signature on voucher receipts and give them less money than he was supposed to, pocketing the difference.

IL: In 1999 the Illinois DOC collected $57,818 from Illinois prisoners under a statute authorizing the collection of money from prisoners to pay for the cost of their captivity. The money collected was from prisoners working for prison industries. In 1999 Illinois spent $856 million on its prison system.

IL: In March, 2000, James P. Struensee, 30, was sentenced to 16 months in federal prison and 3 years of supervised release after pleading guilty to federal charges of possessing child pornography. At the time of his arrest, Struensee was an internal affairs investigator at the Stateville Correctional Center in Joliet.

Mexico: On April 26, 2000, hundreds of prisoners at the La Loma jail in Nuevo Laredo rioted to protest plans to replace the jail's director, Jose Luis Pompa Guerrero. The rioters demanded that Pompa remain at the jail.

NY: On March 29, 2000, Timothy Weeden, 27, was sentenced to six years in prison after pleading guilty to forcing a 15 year old girl to perform oral sex on him during the Woodstock concert. Weeden was employed as a guard at the Marcy Correctional Facility at the time of the attack.

OH: On April 4, 2000, Jeffrey Corbett, 52, was sentenced to 4 years in prison after being convicted in Williams County Common Pleas Court of sexually assaulting three female prisoners at the Corrections Center of Northwest Ohio. Corbett was a supervisor at the jail. According to the victims, Corbett forced them to perform sexual acts while purporting to "counsel" them on disciplinary charges. Corbett was convicted of four counts of sexual battery stemming from the attacks.

OH: On March 27, 2000, Roy Williams, 40, was charged with stealing lighting fixtures and painting equipment while ostensibly supervising prisoners working on a Habitat for Humanity housing project. Williams is a prison guard at the Grafton Correctional Institution. He is charged in state court with receiving stolen property and theft in office. Habitat for Humanity is a non profit group that builds homes for poor people.

OH: On March 31, 2000, Cleveland House of Corrections guards Steven Dlugon, Samuel Young and Terrell Pruitt severely beat jail prisoner Robert Wade, 30. The jail investigated the attack and on May 2, 2000, fired Young and Dlugon. The local prosecutor has recommended that police arrest the three guards on felony charges.

PA: On April 13, 2000, Hasn Dempsey, 20, was charged with manslaughter in the death of Carl Harden, 50, while both men were prisoners in the Philadelphia House of Corrections. Dempsey had told Harden not to stand behind him while they were watching television, Harden did not move. The men then scuffled and Dempsey lifted Harden upside down and drove his head into the concrete floor in the jail dayroom. Harden later died of head injuries.

NY: Responding to complaints by Jail Ministries, the State Commission on correction has ordered the Onondaga County Justice Center to provide jail prisoners with more underwear. The group claimed jail prisoners were forced to wear the same underwear for days on end due to shortages. Jail officials agreed to spend $38,000 from money they receive as kickbacks from the prisoner's phone calls to buy the additional underwear.

TX: On April 7, 2000, a Tyler jury sentenced Kenneth payee, 29, to 16 years in prison for stealing a Snickers bar from a local grocery store. Defending the sentence, Smith county assistant district attorney Jodi Brown told media "It [the Snickers bar] was a king size." The theft was charged as a felony because Payne has prior criminal. convictions, including one for stealing a bag of Oreo cookies.

VA: On April 17, 2000, Calvin Clarke, 30, a Hanover County Jail prisoner, freed himself from his handcuffs and took a 45 caliber pistol from an unidentified jail guard. Clarke then took the guard hostage, forced him to drive away from the jail and later held police at bay for 32 hours before surrendering. No one was injured during the incident. Clarke was being taken to court for sentencing when he freed himself. He faces additional charges stemming from the escape attempt.

Vietnam: To celebrate the 25th anniversary of liberating South Vietnam and unifying their nation, the government announced on April 30, 2000, that it would free 12,000 prisoners.

WA: In April, 2000, King county (Seattle) jail guard Alvin Walker, 49, was charged with bigamy.

WA: In April, 2000, Ryan Wade Mackey, 24, was sentenced to 12 months of community supervision after pleading guilty to disorderly conduct and obstructing a law enforcement officer. Mackey, a white guard at the Clallam Bay Corrections Center (CBCC) in Clallam Bay, was originally charged with felony malicious harassment after confronting three blacks and an Indian in a Port Angeles restaurant. According to police, Mackey cursed and pushed them "asking what they were doing there and stating that their kind did not belong there, so they should leave." As previously reported in the May, 1999, issue of *PLN*, CBCC has a long history of racist prison employees.

WA: On March 28, 2000, officials at the Snohomish County Jail in Everett announced they would no longer force women prisoners to strip naked in an outdoor recreation area, in full view of male guards, in order to exchange clothing and linen. The prisoners were required to remove their clothes outdoors in freezing temperatures and in view of male guards to get clean clothing. Jail spokesman George Hughes said the outdoor stripping program was devised to allegedly stop prisoners from flushing clothes down toilets. "That was a solution that was developed by a few of our staff, and it worked. Our staff is constantly trying to find ways to improve things."

WA: On May 8, 2000, James Harris, Jr. 42, was charged in King County (Seattle) superior court with abuse of power, assault and custodial sexual misconduct. Harris, a former Renton City Jail guard, is charged with raping at least 1 female prisoner at the jail in 1998 as well as having sexual contact with other female prisoners.

WI: On April 26, 2000, police arrested Sandra Peterson, 50, and charged her with. smuggling marijuana into the Jackson Correctional Institute in Black River Falls on 8 occasions. Peterson teaches basic math, science and reading to prisoners at the facility. Peterson was investigated, after informants identified her as smuggling drugs into the prison.

$47,500 Settlement in Pennsylvania Restraint Suit

In May, 1999, the Northampton County Prison (NCP) paid Maria Merced $47,500 to settle a "hogtying" lawsuit she had filed. In August, 1996, while awaiting trial in the NCP, Merced argued with a guard and eventually spat on him. A number of guards then rushed into her cell, handcuffed her hands behind her back, placed shackles around her ankles and then chained the handcuffs to the shackles and left her like that for about eight hours.

On October 7, 1996, Merced was hogtied in this manner for four hours. On October 9, 1996, she was hogtied for 91/2 hours, this time while she was naked. She was also denied food during this period. A community investigation was conducted of the incidents and eventually one of the guards involved in the incidents was fired and several others were suspended. Merced suffered lower back and neck strain, contusions on her thighs and lacerations and swelling on her wrists as a result of the hogtyings.

Merced filed suit claiming the hogtyings violated her Eighth amendment rights against cruel and unusual punishment. The Northampton County Prison settled the lawsuit by paying Merced $47,500 in damages and changing its policies to ensure restraints are used only for medical and mental health purposes and not for disciplinary reasons. Merced was represented by the Pennsylvania Institutional Law Project. See: *Merced v. Northampton County Correctional Facility*, USDC ED PA, Case No. 98-4215.■

$100,000 Awarded Under ICCPR in GA Jail Suit

On February 24, 2000, a federal jury in Augusta, Georgia awarded $1100,000 in damages to a Danish citizen who was denied medical care and phone calls to his family in Denmark while he was awaiting trial in the Lincoln County Jail in Georgia. The ruling is historic because it is the first time and American jury has awarded damages under the International Covenant on Civil and Political Rights (ICCPR), a treaty to which the United States is a signatory.

Flemming Ralk, 72, was held for 14 months in the Lincoln county jail in Lincolnton, Georgia, awaiting trial on federal fraud charges. Ralk went to trial and was acquitted on all charges. While awaiting trial Ralk repeatedly sought medical treatment for a herniated disk and stomach trouble. He did not receive adequate medical treatment. He was also denied reading material and outdoor exercise. The jail's phone system only allows for collect calls within the United States. Ralk was not allowed to make any phone calls to his family in Denmark nor receive any calls from them.

Ralk filed suit under the ICCPR and 42 U.S.C. § 1983. The district court held that rights under the ICCPR are no greater than those under the U.S. constitution. In a published ruling involving the granting of summary judgment to the jail's doctor, the court held that there was no private cause of action for litigants under the ICCPR However, news reports state that Ralk's ICCPR claims did in fact go to the jury on his claims against the remaining defendants. After a three day trial a jury held that Ralk's rights under both the ICCPR and the U.S. Constitution had been violated by Lincoln county, sheriff Edwin Bentley and chief jailer Mary Booker. The jury awarded Ralk $100,000 in damages.

Tyge Trier, Ralk's Danish attorney who handled the ICCPR claim, said the jury understood that Ralk was presumed innocent while in the jail yet he was not treated as such. Joseph Wargo, the Atlanta lawyer who also represented Ralk, said he believed a $100,000 award by a South Georgia jury indicated how serious violations were at the Lincoln county jail. Wargo said the ruling was an important precedent because juries in this country have rarely been allowed to consider ICCPR claims. In addition, it should alert jail officials to special concerns by foreign citizens imprisoned in their jails. Ralk said the damages did not fully compensate him for money he lost from his businesses while he was imprisoned by "I think I got satisfaction, definitely." See: *Ralk v. Lincoln County*, Georgia, 81 F. Supp.2d 1372 (SD GA 2000).

Primary source: *Associated Press*

FDC

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The Politics of Heroin: CIA Complicity in the Global Drug Trade, by Alfred McCoy; Lawerence Hill Books, 634 pages. **$24.95**.....

Latest Edition of the scholarly classic documenting decades of U.S. government involvement in drug trafficking. A must read for anyone interested in the "War on Drugs."

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Crime and Punishment In America: Why the Solutions to America's Most Stubborn Social Crisis Have Not Worked-And What Will, by Elliott Currie; Holt & Co. 230 pages. **$12.95**

Effective rebuttal to the right wing proponents of prison building. Fact based argument showing crime is driven by poverty. Debunks prison myths and discusses proven, effective means of crime prevention.

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Acres of Skin: Human Experiments at Holmesburg Prison, by Allen Hornblum; Routledge Press, 297 pages. **$16.00**

Detailed exposé on the widespread practice of using American prisoners in medical and military experiments and of testing cosmetics, drugs and chemicals on prisoners. The experiments took place until the mid 1970's. Compares American prisoner experiments to those carried out by Nazi doctors in concentration camps.

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Twice the Work of Free Labor: The Political Economy of Convict Labor in the New South, by Alex Lichtenstein; Verso, 264 pages. **$19.00**

History of prison slave labor in industrializing the post civil war Southern economy. Explains how prison slavery was an integral part of the American economy in the post civil war era. Puts today's prison slave labor practices into context.

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Worse Than Slavery: Parchman Farm and the Ordeal of Jim Crow Justice by David Oshinsky; The Free Press, 306 pages. **$12.00**

Historic analysis of modern prison slave labors roots in chattel slavery. Focuses on prison plantations and self sustaining prisons. Analyzes the impact segregation had in ensuring blacks were imprisoned and their labor exploited. Must reading to understand prison slave labor today.

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The Rich Get Richer and the Poor Get Prison: Ideology, Class and Criminal Justice, by Jeffrey Reiman; Allyn & Bacon, 226 pages. **$27.25**

The best book providing a Marxist, class based analysis of the criminal justice system. Factual details on how corporate criminality and crime by the rich is rewarded while the poor bear the brunt of imprisonment. If you read no other book on the criminal justice system, read this one.

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Lockdown America: Police and Prisons in the Age of Crisis, by Christian Parenti; Verso, 290 pages, Hardback. **$25.00**

Radical analysis of the ruling class war on the poor via the criminal justice system. Well supported by the facts and first hand reporting. Covers paramilitary policing and SWAT teams, urban pacification and zero tolerance policing, the INS/Border Patrol and Prisons. Best book on these issues.

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No Equal Justice: Race and Class in the American Criminal Justice System, by David Cole; The New Press, 224 pages, Hardback. **$25.00**

Devastating critique showing how the criminal justice system perpetuates and thrives on race and class inequality, effectively creating a two tiered system of justice at all levels. Describes how the supreme court has hypocritically endorsed this system and ensured it continues. Extensive case citations and legal analysis.

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Review

The Politics of Heroin: CIA Complicity in the Global Drug Trade

By Alfred W. McCoy

Lawrence Hill Books, 1991, 634pgs.

Review by Rick D. Card

Imagine America, the great crusader against illicit drugs, a nation willing to sacrifice hundreds of thousands of its citizens in the name of its War on Drugs. Now imagine that same sovereign secretly allied with known drug producers and traffickers and actively engaged in the control and transportation of those same drugs. This is the contrast unveiled in Alfred McCoy's book, *The Politics of Heroin.*

Heroin has a history that dates further back than the 5th century BC. In the *Odyssey*, Homer describes it as medicine to "lull all pain and anger, and bring forgetfulness of every sorrow." Today it is known as an illegal substance that brings hard core addiction or a fifteen year prison stretch.

How heroin went from the source of everlasting joy described by Homer to a potion of destruction in communities today has a lot to do with American and British activities. A subject McCoy has feverishly researched and documented. He charts the path of heroin as American and British merchants commercialized it and created a world opium trade. Trading it to the Chinese for tea, silk, and porcelain, the two great Western democracies laid a foundation for heroin trading that remains to this day.

The Politics of Heroin begins with a historical look at opium and describes how pharmaceutical companies such as Merck and Bayer transformed it into heroin, then aggressively marketed it domestically in the United States. By touting it as a substitute for morphine, doctors and pharmaceutical companies pushed the addictive narcotic onto an unsuspecting nation.

The early 1900s marked the beginning of a transition from legal to illegal consumption of narcotics, and with it arose a black market where once stood a free market. It is here, says McCoy, that the real politics of heroin took shape.

World wars and a rising and then crashing stock market kept most of the leaders busy during the first fifty years of the 20th century. However, as World War II closed and the Cold War began, McCoy says that America entered the unseemly world of illegal drugs.

McCoy writes, "Needing new weapons to fight a new kind of war, the Truman Administration created the Central Intelligence Agency (CIA) in 1947 with two main missions--espionage and covert action. In effect, the CIA became the vanguard of America's global anti-Communist campaign. Practicing a radical pragmatism, its agents made alliances with any local group, drug merchants included, capable of countering Communist influence."

Within years of its creation, the CIA began to recognize the financial, logistical, and political power of heroin production overseas. Perhaps, McCoy suggests, the CIA recognized a "natural affinity between covert operations and criminal syndicates," which may have lured them to form alliances. In the words of one retired CIA agent, both covert operations and criminal syndicates practice "'Clandestine art'--the basic skill of operating outside the normal channels of civil society."

The first clue to seeing the connection between the CIA and heroin involvement arose during the 1950's when federal agencies appeared to restrict domestic and international illicit drug trafficking, but conspicuously avoided Southeast Asia, the heartland of heroin production, and a center of CIA involvement. As it turned out, this was no coincidence.

The Politics of Heroin presents three distinct levels of American entanglement in drug trafficking. The first was what McCoy calls coincidental complicity, which is to say that the U.S., through the CIA, allied itself with groups who were active participants in the illegal drug trade. The second level was the CIA's active support of the traffickers evidenced by its efforts to cover-up for known heroin dealers thereby condoning their activities. Finally, McCoy cites the active participation by American diplomats and CIA operatives in the transportation of opium and heroin as the third level of U.S. complicity in the international drug trade.

Throughout the book, McCoy takes us step-by-step through the labyrinth of international drug syndicates as they emerged, evolved, and eventually came to dominate the global market place. Behind every corner, he finds and documents evidence of CIA and American diplomatic involvement. The research is exhausting, and the proof undeniable.

Into the 1980s, while eclipsed by the media's attention on cocaine and crack, global heroin production and U.S. consumption rose steadily--a direct effect of the CIA's complicity in the opium fields of Southeast Asia. McCoy points out that world opium production tripled from an estimated 1,600 tons in 1982 to a whopping 4,600 tons in 1990. This production is traced to two key aspects of U.S. policy: the failure of the DEA's interdiction efforts and the CIA's covert operations.

The Politics of Heroin is a real blow to the legitimacy of America's War on Drugs. It shows indisputably that while the United States has set upon a course of incarcerating its citizens for mere possession of the smallest amounts of illegal drugs, it has itself been embroiled to the largest possible extent in the production and transportation of heroin.

The level of hypocrisy unveiled by this book is enough to rattle one's mind. A government who's left hand destroys what its right produces--namely, citizens who sell, possess, or use illegal drugs. But then crimes of this magnitude are all too common in the greatest democracy in the world.

[This book is available through PLN, 2400 NW 80th #48, Seattle, WA 98117, for $24.95 plus $3.20 for priority shipping.