

# Prisoners' Rights Handbook

2013 Edition

**A Guide to Correctional Law Decisions of the Supreme Court of  
the United States & the United States Court of  
Appeals for the Third Circuit**



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*We wish you, the prisoner, the best in the use of this handbook. Despite some negative public perceptions of inmate litigation, we remain committed the old adage that the pen is mightier than the sword and commend your efforts to utilize our judicial system to bring about a just result to your concerns and those of the millions of prisoners throughout the United States and the world.*



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# Table of Contents

<b>Introduction</b>	<b>1</b>
<b>I. Access to the Courts</b>	<b>2</b>
A. Elements of an Access Violation	3
B. Law Libraries	5
C. Legal assistance Programs	7
D. Prisoner to Prisoner Legal Assistance	9
E. Attorney Client Communications	11
F. Notary Services	13
G. Legal Supplies, Property, and Photocopies	13
<b>II. First Amendment Issues</b>	<b>15</b>
A. Mail and Publications	15
B. Religious-Based Issues	20
1. Bona fide Religion	21
2. Sincerity of Beliefs	22
3. Balancing Religious Beliefs Against Penological Interests	23
4. RLUIPA-Based Claims	26
C. Association and Media Rights	29
1. Intimate Association	29
2. Expressive Association	31
3. Access to Press	32
D. Retaliatory Conduct	33
1. Protected Conduct	34
2. Adverse Action	34
3. Causal connection	35
<b>III. Fourth amendment Issues</b>	<b>37</b>
A. Cell Searches	37
B. Body Searches	38
C. Pat-down Searches	39
D. Strip Searches	39
E. Digital Body Cavity Searches	41
F. Blood and Urine Testing	43
G. Searches of Prison visitors	44
<b>IV. Procedural Due process</b>	<b>47</b>
A. Administrative Segregation	48
B. Classification Decisions	50
C. Clemency Decisions	51
D. Disciplinary Sanctions	52
E. Involuntary Medication	57
F. Prison Transfers	58
G. Pre-release Programs	60
H. Parole Release	61
I. Property	62

<b>V. Eighth Amendment issues</b> .....	<b>64</b>
A. Health Care .....	65
1. Are Prisoner's Medical Needs "Serious?" .....	66
2. Were State Officials Deliberately Indifferent? .....	67
a) Knowledge Requirements .....	67
b) Failure to Act .....	68
B. Prison conditions .....	71
C. Prison violence .....	75
D. Sexual Abuse of Female Prisoners .....	77
E. Excessive Force .....	80
<b>VI. Equal Protection</b> .....	<b>83</b>
<b>VII. Ex Post Facto Laws</b> .....	<b>86</b>
<b>VIII. Americans with Disabilities Act</b> .....	<b>88</b>
A. Is the Prisoner Disabled within the Meaning of the ADA? .....	90
1. Physical or Mental Impairment .....	90
2. Major Life Activity .....	90
3. Substantial Limits .....	91
4. Record of, or Regarded as, Disabled .....	92
B. Is the Prisoner Qualified for Correction's Services, Programs and Activities .....	92
C. Reasonable Accommodation .....	92
<b>IX. Prisoner Litigation Reform Act</b> .....	<b>94</b>
A. Exhaustion of State Remedies .....	94
B. Filing Fee .....	97
C. Screening provisions .....	99
D. Physical Injury Requirement .....	99
E. Three Strikes Provision .....	101
F. PLRA Restrictions on Remedial Actions .....	102

1974 the Supreme Court made clear that prisoners do not forfeit all constitutional protection by reasons of their conviction and confinement. "But though his rights may be diminished by the needs exigencies of the institutional environment, a prisoner is not wholly stripped of constitutional protections when he is imprisoned for crime. There is no iron curtain drawn between the Constitution and the prisons of this country." Wolff v. McDonnell, 418 U.S. 539, 556 (1974).

Nearly four decades later, the courts are still refining which constitutional rights "may be diminished" or even totally withdrawn due to the "needs and exigencies of the institutional environment."

While reality tells us that prisoners cannot exercise the same freedoms as ordinary citizens, see Price v. Johnston, 334 U.S. 266, 285 (1948) ("Lawful incarceration brings about the necessary withdrawal of limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system."), we also know that not all constitutional protections are sacrificed at the prison gate. See Pell v. Procunier, 417 U.S. 817, 822 (1974) (a prisoner retains those rights "that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system").

When balancing conflicts between constitutional rights and institutional needs, the Supreme Court has directed judges to grant prison officials "wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline, and to maintain institutional security." Bell v. Wolfish, 441 U.S. 520, 547 (1979). In short, when constitutional exercise conflicts with a valid state interest, chief among them prison security, it is the constitutional right which must yield.

The analytical framework adopted by the Supreme Court unquestionably favors state officials over inmates and state interests over constitutional exercise. Maybe

this is necessary given the complexity and difficulty of prison management. In any event, deference to state officials is not the only problem facing prisoners today. Prodded by the Supreme Court, Congress enacted a series of procedural changes—The Prison Litigation Reform Act of 1995 ("PLRA")—with the express purpose of reducing inmate lawsuits and terminating federal intervention in prison operations. Henceforth, either one complies with PLRA mandates—such as exhaustion of state grievance procedures—or the case will be dismissed, no matter the merit. See McCoy v. Gilbert, 270 F.3d 503, 507 (7th Cir. 2001) (prisoner's suit alleging beating dismissed on PLRA non-exhaustion ground despite fact that guards were cited by Department of Justice for misconduct, including physical abuse of prisoners and filing false FBI statements).

Concluding our introductory remarks, prisoners retain those rights which do not conflict with legitimate penological interests. When making this determination, the courts must give "wide-ranging deference" to valid state concerns, particularly prison security. Identifying exactly which rights survive incarceration and which rights may be diminished or withdrawn, we turn to next.

## I. ACCESS TO THE COURTS

In Bounds v. Smith, the Supreme Court held “prisoners have a constitutional right of access to the courts.” 430 U.S. 817, 821 (1977). Moreover, to safeguard this right, the Court has “required States to shoulder affirmative obligations to assure all prisoners meaningful access to the courts.” Id. at 824. The Supreme Court further held that prison officials must “assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law.” Id. The Bounds majority went to great lengths to point out, however, that while law libraries are one constitutionally acceptable method to assure meaningful access to the courts, other methods (such as using paralegals and bar association programs) were also permissible. Id. at 830. “Any plan, however, must be evaluated as a whole to ascertain its compliance with constitutional standards.” Id. at 832.

Bounds established the principle that inmates enjoy a constitutional right of access to the courts, and that prison officials must provide resources to guarantee that right. Bounds was vague, however, about the specificity of proof necessary to establish and access violation. To this end, almost twenty years later, the Supreme Court refined Bounds by requiring prisoners to prove an “actual injury” in order to sustain an access to courts violation in Lewis v. Casey, 518 U.S. 343 (1996). This ruling would invalidate dozens of lower court precedents and dramatically change access jurisprudence.

In Casey, Arizona inmates brought suit, alleging that prisons throughout the Arizona Department of Corrections (“ADOC”) deprived them of their constitutional right of access to the courts. Id. at 346. Following a three month bench trial, the lower court agreed that ADOC violated Bounds due to a variety of deficiencies, including: untrained library staff, delayed legal materials to lockdown prisoners, failure to upgrade law

libraries, and denial of legal assistance to illiterate and non-English speaking inmates. Id. at 346-7. A 25-page injunctive order was issued, requiring the ADOC to improve its access programs throughout its prisons. Id. at 347.

The Supreme Court reversed both the finding of a systemic-wide Bounds violation and the injunction imposed upon the ADOC to correct its deficiencies. Id. at 361-2. The Court reasoned that the prisoners’ “systemic challenge was dependent on their ability to show widespread actual injury, and that the court’s failure to identify anything more of a systemic Bounds violation invalidated.” Id. at 349. It is Casey’s requirement that prisoners alleging access violations provide proof of “actual injury” that is decisive and pivotal. Id. at 350.

According to Casey, prisoners do not have a constitutional right to a law library or to legal assistance. Id. at 350. Rather, prisoners only have a constitutional right to access to the courts. Id. Prison law libraries and legal assistance programs are merely the means by which the States ensure prisoners have an adequate opportunity to present their constitutional grievances into the courts. Id. at 351. Accordingly, “an inmate cannot establish relevant actual injury simply by establishing that his prison’s law library or legal assistance program is sub-par in some theoretical sense.” Id. at 351. Rather, “the inmate therefore must go one step further and demonstrate that the alleged shortcomings in the library or legal assistance program hindered his efforts to pursue a legal claim. Id.

The Casey majority described its “actual injury” standard as a “constitutional prerequisite”. Id. at 351. In light of such remarks, it is abundantly clear that no matter the nature of a prisoner’s law-related grievance – inadequate law books, insufficient library time, untrained inmate law clerks, lack of photocopying services, or delayed delivery of legal material to isolation prisoners – “actual injury” must be satisfied or the claim will be dismissed. We now

review some of these grievances in light of the Casey actual injury test.

### A. Elements of an Access Violation

Exactly what proof must a prisoner submit to establish an access to courts violation? Under Bounds and Casey a prisoner must prove that he or she: (a) had a “nonfrivolous” claim regarding his or her criminal conviction or sentence, or conditions of confinement; (b) which could not be filed in the appropriate court due to deficiencies in the prison’s legal assistance program. See Casey, at 353. Failure to establish either of these elements will result in case dismissal.

The Bounds Court noted that “we are concerned in large part with original actions seeking new trials, release from confinement, or vindication of fundamental civil rights.” 430 U.S. 817, 827 (1977). The Casey Court emphatically rejected any attempt to extend the constitutional right of access to legal matter beyond post-conviction and civil rights actions. 518 U.S. 343, 355 (stating that “Bounds does not guarantee inmates the wherewithal to transform themselves into litigating engines capable of filing everything from shareholder derivative actions to slip-and-fall claims. The tools it requires to be provided are those that the inmates need in order to attack their sentences, directly or collaterally, and in order to challenge the conditions of their confinement”). Prisoners with other types of legal grievances—divorce actions, child custody cases, malpractice claims—accordingly, have no entitlement to any Bounds assistance.

For example, in Ball v. Hartman, a prisoner brought suit, claiming denial of access to the courts, when prison officials refused to permit her participation in a telephonic hearing in a paternity case. 396 Fed. Appx. 823, 824 (3d Cir. 2010) (unpublished). The case was dismissed. “Ball’s child support action is not related to her criminal sentence or conditions of confinement.” Id. at 825. Thus, “Ball’s right of access to the courts does not extend to the Northampton County child support action

with which she claims defendants have interfered. Id. at 825.

Similarly, in Walker v. Zenk, a prisoner claimed denial of access to the courts when prison officials confiscated legal material concerning a property dispute. 323 Fed. Appx. 144, 145 (3d Cir. 2009) (unpublished). The case was dismissed. The Third Circuit concluded that Walker’s complaint failed to state an access violation since his underlying property grievance concerned neither his conviction nor prison conditions. Id. at 147. See also: Hoffenberg v. Provost, 154 Fed. Appx. 307, 310 (3d Cir. 2005) (unpublished) (prisoner’s collections litigation cannot form basis for access violation as it does not challenge conviction or condition of confinement.)

Of course, not every grievance regarding your criminal case of conditions of confinement will suffice. Casey restricted the constitutional right of access to the courts to only those post-conviction and civil rights claims that are “nonfrivolous.” The court reasoned that depriving someone of a nonfrivolous claim inflicts actual injury “because it deprives him of something of value—arguable claims are settled, bought, and sold.” 518 U.S. at 353 n.3. In contrast, depriving someone of a frivolous claim “deprives him of nothing at all, except perhaps the punishment of Federal Rule of Civil Procedure 11 sanctions.” 518 U.S. at 353 n.3.

What is a “nonfrivolous” legal claim within the meaning of Casey? A nonfrivolous legal claim is simply a claim that has arguable merit. 518 U.S. at 353 n.3. A nonfrivolous legal claim would survive a motion to dismiss for failure to state a claim upon which relief may be granted. See Fed.R.Civ.P. 12(b) (6). A frivolous claim, on the other hand, would not. A frivolous claim lacks a recognizable legal theory or lacks sufficient facts under a cognizable legal theory. See Neitzke v. Williams, 490 U.S. 319, 325 (1989) (a frivolous claim is one which “lacks an arguable basis either in law or in fact.” It includes “not only the inarguable

legal conclusion, but also the fanciful factual allegation”).

A claim lacks an arguable basis in fact if it contains factual allegations that are fantastic, totally implausible or even delusional. See Degrazia v. Federal Bureau of Investigations, (case was frivolous where plaintiff alleged he was victim of government-run genetic experiments “which caused his body to combine with reptile DNA”). 316 Fed. Appx. 172, 173 (3d Cir. 2009). A claim lacks an arguable basis in law if it is based on an indisputably meritless legal theory, such as the violation of a legal interest which clearly does not exist. See Aruanno v. Walsh, 443 Fed. Appx. 681 (3d Cir. 2011) (where claim against judge would have been dismissed due to absolute judicial immunity, prisoner did not have non-frivolous claim); Gordon v. Morton, 131 Fed. Appx. 797, 799 (3d Cir. 2005) (where prisoner’s underlying claims were not cognizable under PCRA, access issue not adequate).

Accordingly, the courts will permit an access case to proceed only if the initial complaint is carefully drafted to reflect the existence of a meritable grievance pertaining to a criminal conviction or prison conditions. See Monroe v. Beard, 536 F.3d 198, 205 (3d Cir. 2009) (“complaint must describe the underlying arguable claim well enough to show that it is more than a mere hope”). Failure of plaintiffs to comply will result in dismissal. See Garcia v. Dechan, 384 Fed. Appx. 94, 95 (3d Cir. 2010) (where complaint failed to plead facts indicating underlying issue had merit, access claim properly dismissed); William v. Sebek, 299 Fed. Appx. 104, 106 (3d Cir. 2008) (access claim dismissed “because Williams failed to submit any evidence to identify what court action was affected by confiscating his legal documents”); Romansky v. Stickman, 147 Fed. Appx. 310, 312 (3d Cir. 2005) (access claim dismissed for failure to identify the underlying cause of action).

Proving that a prisoner had a nonfrivolous legal claim (concerning his conviction and sentence or his conditions of

confinement) that he wished to file before a court is only half of the Casey test. The second and most difficult part involved proof of “actual injury,” that is, the prisoner was “hindered” or “impeded” or “frustrated” in bringing his nonfrivolous claim due to “deficiencies in the prison’s legal assistance facilities.” 518 U.S. at 351. The Casey Court provided two explicit examples of actual injury:

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

Casey, 518 U.S. at 351.

In Monroe v. Beard, a group of prisoners brought suit, claiming denial of access to the courts, after prison officials confiscated boxes of legal material during a prison-wide search for contraband literature. 536 F.3d 198, 204 (3d Cir. 2008). The case was dismissed. The Third Circuit held that prisoners “must show” that they: (1) suffered “actual injury,” that is, they lost an opportunity to pursue a nonfrivolous claim; and (2) they had no other remedy for the lost claim other than the present denial of access suit. Id. at 205. In this case, the Third Circuit held that the [prisoners] failed to specify facts demonstrating that the confiscation resulted in the loss of any nonfrivolous claims. Id. at 206.

State attorneys, always vigilant for lawsuit deficiencies, will contend that the Casey and Monroe actual injury standard has not been satisfied. They may argue that the prisoner’s underlying legal claim was not factually-specific to ascertain its merits or was frivolous and not worthy of Bounds protection. Most likely, however, they will contend that the prisoner has not adequately linked the failure to bring the legal claim into

court with the deficiencies in the prison's legal assistance program. For these reasons, prisoners must carefully draft their complaints, describing in factual detail: (1) that the underlying grievance pertaining to his or her conviction or conditions or confinement has arguable merit in that the prison's legal program blocked presentation of this meritorious claim into court and he had no other remedy available.

As will be seen below, this test is extremely difficult to satisfy.

## B. Law libraries

Many state and local prison systems have established law libraries to satisfy their Bounds obligations. Ideally, the contents of such libraries should be tailored to assist inmates in the three areas of law that Bounds and Casey protect: federal habeas corpus, post-conviction petitions, and civil rights complaints regarding prison conditions.

Do prisoners have grounds to file an access-to-courts lawsuit if a prison law library is missing books or is otherwise deficient in some respect or inmate access to the library is limited by prison policy or blocked by prison guards? The answer is no. It is vital for prisoners to understand that under Casey, prisoners do not have a constitutional right to a law library. 518 U.S. at 350. Rather, prisoners only have a constitutional right of access to the courts. Id. Accordingly, "an inmate cannot establish relevant actual injury simply by establishing that his prison's law library or legal assistance program is sub-par in some theoretical sense." Id. at 351. Rather, "the inmate therefore must go one step further and demonstrate that the alleged shortcomings in the library or legal assistance program hindered his efforts to pursue a legal claim." Id.

Many prisoners presume that a law library lacking in books is—by itself—a Bounds violation. Many prisoners swear that when officials block or restrict access to a library they have grounds to sue. Such presumptions are false. Under Casey, a prisoner can bring an access violation case only if he or she: (1) had an underlying

meritorious legal grievance (concerning conviction or incarceration) due to deficiencies in the law library. 518 U.S. 351. Absent proof of these elements, there is not violation of access to the courts.

For example, in Abraham v. Danberg, a prisoner alleged denial of access to the courts when prison officials failed to provide him with six out-of-state court decisions for use in a post-conviction brief. 322 Fed. Appx. 169, 170 (3d Cir. 2009). The Third Circuit denied relief. The out-of-state cases had no precedential effect and were not considered "essential to his claim." Id. at 171. More importantly, the court examined the PCRA docket entries, finding that Abraham was able to file his brief without the requested cases. Id. at 171. Since the claim was filed, no actual injury was shown.

In O'Connell v. Williams, a prisoner alleged denial of access to the court due to an RHU library that contained sixty books. 241 Fed. Appx. 55, 57 (3d Cir. 2007). Although contending that he lost a federal civil case due to the shortcomings of the RHU library the Third Circuit noted that the federal case was rejected prior to O'Connell's placement in segregation. Id. at 57. Thus, the RHU library—even if deficient—was not the cause of an injury.

In Foreman v. Lowe, a county prisoner alleged that a policy of allowing segregated inmates to use the prison law library only at midnight interfered with his ability to object to a federal magistrate's report. 261 Fed. Appx. 401, 404 (3d Cir. 2008). The record revealed that Foreman was able to obtain a time extension to file his objections and, in fact, met his filing deadline. Id. at 404. Since his legal papers were filed, no actual injury was established. Id. at 404.

In Picquin-George v. Warden, a prisoner alleged that a segregation unit law library was inadequate to ensure his access to the courts. 200 Fed. Appx. 159, 160 (3d Cir. 2006). A prisoner "does not have standing to bring a denial of access suit if he merely alleges that a prison law library is

inaccessible or has a deficient collection of legal research materials.” Id. at 162. Since the plaintiff failed to describe how the library’s shortcomings impeded his ability to bring a claim, the case was dismissed. Id. at 162.

In Tinsley v. Giorla, a prisoner claimed that less than 15-to-20 hours of library time per week was insufficient to ensure his access to the courts. 369 Fed. Appx 378, 381 (3d Cir 2010). Citing Casey’s actual injury requirement, the Third Circuit noted that Tinsley failed to show “any missed deadlines” or “any prejudice” due to prison officials’ actions. Id. at 381.

In Brookins v. County of Allegheny, a prisoner claims 4-to-6 hours of library time per week denied him access to the courts. 350 Fed. Appx. 639, 643 (3d Cir. 2009). Citing Casey’s actual injury requirement, the Third Circuit held there was no proof that his legal grievances would have been remedied by additional law library access. Id. at 643.

In Jones v. Donalakes, a prisoner also alleged an access violation due to limited library time and arbitrary denial of access to the law library. 161 Fed. Appx. 216, 217 (3d Cir. 2006). In this case, however, the Third Circuit concluded that Jones’ allegations of actual injury were “minimally sufficient” Id. at 217. Jones shrewdly submitted documents verifying that his criminal appeal was dismissed as untimely filed, which he attributed to restrictions on his law library access. Id. at 217. Unfortunately, upon remand and further investigation, the case was dismissed for failure to prove actual injury. “The record unequivocally shows that the deadlines for filing the petitions had already passed by the time the alleged interference took place.” See Jones v. Domalakes, 312 Fed. Appx. 438, 440 (3d Cir. 2008).

All of these decisions confirm that—under Casey—mere proof that law books are missing or library entry is restricted are insufficient to establish an access to courts violation. A prisoner must provide evidence that he or she lost a meritorious legal

grievance due to a specific library deficiency or obstructions.

One final matter needs to be addressed. Law libraries are designed to provide meaningful access to the courts for prisoners who can read and comprehend the English language. For the illiterate, mentally-disturbed, and non-English speaking prisoners, however, law books are basically worthless. Unfortunately, a federal judge, no matter how sympathetic, cannot find prison authorities in violation of Bounds simply because an illiterate prisoner cannot use the law library. See Casey, 518 U.S. at 360 (“the Constitution does not require that prisoners (literate or illiterate) be able to conduct generalized research, but only that they be able to present their grievances to the courts”). A federal judge can only find prison officials in violation of the Bounds holding when a prisoner has lost a meritorious habeas corpus or civil rights case due to inadequacies in the prison’s legal access program. Casey, 518 U.S. at 351.

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

Prisons which provide only a law library ignore the access needs of illiterate and non-English speaking prisoners. Such prisoners cannot bring meritorious claims into court through law books which they cannot read. Jailhouse lawyers—often few in number, barred from isolation units and lacking formal research and writing skills—are realistically unable to fulfill this assistance void. The only salvation for the illiterate and non-English speaking inmate is to forward “request slips” or grievances to prison management explaining their legal

needs and seeking some form of assistance. If help is provided, their legal concerns may be addressed. If not, such paperwork may serve valuable evidence in a subsequently-filed access violation case by a willing legal aid organization or private attorney. Under Casey, however, a reading or language-impaired inmate must first prove he or she lost a meritorious legal claim due to the lack of legal assistance.

### C. Legal Assistance Programs.

Bounds noted that while law libraries are an acceptable means to ensure prisoner access to the courts, they are not the only one. Bounds, at 828 “One such experiment, [according to Casey] might replace libraries with minimal access to legal advice and a system of court-provided forms.” 518 U.S. at 352. Prison systems that provide adequate legal assistance are under no constitutional obligation to provide law libraries. See Bounds, 430 U.S. at 829-830.

A meritorious or “nonfrivolous” legal claim must originate from one of three areas of inmate litigation: federal habeas corpus; state post-conviction petitions; and civil rights complaints challenging prison conditions. Casey, 518 U.S. at 354.

Inmates serving short county sentences in local facilities may have a legal need to file a PCRA or federal habeas corpus petition (which would trigger Bounds protection). However, for the vast majority of county prisoners either awaiting trial or sentencing, their criminal cases have not matured or progressed to the point where a post-conviction or federal habeas corpus petition is even permissible. Thus, the only “nonfrivolous legal claim” sufficient to trigger Bounds access protection would pertain to their conditions of confinement. For example, if a county prisoner was denied access to medical treatment for serious illness and wished to bring the matter before the courts, he or she would have a nonfrivolous civil rights claim because such a claim has been recognized as an Eighth Amendment claim. Of course, the facts surrounding the underlying prison condition grievance must

be specified in detail in the Bounds suit to allow the Court to ascertain its merits.

What about county inmates who represent themselves in their criminal cases? Do they have any Bounds rights? Although we certainly do not recommend such a course of action, it is true that a defendant can waive his Sixth Amendment right to counsel and elect to represent himself at trial. See Faretta v. California, 95 S.Ct. 2525 (1975). Pretrial detainees considering such drastic action should understand, however, that a Faretta waiver of counsel does not mean simultaneous entitlement to law library resources. Bounds requires the provision of adequate law libraries or trained assistance, not both. 430 U.S. at 828 (right of access requires prison authorities to provide “prisoners with adequate law libraries or adequate assistance from person trained in the law”).

Although the Supreme Court has yet to decide whether the Sixth Amendment’s right to self-representation implied a right to law library access, see Kane v. Garcia, 546 U.S. 9 (2005), a number of lower courts have dismissed prisoner claims that they were entitled to law library access after waiving representation at their criminal trials. See United States v. Sykes, 614 F.3d 303, 311 (7th Cir. 2010) (a defendant has the right to appointed counsel, and when he waives that right, other alternative rights—such as access to a law library—do not spring up); Bourdon v. Loughren, 386 F.3d 88, 94 (2nd Cir. 2011) (same). In Lindsey v. Shaffer, 411 Fed. Appx. 466, 468 (3d Cir. 2011), the Third Circuit held that “a state can fully discharge its obligation to provide a prisoner with access to the courts by appointing counsel.”

Proving that the prisoner had a meritorious civil rights complaint challenging the conditions of confinement is only half of Casey’s actual injury test. The remaining half requires the prisoner to allege in his or her complaint, and to prove later in court, that such nonfrivolous claim was lost or could not be presented due to deficiencies in the trained assistance program. Casey, 518 U.S.

at 351. Only those prisoners who sustain actual injury to existing or contemplated nonfrivolous claims have standing to bring a Bounds lawsuit.

Although a pre-Casey decision, Ward v. Kort, 762 F.2d 856 (10<sup>th</sup> Cir. 1985) is a perfect illustration of a deficient trained assistance program. In Ward, the Colorado State Hospital contracted a private law firm to provide legal services for its patients. Id. at 857. The contracting attorney testified, however, that he did not draft pleadings or perform research in the areas of federal habeas corpus and civil rights actions. Id. at 859. The Tenth Circuit held that such a legal assistance program was constitutionally deficient because it deprived patients of the opportunity to present such important grievances to the appropriate courts. Id. at 860.

On the other hand, in Garcia v. Hatch, a prisoner alleged denial of access to the courts when New Mexico closed its prison law libraries and replaced them with a "Legal Access Program." 343 Fed. Appx. 316, 318 (10<sup>th</sup> Cir. 2009). The Tenth Circuit dismissed the case, holding that Garcia failed to establish actual injury. There existed no proof that the Legal Access Program—which provided forms and limited staff assistance—"hindered his ability to file a timely habeas petition." Id. at 318.

County prison authorities in Pennsylvania, facing lawsuits alleging denial of access to the courts, frequently claim that their Bounds obligations are satisfied because trained legal assistance is provided by the local public defender's office and/or the local legal services agency. At best this is nothing more than wishful thinking. Pennsylvania public defenders are statutorily-regulated and primarily involved in criminal defense assistance to indigent defendants. See Public Defender Act, 16 P.S. §9960.6. Civil rights lawsuits challenging jail conditions are not approved legal services for public defender offices. See also Bounds v. Smith, 430 U.S. at 828 n.17 (it is irrelevant that North Carolina

authorizes expenditure of funds for appointed counsel in some State post-conviction proceedings when "this statute does not cover appointment of counsel in federal habeas corpus or State or federal civil rights actions, all of which are encompassed by the right of access.").

As for local legal services agencies: these are independent nonprofit organizations (with scarce staff and resources) and under no contractual obligation to provide legal assistance to every county prisoner claiming a civil rights violation. See Leeds v. Watson, 630 F.2d 674, 676 (9<sup>th</sup> Cir. 1980) ("Idaho Legal Aid Services does not have the staff to provide legal representation to inmates" at county facility). County prisoners alleging Bounds violations would be wise to contact the local public defender and legal services office (before filing suit) to obtain verification that such public law firms do not provide adequate assistance to prisoners claiming civil rights violations. See Turiano v. Schnarrs, 904 F. Supp. 400, 402 (M.D. Pa. 1995) (pro se prisoner introduced public defender's letter into evidence stating that his "office handles only State-level criminal defense work and not any civil litigation"). During the discovery phase of any Bounds litigation, prisoners can also submit interrogatories and requests for production of documents (see Fed.R.Civ.P. 33 and 34) probing the existence of any legal services contract and the claimed assistance provided by such organizations. See Turiano, 904 F. Supp. At 402.

Legal assistance programs which exclude the preparation of civil rights actions challenging conditions of confinement are constitutionally suspect (if actual injury to a meritorious claim can be demonstrated). See Casteel v. Pieschek, 3 F.3d 1050, 1054 n.4 (7<sup>th</sup> Cir. 1993) ("The provision of criminal defense counsel, unable or unwilling to assist inmates with a habeas corpus petition or a civil rights complaint, is inadequate under Bounds"). The use of only untrained inmates as paralegals is likewise questionable. See Valentine v. Beyer, 850 F.2d 951, 956 (3d

Cir. 1988). The critical question is whether the prisoner lacks “the capability of bringing contemplated challenges to sentences or conditions of confinement before the courts” because “the State has failed to furnish adequate law libraries or adequate assistance from persons trained in the law.” Casey, 518 U.S. at 356.

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

#### D. Prisoner to Prisoner Legal Assistance

Johnson v. Avery, 393 U.S. 483 (1969), established the right of prisoners to receive assistance from fellow inmates in the preparation of legal documents. At issue was a Tennessee prison rule prohibiting prisoners from assisting each other in the preparation of habeas corpus petitions. Id. at 484. The Johnson majority struck down the rule, noting that prisoners, many of whom are illiterate, are frequently unable to obtain legal assistance from any source other than fellow inmates. Id. at 488. “There can be no doubt that Tennessee could not constitutionally adopt and enforce a rule forbidding illiterate or poorly educated prisoners to file habeas corpus petitions. Here Tennessee has adopted a rule which, in the absence of any other source of assistance for such prisoners, effectively does just that.” Id. at 487. Thus, “until the State provides some reasonable alternative to assist inmates in the preparation of petitions for post-conviction relief, it may not validly enforce a regulation such as that here in issue, barring inmates from furnishing such assistance to other prisoners.” Id. at 490.

The Johnson Court did not give “inmate paralegals” or “writ writers” or “jailhouse lawyers” unchecked freedom in the

course of providing legal assistance. The States “may impose reasonable restrictions and restraints upon the acknowledged propensity of prisoners to abuse both the giving and the seeking of assistance in the preparation of applications for relief.” Id. at 490. Among the restrictions deemed reasonable by Johnson are time and location rules governing the giving and receiving of legal assistance and the “imposition of punishment for the giving or receipt of consideration in connection with such activities.” Id. See also: Little v. Norris, 787 F.2d 1241, 1244 (8<sup>th</sup> Cir. 1986) (prohibiting segregated prisoner access to writ-writer upheld where he could consult other segregated prisoners); Bellamy v. Bradley, 729 F.2d 416, 421 (6<sup>th</sup> Cir. 1984) (prohibiting in-cell legal assistance upheld where prisoners can meet in library). The Johnson Court also made clear that the States have the option to totally ban mutual legal assistance between prisoners if they can provide a reasonable alternative such as attorney assistance. 393 U.S. at 490-491.

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

Prisons and county jails which provide law libraries as the sole means to ensure prisoner access to the courts can regulate but not prohibit mutual inmate legal assistance. This does not mean, however, that when prisoner-to-prisoner legal assistance is curtailed or interrupted there exists grounds to file litigation claiming denial of access to the courts. Johnson must be read in light of subsequent Supreme Court activity in this area, most notably Lewis v. Casey, 518 U.S. 350 (1996). Casey made clear that prisoners have no constitutional

right to law libraries or legal assistance. Id. Rather, prisoners only have a constitutional right of access to the courts. Id. Mere proof that prison authorities have banned inmate-to-inmate legal assistance is insufficient to establish denial of access to the courts. Id. at 349. Under Casey, the prisoner must prove “actual injury,” that is, he or she lost a meritorious legal claim due to a specific deficiency in the state’s legal assistance program. Id.

Prisoners with educational and language barriers need assistance to gain access to the judicial system. However, under Casey, they cannot bring a Bounds violation suit for disruption of inmate-to-inmate assistance absent proof of actual injury. See also, Shaw v. Murphy, 532 U.S.223, 231 (2001) (“Under our right-of-access precedents, inmates have a right to receive legal advice from other inmates only when it is a necessary ‘means for ensuring a reasonably adequate opportunity to present claimed violations of fundamental constitutional rights to the courts.’”) (citations omitted).

For example, in McCurtis v. Wood, a prisoner claimed denial of access to the courts when prison officials rejected a request for legal assistance from another prisoner. 76 Fed. Appx. 632, 633 (6th Cir. 2003). The case was dismissed. Citing Casey, the court concluded that McCurtis not only failed to specify the exact nature of the claim he wished to bring to court but also failed to explain “why he was unable to proceed on these alleged claims without the assistance of another prisoner.” Id. at 634.

In Harvey v. Addison, a prisoner argued that his Oklahoma prison failed to provide legal assistance and “discourages jailhouse lawyering.” 390 Fed. Appx. 840, 841 (10th Cir. 2010). The case was dismissed. Citing Casey, the court noted that Harvey “has not shown how the allegedly deficient library facilities and law clerks” hindered his ability to file a timely habeas petition. Id. at 842.

Likewise, in Perry v. Texas Department of Criminal Justice, a prisoner alleged denial of access to the courts when a librarian rejected a face-to-face meeting with another inmate assisting in ongoing litigation. 275 Fed. Appx. 277, 278 (5th Cir. 2008). Dismissing the case, the court concluded that Perry failed to demonstrate how such action “hindered his ability to file a nonfrivolous legal claim.” Id. at 278.

These cases make clear that the denial of legal assistance—by itself—is not sufficient to establish an access violation. Casey requires more. It requires specific proof that a nonfrivolous claim was lost or could not be presented to court due to restrictions on legal assistance.

As for the inmate paralegal providing assistance, the likelihood of success in a Bounds access violation case is even more remote. An inmate denied the opportunity to provide advice, review transcripts, and prepare legal documents for another inmate has not lost a legal claim or suffered actual injury, as required by Casey. His only loss is the opportunity to give assistance. Although an earlier Third Circuit ruling concluded that an inmate law clerk had standing to bring an access violation case when he was prohibited from assisting other prisoners while on duty, that decision is questionable in light of Casey. See Rhodes v. Robinson, 612 F.2d 766, 769 (3d Cir. 1979) (allowing third party standing for jailhouse lawyer because “many prisoners are unable to prepare legal materials and file suits without assistance. The record contains some examples of Rhodes having provided the assistance required by a few such prisoners”).

Further complicating the matter is the Supreme Court’s decision in Shaw v. Murphy, where an inmate law clerk attempted to provide legal advice in a letter to a segregated prisoner. 532 U.S. 223, 225 (2001). The letter was intercepted and Murphy was charged with violating prison rules. Id. at 226. At issue in the case was “whether prisoners possess a First Amendment right to provide legal assistance

that enhances the protections” otherwise available under Turner v. Safley, 482 U.S. 78, 88 (1987) (when prison regulation infringes upon prisoners’ constitutional rights, the regulation is valid if reasonably related to prison security or other legitimate government interests.) Murphy, 532 U.S. at 225

The Murphy court declined “to cloak the provision of legal assistance with any First Amendment protection above and beyond the protection normally accorded prisoners’ speech.” Id. at 231. Thus, while it appears that some protection is warranted, the extent of that protection will depend upon the reasonableness of security concerns of prison authorities. Where the provision of legal assistance is a valid threat to institutional safety or other legitimate correctional goals, such assistance may be prohibited under Turner.

Finally, prisoners should exercise caution when seeking assistance from “jailhouse lawyers.” First, what information you provide another inmate is not protected by any attorney-client privilege. See United States v. Henry, 2007 U.S. Dist. Lexis 8412, 4-5 \*\*06-33-01 (E.D. Pa. 2007) (holding that where a jailhouse lawyer is not licensed to practice law and does not purport to be, there is no attorney client privilege). Such communications could end up in the hands of a district attorney. Secondly, not all advice provided by inmate law clerks, no matter how well intended, is necessarily competent. There have been documented cases in which frivolous rumors were spread throughout prison systems by jailhouse lawyers. See United States v. Felipe, 2007 U.S. Dist. LEXIS 43520 \*\* 07-cv-061 (E.D. Pa. 2007) (citing numerous cases in which claims were made that the federal courts had no jurisdiction over federal crimes due to unchecked inmate rumors).

#### **E. Attorney-Client Communications**

Confidential communications between a prisoner and his lawyer are absolutely essential to effective representation. When prison guards read

legal mail or listen to telephone and visiting room conversations, prisoners will not engage in full and frank conversations that are indispensable to the attorney-client relationship.

In Wolff v. McDonnell, 418 U.S. 539 (1974), the Supreme Court upheld a Nebraska prison policy under which prison officials would open legal mail, but only in the prisoner’s presence and without reading it. Noting that “freedom from censorship is not equivalent from inspection or perusal,” Id. at 576, the Court concluded that prison officials “have done all, and perhaps even more, than the Constitution requires.” Id. at 577. The Wolff court also approved prison policy requiring lawyers to mark their incoming correspondence “privileged” or “attorney-client” mail to alert prison staff to the need for special handling. Id. at 576. See also: Fontroy v. Beard, 559 F.3d, 173, 174 (3d Cir. 2009) (upholding DOC policy of requiring attorneys to affix “control numbers” on the outside of envelopes in order to receive privileges treatment).

In Procurier v. Martinez, 416 U.S. 396 (1974), the Supreme Court invalidated a California regulation barring visitation by law students and paraprofessionals employed by attorneys. Id. at 420. Noting that prisoners must have a reasonable opportunity to seek and receive the assistance of attorneys, the Martinez Court held that, “Regulations and practices that unjustifiably obstruct the availability of professional representation or other aspects of the right of access to the courts are invalid.” Id. at 419.

Both Martinez and Wolff were decided long before the Casey court made proof of “actual injury” a prerequisite in all access violation cases. Consequently, it is not sufficient to show that prison officials opened legal mail outside an inmate’s presence or eavesdropped on privileged communications. Rather, prisoners must prove that interference or exposure of confidential communications resulted in “actual injury” to nonfrivolous litigation. As will

be seen below, that is a difficult burden to satisfy.

In Oliver v. Fauver, 118 F.3d 175 (3d Cir. 1997), a prisoner alleged that prison officials refused to send his outgoing legal mail to the courts and had opened one letter outside his presence. Id. at 176. The Third Circuit dismissed the denial of court access claim, noting that “Oliver suffered no injury as a result of the alleged interference with his legal mail. His papers addressed to the New Jersey Superior Court did arrive, as evidenced by the fact that his appeal was considered and adjudicated by that court.” Id. at 178.

In Oriakhi v. Carroll, a prisoner alleged “that while in segregation he did not receive legal mail related to a habeas case.” 368 Fed. Appx. 271, 272 (3d Cir. 2010). The case was also dismissed since “Oriakhi has not alleged any actual injury related to the appellees’ alleged failure to deliver his legal mail.” Id.

In Blanchard v. Federal Bureau of Prisons, a prisoner claimed his access rights were violated when prison officials delayed both incoming and outgoing legal mail. 428 Fed. Appx. 128, 129 (3d Cir. 2011). The case was dismissed for failure to prove that the mail delay resulted in the loss of a nonfrivolous claim. Id. at 130.

In Abu-Jamal v. Price, 154 F.3d 128 (3d Cir. 1998), a death-row prisoner brought suit, claiming (among other matters) denial of access to the courts when prison officials denied visitation by a paralegal. Id. at 130. The Third Circuit rejected the claim, noting that Jamal “has not demonstrated that the paralegal visitation restriction delayed or hindered his State court appeal.” Id. at 136.

In Simkins v. Bruce, a prisoner alleged denial of access to the courts when legal mail was not forwarded to him during a temporary transfer to another facility. 406 F.3d 1239, 1240 (10<sup>th</sup> Cir. 2005). Unlike most cases, the Tenth Circuit found actual injury. Simkins proved that the failure to receive his legal mail was “inextricably tied to the adverse disposition of this underlying case

and the loss of his right to appeal from that disposition.” Id. at 1244.

All of these decisions strongly suggest that it is extremely difficult to prove that prison authorities’ interference with legal mail and other forms of privileges communications has resulted in “actual injury” to the presentation of some meritorious claim. There is, however, a potential solution to this problem if prisoners base their constitutional claims upon the First Amendment’s free speech clause or the Sixth Amendment’s right to counsel (as opposed to denial of access to the courts).

In Jones v. Brown, the Third Circuit held that a New Jersey policy of opening legal mail outside the presence of addressee inmates violated their right to freedom of speech. 461 F.3d 353, 359 (3d Cir. 2006). In this case, New Jersey contended that authorities needed to open legal mail outside the presence of inmates in order to avoid anthrax attacks. Id. at 363-364. The court stated that such activity “interferes with protected communications, strips those protected communications of their confidentiality, and accordingly, impinges upon the inmate’s right to freedom of speech.” Id. at 359. Analyzing the case under Turner v. Safley (482 U.S. 78, the Third Circuit concluded that New Jersey’s reasoning was not rationally related to its goal of protecting staff and inmates because the unconstitutional policy was started three years after the terrorist attacks, long after the threat of anthrax. Id. at 362.

In Al-Amin v. Smith, a prisoner brought suit claiming denial of access to the courts and free speech after prison officials repeatedly opened legal mail outside his presence. 511 F.3d 1317, 1320-1321 (11<sup>th</sup> Cir 2008). The access to courts claim was dismissed for failure to demonstrate actual injury. Id. at 1332. “Al-Amin’s testimony contains only a conclusory allegation that the mail opening compromised his cases and does not identify how any legal matters specifically were damaged.” Id. at 1333. In contrast, the Eleventh Circuit agreed that

opening Al-Amin's attorney mail outside his presence violated free speech. Id. at 1336.

Of course, not every instance of interference with legal mail constituted a free speech violation. In Fortune v. Hamberger, the Third Circuit affirmed a district judge's decision that "a single instance of interference with an inmate's mail is not sufficient to constitute a First Amendment violation." 379 Fed. Appx. 116, 120 (3d Cir. 2010).

Likewise, in Slaughter v. Rogers, the Third Circuit rejected an inmate's free speech case due to a single instance of opening legal mail outside his presence. 408 Fed. Appx. 510, 513 (3d Cir. 2010). The court ruled that the prisoner "must show a pattern or practice regarding legal mail that is not related to legitimate penological interests." Id.

In terms of attorney-client visits, death-row prisoners in Williams v. Price, 25 F. Supp. 2d 605 (W.D. Pa. 1997), brought suit claiming that prison guards could overhear confidential attorney-client conversations because visiting room booths were not soundproof. Id. at 615. The plaintiffs did not ground their claim on the basis of access to the courts, but rather upon the right to privacy in their communications with counsel. Id. at 616. "Now that the constitutional right of access to court is no longer available to prisoners to preserve the confidentiality of their communication with their counsel unless they can meet the difficult test of injury set forth in [Casey], or unless the Sixth Amendment is available, they will reasonably look to the right of privacy to assure their right to confidential communications with counsel." Id. at 619. See also: Benjamin v. Frazer, 264 F.3d 175, 187 (2nd Cir. 2009) (holding that undue delays in producing prisoners for attorney client visitations violated Sixth Amendment).

#### F. Notary Services

The Supreme Court in Bounds held that indigent inmates must be provided "with notarial services to authenticate" legal documents. 430 U.S. at 824-825. However, it

is extremely remote that any delay or outright refusal by prison officials to supply notarial services will result in actual injury.

In Hudson v. Robinson, 678 F.2d 462 (3d Cir. 1982), the Third Circuit rejected a prisoner's claim that he was denied access to the courts when he was required to wait ten days for notary services. Id. at 466. Mere delay, according to Hudson, "does not satisfy the actual injury requirement." Id. Moreover, in support of its finding of no injury or prejudice to Hudson's pending litigation, the Third Circuit cited 28 U.S.C. §1746 which allows an unsworn statement to be used in place of an affidavit if it is based under penalty of perjury. Id. at 466 n.5.

#### G. Legal Supplies, Property, and Photocopies

Bounds also held that "indigent inmates must be provided at State expense with paper and pen to draft legal documents" and "with stamps to mail them." 430 U.S. at 824-825. This does not mean, however, that prisoners without funds are entitled to unlimited legal supplies and postage for the courts have agreed that the States may impose reasonable restrictions. See Smith v. Erickson, 961 F.2d 1387, 1388 (8th Cir. 1992) (providing indigent prisoner with one free mailing per week for legal correspondence satisfies Bounds). Additionally, prisoners denied free legal supplies and postage have no cognizable claim absent proof of "actual injury" to legitimate nonfrivolous litigation. See Casey, 518 U.S. at 349.

For example, in Butler v. Meyers, a prisoner claimed denial of access to the courts based upon a prison policy of restricting the purchase of bond paper to 25 sheets per week. 241 Fed. Appx. 818, 819 (3d Cir. 2007). The case was dismissed. Citing Casey, the Third Circuit held that Butler failed to demonstrate how the paper restriction resulted in actual injury to an underlying grievance. Id. at 820.

In Salkeld v. Tennis, a prisoner alleged denial of access to the courts when prison officials refused to advance him sufficient funds to mail a filing in state court,

and as a result, his appeal was deemed untimely and waived. 248 Fed. Appx. 341, 342 (3d Cir. 2007). The case was dismissed. Bounds applied only to inmate legal grievances involving sentences or conditions of confinement. Since Salkeld's underlying case was outside of Bounds protection, the Third Circuit concluded that a cognizable access violation case did not exist. Further, the court noted that there is no First Amendment right to have subsidized mail. Id.; citing Reynolds v. Wagner, 128 F.3d 166, 183 (3d Cir. 1997) (holding that there is no First Amendment right to subsidized legal photocopying or postage, but with an actual injury, a claim could be actionable under Casey).

Photocopying services were not discussed in Bounds. However, once again, prisoners claiming denial of access to the courts due to the lack of photocopying services must establish actual injury to legitimate, nonfrivolous claims. In Kelly v. York County Prison, a prisoner claimed denial of access to the courts when county officials denied him free photocopies of legal material. 325 Fed. Appx. 144, 145 (3d Cir. 2000). The case was dismissed; "[p]risoners do not have a [First Amendment] right to free photocopies for use in lawsuits." Id. at 145. Additionally, citing Casey, the Third Circuit noted that Kelly did not claim "that he has been unable to meet any court-imposed deadlines as a result of the library's alleged lack of amenities." Id. at 146.

In Cooper v. Sniexek, a prisoner alleged denial of access to the courts when prison officials overcharged him for photocopies. 418 Fed. Appx. 56, 58 (3d Cir. 2011). The claim was dismissed, noting that Cooper "failed to specify any particular pleading that he was unable to file as a result of any action taken by the defendants." Id.

Likewise, in Moua v. Taylor, a prisoner alleged denial of access to the courts when county officials failed to fulfill his request to purchase his criminal transcripts. 348 Fed. Appx. 726, 727 (3d Cir. 2009). Moua received the court transcripts five

months after he filed the law suit but before his appeal which ultimately dismissed his case. Id. Since his attorney was successful in filing an amended PCRA petition, the Third Circuit concluded that Moua had suffered no injury or harm as a result of not having his transcript. Id. at 728.

Finally, we turn to the conflict between inmates and authorities over the amount of legal material stored in a cell. In Gay v. Shannon, a prisoner alleged denial of access to the courts when prison officials placed limits on the amount of legal material a prisoner could keep. 211 Fed. Appx. 113, 115 (3d Cir. 2006). The Third Circuit dismissed the case, finding that Gay failed to allege "that he was actually injured by having limited access to his legal materials." Id. at 115.

In Schlager v. Beard, a prisoner alleged denial of access to courts after prison officials confiscated legal material considered contraband. 398 Fed. Appx. 699, 700 (3d Cir. 2010). The case was dismissed. The Third Circuit held that Schlager's underlying claim—that he was entitled to prison release because he was a "Secured Party Sovereign"—was frivolous and not worthy of access protection. Id. at 701. Further, the court explained that Schlager did not have an actual injury as required by Casey because he presented his argument without his legal materials to the court in a hearing. Id. at 702.

In Pressley v. Johnson, a prisoner alleged denial of access to the courts based upon prison officials' destruction of legal materials involving a civil case. 268 Fed. Appx 181, 183 (3d Cir. 2008). The Third Circuit dismissed the case, noting that Pressley was represented by counsel in the civil matter and received a jury trial, thus, "there is no nexus between the deprivation and any loss suffered in the case." Id.

In Snee v. Barone, a prisoner alleged that prison officials' confiscation of legal materials prevented him from proceeding with a habeas corpus appeal. 359 Fed. Appx. 281, 283 (3d Cir. 2009) (unpublished). The court explained that

“contrary to Snee’s position, we have held that prisoners do not have an unrestricted constitutional right of access to legal materials.” Id. at 284. Moreover, actual injury was not shown, since “Snee has been able to adequately articulate his habeas corpus claims in the absence of the confiscated documents.” Id. at 285.

In Lyons v. Secretary of Department of Corrections, a prisoner alleged denial of access to the courts when prison officials confiscated legal material, thereby impeding his ability to pursue his PCRA appeal. 445 Fed. Appx. 461 (3d Cir. 2011). The claim was dismissed. The Third Circuit noted that the legal materials were confiscated after Lyons filed his PCRA case, and thus, did not prejudice his ability to bring the matter before the courts. Id. at 464.

In summary, the constitutional right of access to the courts applies only to nonfrivolous, meritable post-conviction petitions, habeas corpus actions, and civil rights cases challenging prison conditions. If a prisoner’s legal grievance does not concern his conviction, sentence, or conditions of confinement, it will likely be construed as unworthy of Bounds protection.

Having a legitimate grievance, however, is only half of the Casey test. A prisoner must also prove that he or she has lost the underlying claims, or cannot present this underlying grievance to the appropriate court, due to deficiencies in the state’s legal assistances program. Absent proof of “actual injury,” there is no violation of access to the courts.

## II. FIRST AMENDMENT ISSUES

The First Amendment to the United States Constitution guarantees the right of individuals to freedom of speech, religion, and assembly. Although considered essential to a democratic society, the exercise of these rights behind prison walls depends upon their compatibility with the security, order, and rehabilitative needs of the corrections system. See Pell v. Procunier, 417 U.S. 819, 822 (1974) (“Challenges to prison regulations that are asserted to inhibit First Amendment interests must be analyzed in terms of the legitimate policies and goals of the corrections system”). Where a prisoner’s exercise of First Amendment freedoms conflict with, or are detrimental to legitimate state interests, it is the constitutional right which must yield. See Id. at 827 (noting that “security considerations are sufficiently paramount” to justify restrictions on face-to-face press interviews with prisoners); Jones v. North Carolina Prisoners’ Labor Union, Inc., 433 U.S. 119, 132 (1977) (upholding rejection of prisoners’ labor union on basis that it was “detrimental to order and security in the prisons”).

In Turner v. Safley, the Supreme Court announced its definitive ruling regarding prisoners’ First Amendment rights: “When a prisoner regulation impinges on inmates’ constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests. 482 U.S. 78, 90 (1987). Applying a “reasonable test,” it is necessary, according to Turner, to give prison administrators the deference required to make the difficult decisions concerning institutional operations. Id.

### A. Mail And Publications

Procunier v. Martinez was the first case in which the Supreme Court reviewed prison mail regulations. 416 U.S. 396 (1974). In Martinez, prisoners challenged censorship regulations which authorized staff to reject letters that “unduly complain,” express “inflammatory political, racial, religious, or other views” or contain “lewd, obscene or defamatory” material. Id. at 399-400.

The Martinez court first agreed that communication by letter implicates the First Amendment's right to free speech. Id. at 408 (noting that the addressee and the sender derive a "protection against unjustified governmental interference with the intended communications" from the First Amendment). In that case, all non-legal mail was being read and censored if the prisoner complained, "magnified grievances," or expressed "inflammatory political, racial, religious or other views or beliefs." Id. at 399. The prison screened incoming and outgoing mail for the written content of the letters. Id. at 400. The Court did not base its holding on prisoners' First Amendment rights because, "in the case of direct personal correspondence between inmates and those who have a particularized interest in communicating with them, mail censorship implicated more than the rights of prisoners." Id. at 408. The Court held that prisons may not censor mail unless such actions "further an important or substantial governmental interest unrelated to the suppression of expression." Id. at 413. Thus, prison officials may not censor prisoner mail simply to eliminate unflattering or unwelcome opinions or factually inaccurate statements. Id. Rather, they must show that censorship furthers one or more substantial governmental interests of security, order and rehabilitation. Id. Secondly, "the limitations of First Amendment freedoms must be no greater than necessary or essential to the protection of the particular governmental interest involved." Id. at 413. Thus, a restriction on inmate correspondence that furthers prison security will nevertheless be invalid if its sweep is unnecessarily broad. Id. at 413-414.

Applying this two part "strict scrutiny" standard, the Martinez court found the California regulations invalid. Id. at 415. The Court reasoned that the vague language of the regulations encouraged prison staff to apply self-determined standards reflecting their individual prejudices and opinions. Id. Additionally, the regulations were either not in furtherance of legitimate governmental

interests, id., or were "far broader than any legitimate interest or penal administration demands." Id. at 416. Although a free speech victory, the Martinez decision seemed vulnerable because it was based not upon the free speech rights of prisoners, but rather additionally upon the First Amendment concerns of free citizens who sought to communicate with prisoners. Id. at 408. The Supreme Court, in creating a narrow holding, looked at the First Amendment rights of the writers and readers of the mail, and found that these combined rights, not just the rights of prisoners, compelled the Court to apply strict scrutiny. Id. In situations where a policy infringes only on the First Amendment rights of prisoners, the court will use a reasonable basis test, not strict scrutiny. See Turner v. Safley, 482 U.S. 78, 88 (1987). In 1979 the Supreme Court handed down Bell v. Wolfish, in which pretrial detainees challenged on First Amendment grounds a "publishers-only" regulation which disallowed receipt of all hardback books unless they were sent directly from a bookstore, publisher, or book club. 441 U.S. 520, 548-549 (1979). The Wolfish court upheld the regulation based upon prison officials' security concerns that "hardback books are especially serviceable for smuggling contraband into an institution." Id. at 551. The Court did not base its decision upon the Martinez standard, but rather concluded that the regulation was a "rational response by prison officials to an obvious security problem." Id. at 550. Additionally, the Wolfish majority observed that the regulation operated in a neutral fashion, without regard to the content of expression, and there existed alternative means of obtaining reading material. Id. at 551.

Due to the increased confusion in the lower courts over which standard of review to apply—the Martinez "strict scrutiny" rule or the Pell and Wolfish "reasonable relation to governmental interests" test—the Supreme Court granted review in Turner v. Safley to clarify the law. 482 U.S. 78 (1987). At issue were two Missouri prison regulations. The first permitted inmates to

correspond with other inmates at different facilities if they were immediate family members or concerned legal matters. Id. at 81. All other inmate-to-inmate correspondence was banned absent approval by prison officials. Id. The second regulation allowed prisoners to marry but only upon both the demonstration of compelling reasons for marriage and approval by the superintendent of the prison. Id.

Adopting the more formidable “reasonableness” standard, the Turner court held: “When a prison regulation impinges on inmates’ constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests.” Id. at 89. The Court explained that a reasonableness “standard is necessary if prison administrators, and not the courts, are to make the difficult judgments concerning institutional operations”. Id. (citation omitted) “Subjecting the day-to-day judgments of prison officials to an inflexible strict scrutiny analysis would seriously hamper their ability to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration.” Id.

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

“First, there must be a ‘valid rational connection’ between the prison regulations and a neutral governmental interest put forward to justify it.” Id. A regulation will not be sustained where the connection between the regulation and the asserted goal is so remote as to render the policy arbitrary or irrational. Id. If the connection between the regulation and the asserted goal is arbitrary or irrational, then the regulation fails, irrespective of whether the other factors tilt in its favor. See Shaw v. Murphy, 532 U.S. at 229-230.

Second, the courts must inquire whether there are alternative means of exercising the right in question. Turner, 482 U.S. at 90. “Where other avenues remain available for the exercise of the asserted

rights, courts should be particularly conscious of the degree of judicial deference owed to prison officials.” Id.

Third, the courts must determine whether the accommodation of the asserted right will have an adverse impact upon guards, other inmates, and prison resources. Id. When accommodation of an asserted right will have a significant “ripple effect” on other inmates and prison staff, courts should be particularly deferential to corrections officials’ judgment. Id.

Finally, the fourth factor inquires whether there is an obvious alternative to the regulation which “fully accommodates the prisoner’s rights at *de minimis* cost to valid penological interests.” Id. at 91. The Supreme Court explains this is not a “least restrictive means” test because “prison officials do not have to set up and then shoot down every conceivable alternative method of accommodating the claimant’s constitutional complaint.” Id. at 90. But if a prisoner can point to an alternative that would fully accommodate the First Amendment right at *de minimis* cost to the governmental interest, it is evidence that the regulation is unreasonable. Id. at 91.

Applying this four-factor test, the Court concluded that the inmate-to-inmate correspondence regulation passed constitutional scrutiny. Id. First, the Court noted that a neutral penological interest, prison security, was at stake and there was a rational connection between this interest and banning inmate-to-inmate correspondence which facilitates escape plans, assaults and gang activity. Id. Secondly, the ban on inmate-to-inmate correspondence did not deprive prisoners of all avenues of communication but simply prohibited correspondence with a small class of incarcerated people. Id. at 92. Thirdly, the Court observed that permitting inmate-to-inmate correspondence would have an adverse impact on the safety of both prisoners and guards. Id. Finally, the alternative of monitoring every piece of

inmate mail would require more than *de minimis* cost. Id. at 93.

The marriage regulation, however, was held unconstitutional because it was not reasonably related to a legitimate penological interest. Id. at 91. The Supreme Court concluded that prison officials' fear of "love triangles" causing violent confrontations and of female prisoners being abused or becoming "overly dependant," represented an "exaggerated response" to security and rehabilitative concerns. Id. at 97.

In 1989, the Supreme Court extended Turner and further limited Martinez in yet another First Amendment case. 490 U.S. 401, 413 (1989). In Thornburgh v. Abbott, a group of prisoners and publishers brought suit challenging a Federal Bureau of Prisons regulation which authorized the warden to reject incoming publications found "detrimental to the security, good order, or discipline of the institution or if it might facilitate criminal activity." Id. at 404.

The Abbott decision is important giving its distinction between incoming correspondence and publications and outgoing correspondence. Incoming mail, according to Abbott, poses a serious security hazard due to circulation among prisoners "with the concomitant potential for coordinated disruptive conduct." Id. at 412. The Court therefore held "that regulations affecting the sending of a publication to a prisoner must be analyzed under the Turner reasonable standard." Id. In contrast, outgoing mail is less likely to pose a serious threat to prison order and security. Id. at 413. Thus, prison regulations affecting outgoing mail are to be analyzed under the Martinez strict scrutiny standard. Id. at 411-412.

Applying the four-factor reasonableness test, the Abbott court found the censorship regulation constitutional. Id. at 419. First, the Court found that a regulation banning incoming publications that are "detrimental to the security, good order, or discipline of the institution" was "beyond question" rationally related to the legitimate penological interest of prison security. Id. at

415, 416. Secondly, the Abbott court found that although some publications may be banned under the regulations, many other alternatives existed to the inmate because the regulations permit "a broad range of publications to be sent, received, and read." Id. at 418. Analyzing the third factor—impact on third parties—the court concluded that allowing publications detrimental to prison security would adversely impact the safety of both guards and other inmates. Id. Finally, the prisoners failed to establish that an "obvious, easy alternative" existed which would permit introduction of the publications at *de minimis* cost to prison security. Id. The Court also upheld the "all or nothing" rule which permitted prison officials to reject an entire publication because of one offensive article, rather than merely tearing out the rejected portion. Id. at 419. The court accepted prison officials' views that such an alternative would "create more discontent" and was administratively inconvenient. Id.

In Beard v. Banks, the Supreme Court granted *certiorari* to review a Pennsylvania DOC policy which banned all newspapers, magazines and personal photographs to inmates confined in long-term segregation units. 548 U.S. 521, 524-525 (2006). Applying the Turner factors to Banks, the court concluded that depriving the "most incorrigible, recalcitrant inmates" access to such material was reasonably related to the Commonwealth's asserted goal of creating incentives for positive behavior. Id. at 531-532. "The articulated connection between newspapers and magazines, the deprivation of virtually the last privilege left to an inmate and a significant incentive to improve behavior are logical ones." Id. at 531.

The Turner, Abbott, and Banks court's adoption of a reasonableness standard and emphasis on deferring to the judgment of prison officials regarding institutional needs and interests makes it extremely difficult for prisoners to establish First Amendment violations. Under Martinez, prison officials must show how a regulation restricting First Amendment freedoms will "further" a legitimate penological interest.

The difference is that while prison officials need evidence in Martinez, they need only opinions and speculation in Turner. Additionally, under Turner, as long as the regulation is reasonably related to a legitimate interest, it is valid. Under Martinez, a regulation that furthers a legitimate prison interest would still be unconstitutional if a less restrictive alternative existed that would protect the state's interest while permitting exercise of the First Amendment rights. The bottom line is simple: prison regulations that would be struck down under Martinez are now routinely upheld under Turner.

For example, in Waterman v. Farmer, two prisoners confined at a New Jersey facility for sex offenders brought suit, claiming that a state statute restricting their access to sexually-oriented material violated the First Amendment. 183 F.3d 208, 209 (3d Cir. 1989). Applying the four pronged Turner test, the Third Circuit upheld the statute and rejected the free speech challenge. Id. at 220. The court held that the statute was rationally related to the state's interest in rehabilitating sex offenders since prison experts testified that sexually-oriented material can thwart the effectiveness of sex offender treatment. Id. at 217. The Third Circuit made this remarkable conclusion notwithstanding a lack of consensus among psychologists on how sexually-oriented publications affect the treatment of sex offenders. Id. at 216. The court explained that under Turner, as long as the asserted link between the statute and the penological interest is rational—not necessarily a perfect fit—it must defer to the judgment of state authorities. Id. at 216-217.

At issue in Nasir v. Morgan, was a Pennsylvania DOC policy prohibiting correspondence between current and former inmates. 350 F.3d 366, 368 (3d Cir. 2003). Disciplined for receiving, and attempting to send letters to a former inmate, Nasir claimed a violation of his free speech rights. Id. at 369. Applying Turner to the incoming mail and Martinez to the outgoing correspondence, Id., at 371, the Third Circuit upheld the policy. Id. at 374-376. "Incoming

communication to inmates by former prisoners presents a serious set of dangers to prison safety and prison administration, and the regulation logically addresses those dangers by permitting correspondence only with approval. Id. at 374.

In Monroe v. Beard, prisoners filed suit contending that the confiscation of the Uniform Commercial Code (UCC) manuals and publications violated their First Amendment rights. 536 F. 3d 198, 205 (3d Cir. 2008). In this case, prison officials argued that the confiscation was necessary to protect judges, prosecutors, prison officials, and other government employees from inmates filing fraudulent liens against them. Id. at 208. Applying Turner, the Third Circuit sustained the policy, noting that "the defendants' decision to engage in preemptive action was reasonably and within their discretion." Id.

In each of these decisions, the Third Circuit Court of Appeals—pursuant to Turner—agreed that inmates' free speech rights were secondary and subordinate to important state interests such as prison security, inmate rehabilitation, and fraud prevention. As long as prison censorship regulations and resulting action are reasonably related to these interests, Turner requires the courts to sustain them. See also, Sheets v. Moore, 97 F.3d 164 (6th Cir. 1996) (prison may ban junk mail due to prison security); Stow v. Grimaldi, 993 F.2d 1002 (1st Cir. 1993) (prison may inspect outgoing mail to university for escape plans and contraband); Knight v. Lombardi, 952 F.2d 177 (8th Cir. 1991) (prison may reject incoming mail from former guard due to security threat); Rodriguez v. James, 823 F.2d 8 (2d Cir. 1987) (prison may inspect outgoing business mail to prevent fraud).

On the other hand, where censorship or restrictions on inmate mail are not reasonably based upon valid governmental interests, or where the connection between the censorship and the governmental interest is so remote as to render the policy arbitrary

or irrational, the courts will declare the matter unconstitutional.

In Abu-Jamal v. Price, the Third Circuit held that prison officials violated a prisoner's free speech rights when they opened, read, and sent to government lawyers at the Governor's office copies of confidential attorney-client mail. 154 F.3d 128, 132 (3d Cir. 1998). Prison officials did so pursuant to an investigation as to whether Jamal, a former journalist who continued to write while on death row, was violating a prisoner regulation barring inmates from carrying on a business or profession while incarcerated. Id. at 131. The prison claimed that they were reading his attorney mail to determine whether Abu-Jamal's attorney was helping him get compensation for publications; however, the regulation did not address the question whether payment was permitted. Id. Therefore, the prison's reasoning was illogical. Id. Citing Turner, the Third Circuit held there was no valid, rational connection between the prison regulation and a legitimate penological interest. Id. at 135-136. Moreover, the court found that prison officials were motivated, as least in part, by the content of his articles and mounting public pressure to do something about them. Id. at 134.

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

actions." Id. See also: Crofton v. Roe, 170 F.3d 957 (9th Cir. 1999) (prohibiting inmate receipt of publications unless paid for in advance by inmate held unconstitutional); Thongvanh v. Thalacker, 17 F.3d 256 (8th Cir. 1994) (regulation requiring "English only" correspondence unconstitutional where few letters were actually read by prison staff).

Finally, the decision to withhold or censor inmate mail and publications must be accompanied by procedural Due Process to both the prisoner and his or her correspondent. See Martinez, 416 U.S. at 417. Even if a magazine, newspaper or personal letter is considered a threat to prison security, prison officials must provide Due Process safeguards to both parties, including notice of the rejection and an opportunity to present objections. Id. In addition, complaints about mail censorship should be "referred to a prison official other than the person who originally disapproved the correspondence." Id. See also: Jacklovich v. Simmons, 392 F.3d 420, 433 (10th Cir. 2004) stating that "both inmates and publishers have a right to procedural Due Process when publications are rejected"; Bonner v. Outlaw, 552 F.3d 673 (8th Cir. 2009) (Due Process applies to rejected mail regardless whether communication occurs in the form of letter, package, newspaper, or magazine).

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

## **B. Religious-Based Issues**

In addition to protecting freedom of speech, the First Amendment also requires that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const.

Amendment I. While the right to hold religious beliefs is absolute, see Sherbert v. Verner, 374 U.S. 398, 402 (1963), “the freedom to act, even when the action is in accord with one’s religious convictions, is not totally free from legislative restrictions.” Braunfeld v. Brown, 366 U.S. 599, 603 (1961).

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

#### 1. Bona Fide Religion

The threshold issue in every free exercise claim is whether there is a religion at stake within the meaning of the First Amendment. See Dehart v. Horn, 227 F.3d 47, 51 (3d Cir. 2000) (only those beliefs that are “religious in nature are entitled to constitutional protection”); Wilson v. Schillinger, 761 F.2d 921, 925 (3d Cir. 1985) (before particular beliefs are accorded First Amendment protection, a court must determine that the avowed beliefs are “religious in nature, in the claimant’s scheme of things”). While religious beliefs “need not be acceptable, logical, consistent, or comprehensible to others to merit First Amendment protection,” the Supreme Court has made clear that beliefs which are

philosophical and personal rather than religious do not merit constitutional protection. Thomas, 450 U.S. at 714; See also, Wisconsin v. Yoder, 406 U.S. 205, 215 (1972) (“A way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable State regulation ... if it is based on purely secular considerations; to have the protection of the Religion Clauses, the claims must be rooted in religious belief.”).

In Africa, the Third Circuit identified three factors for determining the existence of a religion: (1) a religion addresses fundamental matters; (2) a religion is comprehensive in nature, consisting of a belief system as opposed to an isolated teaching; and (3) a religion can be recognized by certain structural characteristics, such as formal ceremonies, clergy, etc. 662 F.2d at 1032. Applying these factors in Africa, the Third Circuit concluded that the “MOVE” organization was not a religion entitled to the protection of the First Amendment. Id. at 1035.

In Frazee v. Illinois Dept. of Employment Security, the state of Illinois denied unemployment benefits to the plaintiff because he refused a temporary retail job which would have required him to work on the “Lord’s Day.” 489 U.S. 829, 830 (1989). Illinois argued that Frazee’s rejection of Sunday employment was not based on a specific tenet of Christianity, and hence, was not protected by the First Amendment. Id. at 1516. The Supreme Court reversed, holding that Illinois had violated Frazee’s free exercise rights by conditioning the receipt of unemployment benefits on his abandonment of sincerely-held religious beliefs. Id. at 1518. The Court notes that while it “is also true that there are assorted Christian denominations that do not profess to be compelled by their religion to refuse Sunday work,” that fact alone “does not diminish Frazee’s protection flowing from the Free Exercise Clause.” Id. at 834. The Court emphasized that, “we reject the notion that to claim the protection of the Free Exercise Clause, one must be

responding to the commands of a particular religious organization.” Id.

Other Supreme Court and Third Circuit decisions have likewise held that religious beliefs need not be “orthodox” or “mainstream” to deserve First Amendment recognition. See Employment Division v. Smith, 494 U.S. 872, 887 (1990) (it is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants’ interpretations of those creeds); Thomas v. Review Boards, 450 U.S. 707, 716 (the guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect); Dehart v. Horn, 227 F.3d at 55 (finding that the lower court’s inquiry into whether prisoner’s religious-based request for a strict vegetarian diet was shared by Buddhist doctrine “is simply unacceptable”).

Prisoners seeking religious status for unconventional faiths must be prepared to prove that their systems of belief and worship satisfy the Africa definition of religion. See Dehart, 227 F.3d at 52 n. 3 (in determining whether a non-traditional belief or practice is religious, the courts will look to familiar religions as models to ascertain, by comparison, whether the new set of ideas or beliefs is confronting the same concerns, or serving the same purposes, as unquestioned and accepted religions).

Since religions tend to have certain elements in common (such as rituals to perform; prayers to recite; holy days to observe; sacred literature to read; and personal codes of behavior to follow), courts will examine these tenets, traditions, and practices of the disputed faith in light of the Africa criteria to determine whether there is indeed a “religion” at stake. Non-traditional belief and worship systems will be granted First Amendment protection as long as they are rooted in legitimate religious beliefs. See Church of the Lukumi Babacu Aye v. City of Hialeah, 508 U.S. 520, 538 (2003) (protecting Santeria and animal sacrifices, outside of the prison context); Sutton v.

Rasheed, 323 F.3d 236, 252 (3d Cir. 2003) (“The central foundational tenets of the Nation of Islam meet the definition of religion as set forth in Hialeah and Africa.”); Love v. Reed, 216 F.3d 682, 687-688 (8th Cir. 2000) (belief system of prisoner who was self-proclaimed adherent of Hebrew religion and derived his beliefs from Old Testament was a religion within the meaning of First Amendment).

Belief systems not religious in nature will be denied free exercise protection. See Africa, 662 F.2d at 1036 (MOVE organization not a religion); Johnson v. Pennsylvania Bureau of Corrections, 661 F.Supp. 425, 436-437 (W.D. Pa. 1987) (applying Africa criteria, Spiritual Order of Universal beings was not a religion.)

## 2. Sincerity Of Beliefs

It is not sufficient to establish that a particular set of beliefs constituted a religion within the meaning of the First Amendment. There is also the threshold requirement of sincerity—whether the religious beliefs professed are sincerely held. See Cutter v. Wilkinson, 544 U.S. 709, 725 n. 13 (“prison officials may appropriately question whether a prisoner’s religiosity, asserted as the basis for a requested accommodation, is authentic.”). Absent proof of a sincere religious belief, prison officials are under no obligation to consider faith based exceptions to prison rules. See Chase v. City of Philadelphia, 2011 U.S. Dist. Lexis 75463 (E.D. Pa. 2011) (denial of kosher food was not violation where inmate failed to establish sincere belief in Judaism).

In Dehart v. Horn, the Third Circuit held that prison officials are entitled to make a judgment about the sincerity and the legitimacy of a prisoner’s religious beliefs and act in accordance with that judgment. 227 F.3d at 52 n. 3. If a prisoner’s religious beliefs are “not a constituent part of a larger pattern of religious observance on the part of the inmate,” prison officials may regard it as a pretext that is not sincere. Id.

In Sourbeer v. Robinson, a prisoner contended that his First Amendment rights

were violated when he was denied congregational services while confined in administrative segregation. 791 F.2d 1094, 1102 (3d Cir. 1986). Noting that Sourbeer never designated a spiritual advisor while in the RHU and attended religious services only five times after his RHU release, the Third Circuit dismissed the case, finding that his religious beliefs were insincere. Id.

Similarly, in Johnson v. Pennsylvania Bureau of Corrections, a Muslim prisoner claimed his free exercise rights were violated when female prison guards were assigned areas in the prison where they could view him unclothed, violating the tenets of Islam. 661 F. Supp. 425, 427 (W. D. Pa. 1987). The district judge concluded that the plaintiff did not have sincere Muslim beliefs because he abandoned his religion during his first years in prison and additionally because his complaint was largely based upon "his human dignity" as opposed to being religiously-based. Id. at 437.

On the other hand, the Fourth Circuit has noted simply because a prisoner fails to adhere to a particular religious practice does not permit prison officials or the courts to automatically assume a lack of sincerity. See Lovelace v. Lee, 472 F.3d 174, 188 (4th Cir. 2006) ("An inmate, however, could decide not to be religious about fasting and still be religious about other practices, such as congregational services or group prayer."); Reed v. Faulkner, 842 F.2d 960, 963 (7th Cir. 1988) (prisoner's failure to adhere to every tenet of Rastafarian faith could not be considered conclusive evidence of insincerity).

Whether or not an individual sincerely holds religious beliefs is not dependant upon racial or biological criteria. For example, in Jackson v. Mann, state officials, including the prison rabbi, denied a prisoner access to kosher meals because he could not provide evidence that he was either born Jewish or had converted to Judaism. 196 F.3d 316, 320 (2nd Cir. 1999). The Second Circuit remanded the case back to the lower court, noting that the question

whether Jackson's beliefs are entitled to free exercise protection turns on whether they are sincerely-held, not on the ecclesiastical question whether he is in fact a Jew under Judaic law. Id. at 321.

Likewise, in Morrison v. Garraghty, the Fourth Circuit held that prison officials' refusal to consider a prisoner's request for Native American religious items only upon proof of Native American descent violated equal protection. 239 F.3d 648, 659 (4th Cir. 2001). The court explained, "we agree with the district court's conclusion that prison officials cannot measure the sincerity of Morrison's religious beliefs in native American spirituality solely by his racial make-up of the lack of his tribal membership." Id.

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

### 3. Balancing Religious Exercise Against Penological Interests

In O'Lone v. Estate of Shabazz, the Supreme Court established the precise standard of review for prisoners' claims that state officials have violated their First Amendment rights to free exercise of religion. 482 U.S. 342 (1987). At issue in the case was a New Jersey prison policy which prohibited prisoners assigned to outside work details from returning to the prison on Friday afternoons to attend the weekly Islamic congregational services. Id. at 345. Prison officials adopted the policy because of the security and administrative burdens which resulted when one or more prisoners desired to re-enter the facility and attend services. Id. Prisoners brought suit claiming a violation of their rights to free exercise or religion. Id.

The Shabazz court held that regulations restricting prisoners' free exercise rights are constitutional if they are reasonably related to legitimate penological objectives. Id. at 353. The Court thus adopted the four factor reasonableness test formulated in Turner to all free exercise of religion claims. Id.

Applying the Turner test, the Shabazz majority upheld the policy as reasonably related to the penological objectives of institutional security, order and rehabilitation of inmates. Id. at 349-350. First, the policy was deemed rationally connected to legitimate state interests in security and prisoner rehabilitation by easing congestion at the main gate and instilling responsible work habits. Id. Secondly, the Court noted that although denied religious services, the prisoners did enjoy alternative meals, and special arrangements during the holy month or Ramadan. Id. at 352. As for the third factor—the impact of accommodating the right on other prisoners, guards and institutional resources—the Court agreed with state officials that adverse consequences would result because extra supervision would be required and friction would emerge inside work details as other prisoners perceive favoritism. Id. at 353. Finally, the Shabazz court held that there were no obvious, easy alternatives. Id. In conclusion, the refusal to allow Muslim prisoner back into the prison for congregational services was “reasonably related to legitimate penological objectives” and did not offend the First Amendment. Id.

The Turner and Shabazz decisions make it crystal clear that prison regulations restricting prisoners religious exercise are not to be analyzed under any heightened or strict scrutiny standard. Nor are the courts permitted to substitute their judgment—in matters of prison security—for those charged with the task of running prisons. Shabazz, 482 U.S. at 349. As long as prison policy is reasonably related to some legitimate state interest, they are constitutional.

The Third Circuit Court of Appeals has applied the Turner reasonableness standard in numerous actions involving state restrictions on religious exercise. In each case the result hinged on whether a legitimate penological interest existed to justify the curtailment of religious activity.

For example, in Cooper v. Ford, prisoners brought suit after they were punished for participating in group prayer in the prison yard. 855 F.2d 125, 127 (3d Cir. 1988). Applying Turner, the Third Circuit upheld the policy prohibiting unauthorized group activity, noting that such a structure “posed a potential threat to prison authority.” Id. at 129.

In Pressley v. Beard, an inmate alleged denial of religious exercise when state officials confiscated a hard-bound Koran and prayer rug during his confinement in a segregation unit. 266 Fed. Appx. 216, 218 (3d Cir. 2008). Applying Turner, the court upheld the policy, noting that the items could be used to conceal contraband and that Pressley had alternative means to exercise his religious beliefs. Id. at 219.

In Smith v. Kyler, an inmate alleged denial of his free exercise rights when prison officials refused to provide weekly Rastafarian religious services. 295 Fed. Appx. 479, 480 (3d Cir. 2008). “Because of limited resources, the DOC will not pay for religious leaders for smaller groups.” Id. at 480. Citing Turner, the Court upheld the policy given the Commonwealth’s interests in prison security and conserving limited financial resources. Id. at 481. See also: Anderson v. Angelone, 123 F.3d 1197, 1199 (9th Cir. 1997) (“Requiring an outside minister to lead religious activity among inmates undoubtedly contributes to prison security.”); Hadi v. Horn, 830 F.2d 779, 784 (7th Cir. 1987) (cancellation of Islamic services upheld as reasonable security measure when outside minister was unavailable).

In Sutton v. Rasheed, inmates were denied access to Nation of Islam literature due to a tiered policy in which high security

prisoners could gain access to more religious texts by meeting institutional requirements. 323 F.3d 236, 241 (3d Cir. 2003). When the plaintiffs met the requirements that would have allowed them access to two religious texts in addition to a Qur'an or Bible, however, they were denied Nation of Islam materials anyway. This denial was because the SCI Chaplain deemed the books to be political in nature. Id. at 242. The Third Circuit determined that the Nation of Islam materials qualify as a religious materials and therefore the prison's refusal to permit the books "deprived the plaintiffs of texts without which they could not practice their religion." Id. at 257.

Conflicts over religious dietary codes were addressed in two cases—both unsuccessful. In the first, a New Jersey prisoner claimed state officials violated his First Amendment rights when they refused to provide meals consistent with his Islamic beliefs. Williams v. Morton, 343 F.3d 212 (3d Cir. 2003). Applying the four-factor Turner analysis, the court concluded that rejection of the specialized diet was rationally related to the state's interest in a simplified food service, security and budgetary concerns. Id. at 217-218. In the second case, the Third Circuit rejected a Buddhist prisoner's claim that state authorities unconstitutionally disallowed his specialized dietary requests. See Dehart v. Horn, 390 F.3d 262 (3d Cir. 2004). Applying Turner, the court concluded that the Commonwealth's interest in an efficient food service system justified denial of the religious based diet. Id. at 268-270.

Personal grooming and clothing regulations are another source of conflict between inmate religious exercise and state penological interests. Religious decrees requiring the covering of the head conflicts with prison officials' security concerns pertaining to contraband smuggling and detection. Similarly, religious codes prohibiting the cutting of facial hair or the hair on one's head conflict with state interests in prisoner identification.

In Wilson v. Schillinger, 761 F.2d 921 (3d Cir. 1985) and Cole v. Flick, 758 F.2d 124, 131 (3d Cir. 1985) the Third Circuit rejected free exercise challenges to a Pennsylvania grooming regulation which banned male hair length below the collar. Finding that the regulation was based on valid security concerns, including an effective inmate identification system, contraband, and the control of predatory homosexuals, the court sustained the regulation. Id. at 126-131. Post Turner grooming decisions in other federal appellate courts have also been negative. See Fegans v. Norris, 537 F.3d 897 (8th Cir. 2008); Longoria v. Dretke, 507 F.3d 898 (5th Cir. 2007); Harris v. Chapman, 97 F.3d 499 (11th Cir. 1996).

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

Faith-based name changes have also generated free exercise disputes. Prisoners who successfully petition the local courts to obtain a name change for religious reasons are often confronted by state officials who insist that the inmate identify himself under his commitment name. For example, in Hakim v. Hicks, a prisoner converted to Islam and obtained a name change from the state of Florida. 223 F.3d 1244, 1246 (11th Cir. 2000). Prison officials, however, refused to recognize the religious name, claiming that name changes would interfere with record-keeping practices and undermine security by creating confusion in prisoner identification. Id. at 1249. The Eleventh Circuit concluded that the state's refusal to adopt a "dual-name policy" (in which the prisoner's commitment name is followed by his legally-recognized religious name) was unreasonable under Turner. Id. Whether the Third Circuit will follow the Hakim rationale is presently unknown. Keep

in mind, however, the First Amendment's exercise clause only protects name changes stemming from sincerely-held religious beliefs. Name changes obtained for ethnic or other reasons do not fall within the scope of the First Amendment's exercise clause. See Ali v. Stickman, 206 Fed. Appx. 184 (3d Cir. 2006) (name change to reflect African heritage, not for religious reasons, was not protected by First Amendment).

#### 4. RLUIPA-Based Claims

It is quite obvious that prisoners contemplating First Amendment challenges to state restrictions of religious activity face an overwhelming, if not insurmountable, task under the Turner reasonableness standard. As long as restrictions on religious exercise are reasonably related to a valid penological interest, the courts are required to sustain them.

In addition to claiming that state restrictions on religious practices violate the First Amendment, prisoners should consider adding a separate claim that such restrictions also violate the Religious Land Use and Institutionalized Persons Act of 2000 (commonly known as "RLUIPA"). See 42 U.S.C.A. § 2000cc. The legislation states:

No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, [even if the burden results from a rule of general applicability] unless the government demonstrates that imposition of the burden on that person, assembly, or institution--

(A) is in furtherance of a compelling governmental interest; and

(B) is the least restrictive means of furthering that compelling governmental interest.

42 U.S.C.A. § 2000cc

Applicable to all states that receive federal financial assistance (this would

include Pennsylvania), RLUIPA was enacted into law because prisons throughout the United States were imposing "frivolous" and "arbitrary" barriers that impeded prisoners' religious exercise. See Cutter v. Wilkinson, 544 U.S. 709, 716 (2005). RLUIPA requires application of a compelling governmental interest test which affords prisoners greater protection of religious exercise than what the First Amendment and Turner mandates. See Warren v. Pennsylvania, 316 Fed. Appx. 109, 114 (3d Cir. 2008) ("For prisoners, RLUIPA heightens the protection from burdens on religious exercise").

RLUIPA-based claims, however, have some drawbacks and warrant careful research prior to filing. In Cutter v. Wilkinson, the Supreme Court agreed that RLUIPA did not violate the First Amendment's Establishment Clause. 544 U.S. at 724. However, the Supreme Court has yet to decide whether RLUIPA violates other constitutional provisions. Id. at 719 n. 7 (noting that the Supreme Court did not consider whether RLUIPA violated the Spending and Commerce Clauses or the Tenth Amendment).

Secondly, prisoners cannot recover monetary damages even if they prove RLUIPA violated. Under the terms of the statute, a person may assert RLUIPA claims "against government." 42 U.S.C. § 2000cc-2(a). It does not authorize suits against state officials in their individual capacities. See Nelson v. Miller, 570 F.3d 868 (7th Cir. 2009); Rendelman v. Rouse, 569 F.3d 182 (4th Cir. 2009); Sharp v. Johnson, 669 F.3d 144, 153-154 (3d Cir. 2009) (RLUIPA does not permit action against state officials in their individual capacities).

Since prisoners may bring RLUIPA claims only against the government or state employees in their official capacities, questions of sovereign immunity come into play. See Will v. Michigan Dept. of State Police, 491 U.S. 58, 71 (1989) ("a suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office"). In

Sossman v. Texas, the Supreme Court agreed that Eleventh Amendment sovereign immunity bars prisoners from seeking monetary damages against the states for violations of RLUIPA. 131 S.Ct. 1651, 1655 (2011). Thus, even if a prisoner proves a RLUIPA violation in federal court, he or she is limited to declaratory and injunctive relief. See also, Washington v. Grace, 2011 U.S. Appx. 611, 616 Lexis 19715 (3d Cir. 2011) (“to the extent that he requested money damages for RLUIPA violations, such relief is barred by the recent holding in Sossamon v. Texas”).

RLUIPA states that “no government” shall impose a “substantial burden” on a person’s “religious exercise unless it demonstrates that the burden “is in furtherance of a compelling governmental interest” and is “the least restrictive means of furthering that compelling governmental interest.” 42 U.S.C.A. §2000cc-1. Of course, a prisoner must first meet the threshold requirements that: (a) his system of belief constitutes a religion; and (b) he or she sincerely holds those religious beliefs. See Cutter v. Wilkinson, 544 U.S. at 725 n. 13 (RLUIPA does not preclude inquiry into the sincerity of a prisoner’s professed religious beliefs).

Under RLUIPA, a prisoner must first prove that the government imposed a “substantial burden” on the “religious exercise” of a person. In Washington v. Klem, the Third Circuit ruled that a “substantial burden” under RLUIPA exists where: (a) the follower is forced to choose between following the precepts of his religion and forfeiting benefits otherwise generally available to other inmates versus abandoning one of the precepts of his religion in order to receive a benefit; or (b) the government puts substantial pressure on an adherent to substantially modify his behavior and to violate his beliefs. 497 F.3d 272, 280 (3d Cir. 2007). Applying this definition to the case at hand, the Third Circuit concluded that a Pennsylvania DOC rule restricting prisoners to possession of ten books “substantially burdened” the plaintiff’s

“Pan-Afrikanism” religious beliefs which required him to read four African-related books each day. Id. at 282.

In Heleva v. Kramer, 330 Fed. Appx. 406 (2009) a prisoner alleged state officials violated his rights under RLUIPA when they delayed deliver of two spiritually-based books. Id. at 407. The books were eventually delivered after proof was obtained that they originated from a publisher. Id. at 409. The Third Circuit concluded that the eight-month delay did not result in a “substantial burden” of religions. Id. at 409. “At no point did Heleva have to abandon one of the precepts of his Christian religion, nor did the government put pressure on him to substantially modify his behavior or violate his beliefs. Id. at 409.

In Kretchmar v. Beard, the Third Circuit ruled that absence of hot meals did not constitute a substantial burden on a Jewish prisoner’s religious exercise when he was accorded a nutritionally-adequate and religiously-compliant cold kosher diet. 241 Fed. Appx. 863, 865 (3d Cir. 2007). The court agreed that such action did not pressure him to modify his behavior or violate his beliefs. Id.; see also, Smith v. Ozmint, 578 F.3d 246 (4th Cir. 2009) (forced haircuts constituted substantial burden); Nelson v. Miller, 570 F.3d 868 (7th Cir. 2009) (denial of non-meat diet on Fridays and during Lent constituted substantial burden); Smith v. Allen, 502 F.3d 1255 (11th Cir. 2007) (denial of small quartz was not substantial burden).

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

exercise and accordingly, are protected activities under RLUIPA).

A prison regulation which substantially burdens a prisoner's religious practice will be upheld by the courts if it is in furtherance of a "compelling governmental interest" and is the "least restrictive means" of furthering that governmental interest. 42 U.S.C.A. § 2000cc-1(a) (1)-(2). The safety, security and order of the institution and the discipline and rehabilitation of prisoners remain compelling governmental interests under RLUIPA. See Cutter v. Wilkinson, 544 U.S. at 722 ("We do not read RLUIPA to elevate accommodation of religious observances over an institution's need to maintain order and safety"); Turner, 482 U.S. at 92 (maintaining safety and internal security are the core functions of prison administration).

In Smith v. Kyler, where the prison refused to allow religious group meetings that were not led by an outside chaplain or volunteer, the Third Circuit did not directly address whether the substantial cost to the prison would constitute a compelling interest. 295 Fed. Appx. 479, 483 (3d Cir. Pa. 2008) (unpublished). Rather, the court dismissed the plaintiff's case because his claim was not based on a government policy as required by RLUIPA. The court reasoned that the absence of weekly religious meetings was caused not by the prison regulation, but rather by "inadequate demand for such services and from a dearth of qualified outside volunteers available to go to SCI-Huntington not from some rule or regulation that directly prohibits such gatherings." Id. Although the Third Circuit did not directly rule on this issue, its opinion in Kyler suggests that it might take cost into account in determining whether a policy is narrowly tailored to a compelling prison interest.

If a prison regulation burdening religious exercise is in furtherance of a compelling penological interest such as security and safety of the institution, it will be sustained by the court if it is the least restrictive means to protect that interest.

Under this requirement, prison officials cannot simply ban a religious practice if there exist reasonable alternatives that, if implemented, will protect the penological interest while allowing the religious practice. For example, one justification for state prison grooming regulations is that uncut long hair is unsanitary and dangerous when prisoners work in food preparation or around machinery. Under the least restrictive means test, however, a simple hair net would protect the state's safety interests while permitting the exercise of the prisoner's religious beliefs.

In Washington v. Klem, a prisoner filed a RLUIPA-based suit claiming that a Pennsylvania DOC rule limiting him to possession of ten books infringed on his religious exercise (in this case, the plaintiff's beliefs required him to read four Afro-centric books per day). 497 F.3d 272, 275 (3d Cir. 2007). Having determined that the rule "substantially burdened" his religious beliefs, the court confronted the question of whether the DOC's actions were the "least restrictive means" to safeguard the Commonwealth's concerns that excessive inmate property presented contraband-hiding and fire-safety hazards." Id. at 282, 284. Reviewing the available record, the Third Circuit concluded that the ten-book policy was not the "least restrictive means" but was, in fact, arbitrary. Id. at 285-286. The court noted that while enforcing the ten-book limitation (for the intended purpose of preventing contraband hiding and fire hazards), the DOC's own regulations permitted possession of more than ten books for educational purposes. Id. at 285.

The compelling governmental interest test of RLUIPA is certainly a more prisoner friendly free exercise standard than Turner and Shabazz. See Vasquez v. Ragonese, 393 Fed. Appx. 925, 929 (3d Cir. 2010) ("even if a prison's actions are allowed by the Constitution under the Turner analysis, they may not be allowed under the more restrictive (RLUIPA) statute"). It requires state officials prove that a restriction on religious exercise actually furthers prison

security or other legitimate interests, and additionally, is no broader than necessary to safeguard such interests.

RLUIPA, however, should not be interpreted as the answer to all religious grievances. It does not mean, for example, that prisoners confined in isolation units for security reasons will be released to attend the weekly congregational services or prisoners will be entitled to don robes and conduct rituals in their cells. See Boretsky v. Corzine, No. 08-2265 (GEB), 2011 U.S. Dist. Lexis 70654 at \*41 (D. N.J. June 30, 2011) (inmate denied weekly group religious services while confined in special sentencing unit was not violation of Turner or RLUIPA due to compelling governmental interest in staffing and security).

When asserting RLUIPA claims, remember that the courts will always give substantial deference to state officials in matters involving the safety and security of the institution. See Cutter v. Wilkinson, 544 U.S. at 726 (“Should inmate requests for religious accommodation become excessive, impose unjustified burdens on other institutional persons, or jeopardize the effective functioning of an institution, the facility would be free to resist the imposition.”) The lower courts will uphold the vast majority of prison regulations curtailing religious exercise even when applying the compelling interest standard of RLUIPA.

For example, in Fowler v. Crawford, the Eighth Circuit rejected a Native American inmate’s claim that the denial of a sweat lodge violated RLUIPA. 534 F.3d 931, 934 (8th Cir. 2008). The court determined that maximum security inmate access to burning fires, scalding rocks, and sharp objects like shovels and deer antlers presented obvious security hazards. Id. at 939. The court also agreed that the “least restrictive means” requirement was satisfied given the plaintiff’s refusal to accept institutional alternatives. Id. at 939-940.

In conclusion, while religious practices are now routine in prisons and jails, the standards applied by the courts to

evaluate free exercise disputes remain unsettled. Clearly, prisoners should assert that the appropriate free exercise standard is the compelling interest test enunciated in RLUIPA. Under this standard, a regulation curtailing religious free exercise can be sustained only if it is in furtherance of a compelling governmental interest (such as prison security and the discipline and rehabilitation of prisoners) and is the least restrictive means to protect that interest.

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

### C. Association And Media Rights

The First Amendment also protects the individual’s right to freedom of association. The Supreme Court has recognized two types of association protected by the First Amendment: (1) “intimate association,” that is, the right to maintain personal family relations; and (2) “expressive association,” that is, the right to join groups and associate with others to advance ideas or engage in expressive conduct. See Roberts v. United States Jaycees, 104 S.Ct. 3244, 3249 (1984). Given the fact that prisoners maintain family relationships and join advocacy groups while incarcerated, both types of association are implicated in the correctional system. Once again, however, the exercise of a constitutional right is not absolute, but must be weighed against legitimate state interests.

#### 1. Intimate Association

In Turner v. Safley, prisoners brought suit challenging a Missouri regulation which prohibited them from marrying unless they had permission of the prison superintendent, which could be given only when there were compelling reasons to do so. 482 U.S. at 82. The Turner court struck down the marriage regulation, holding that it was not reasonably related to the state's rehabilitation and security concerns, and thus, was unconstitutional. Id. at 91. Whether other state regulatory impediments to marriages between prisoners and non-prisoners violated the First Amendment should be carefully researched prior to filing any litigation.

The right of intimate association in prison emerges primarily in the context of family visitation and prisoner marriages. Turner held that the states cannot impose unreasonable barriers on prisoner marriages. As for family visitation, some lower courts have held that prisoners do not enjoy a constitutional right to visitation. See Buehl v. Lehman, 802 F.Supp. 1266, 1270 (E. D. Pa. 1992) ("It is doubtful that convicted prisoners or those who wish to visit them, including family and spouses, have a constitutional right to visitation"); Flanagan v. Shively, 783 F. Supp. 922, 934 (M. D. Pa. 1992) (noting that visitation is a privilege subject to the discretion of prison officials, the court held, "Inmates have no constitutional right to visitation."), affirmed, 980 F.2d 722 (3d Cir. 1993).

In Overton v. Bazzetta, the Supreme Court had the opportunity, but declined to decide whether inmates enjoy a constitutional right to prison visitation. 539 U.S. 126, 131 (2003). At issue in Overton, were various restrictions on prisoner visitation imposed by the Michigan Department of Corrections regarding minors, former inmates, and curtailment of visits for inmates found guilty of substance abuse. Id. at 130. The Court concluded that the regulations in question survived the four-part "reasonableness" test of Turner, and therefore, there was no need to decide whether inmates enjoy a constitutional right

to prisoner visitation. Id. at 131, 136 ("We do not hold, and we do not imply, that any right to intimate association is altogether terminated by incarceration or is always irrelevant to claims made by prisoners."). Whether the Supreme Court will finally resolve this question in the future remains to be seen.

Assuming that prisoners do enjoy some form of a constitutional right of intimate association in the context of family visitation, there can be no doubt that the state has the right to enforce regulations which are reasonably necessary to ensure the safety, security, and order of the institution during the visiting process. For example, in Overton, the Supreme Court applied the four-part Turner analysis in upholding various Michigan policies restricting inmate visitation. Id. at 133-135. Among the policies upheld were regulations barring minors who were no family members and requiring all minor family members to be accompanied by an adult. Id. at 133. The Overton court also upheld regulations barring visitation by former inmates and those prisoners found guilty of two substance abuse charges during incarceration. Id. at 133-134. In short, Overton gives prison authorities wide latitude over prison visitation, including the time and manner of visits, and who is actually permitted entry to the facility for visitation purposes.

Likewise, in Block v. Rutherford, the Supreme Court upheld a California jail regulation banning all contact visits. 468 U.S. 576, 587 (1984). Noting that contact visits may allow the introduction of contraband into the facility and expose innocent persons to potentially dangerous persons, the Supreme Court upheld the regulation stating that "the Constitution does not require that detainees be allowed contact visits when responsible, experienced administrators have determined, in their sound discretion, that such visits will jeopardize the security of the facility. Id. at 589.

When prison policy impinges upon inmate visitation, the courts will determine,

under Turner, whether it is reasonably related to legitimate penological interests. For example, in Maze v. Tafolla, the court upheld a policy barring detainees charged with murder from receiving contact visits with their minor children. 369 Fed. Appx. 532, 534 (5th Cir. 2010). And in Henry v. Department of Corrections, the court upheld a permanent ban on contact visitation for an inmate suspected of destroying drugs during a cell search. 131 Fed. Appx. 847, 850-851 (3d Cir. 2005). In each of these cases, the courts determined that valid security and safety concerns justified the curtailment of inmate visitation.

On the other hand, where prison policy restricting family visitation is not reasonably related to legitimate security concerns, the courts have found First Amendment violations. In Doe v. Sparks, the district court found unconstitutional a Blair County regulation which prohibited visitation between homosexual prisoners and their boyfriends or girlfriends. 733 F. Supp. 227, 234 (W. D. Pa. 1990). Applying Turner, the court held that the connection between the asserted security goal (of preventing harassment or abuse of homosexual prisoners) and the visitation policy "is so remote as to be arbitrary." Id. The court noted that the perception of prisoners that a particular inmate is homosexual due to a change observation during a mere two-hour weekly visit is "practically negligible" in comparison to the other 166 hours per week in which prisoners can observe the inmate's appearance and behavior. Id. at 233.

## 2. Expressive Association

The Supreme Court has recognized a First Amendment "right to association with others in pursuit of a wide variety of political, social, economic, educational, religious and cultural ends." Roberts v. United States Jaycees, 104 S. Ct. 3244 (1984). Whether or not a particular group or organization is entitled to constitutional protection as an expressive association depends on whether it is engaged "in some form of expression, whether it be public or private." Boy Scouts

of America v. Dale, 530 U.S. 640, 648 (2000). In Roberts, the Supreme Court held that the Jaycees were a protected expressive association because "the national and local levels of the organization have taken public positions on a number of diverse issues, and members of the Jaycees regularly engage in other activities." 104 S. Ct. at 3254.

In Pennsylvania's state correctional system, prisoners are permitted to join a diverse group of organizations including the Jaycees, Lifer's organizations and Vietnam Veterans chapters, among many others. All of these groups have taken positions on public issues affecting their members and engage in a variety of civic and charitable activities. Accordingly, they likely qualify as constitutionally protected expressive associations. See Roberts, 104 S. Ct. at 3252.

That a particular organization qualifies under the First Amendment as a constitutionally protected expressive association does not mean that it is immune from state regulations. Roberts, 104 S.Ct. at 3252 (right to associate for expressive purposes is not absolute and infringements on that right may be justified by compelling state interests). In the prison context, curtailment or prisoners' rights to expressive association can be justified by important state penological interests, central of which are institutional safety and order. In Jones v. North Carolina Prisoners' Labor Union, Inc., the Supreme Court rejected prisoners' First Amendment associational challenge to prison regulations prohibiting meetings of a prisoners' labor union and barring prisoners from soliciting others to join the union. 433 U.S. 119, 131 (1977). The Court based its decision upon prison officials' testimony that the concept of a prisoners' labor union was "fraught with potential dangers," including increased tension between prisoners and staff, and between union and non-union prisoners. Id. at 126.

Similarly, in Hudson v. Thornburg, the district court upheld prison officials'

decision to disband a prisoners' lifers' organization on grounds that its leaders were exacerbating tensions within the facility. 770 F. Supp. 1030, 1036 (W. D. Pa. 1991); see also, Hendrix v. Evans, 715 F. Supp. 897 (N. D. Ind. 1989) (prison had a legitimate interest in security in refusing to fund lobbying efforts and prohibiting distribution of leaflets by a prisoner organization). In conclusion, although prisoner organizations like Jaycees and lifers' organizations retain some First Amendment associational rights under Turner and Jones those rights may be restricted by prison regulations reasonably related to legitimate penological objectives such as prison security and safety. Finally, it is well-settled that prisoners do not have any First Amendment expressive associational rights to circulate petitions protesting prison conditions. See Wolfel v. Morris, 972 F.2d 712, 716 (6th Cir. 1992) ("The right to circulate a petition in prison is not a protected liberty interest."); Edwards v. White, 501 F.Supp. 8, 12 (M. D. Pa. 1979) ("a regulation prohibiting circulation of petitions among inmates is a reasonable response to a reasonable fear"), affirmed, 633 F.2d 209 (3d. Cir. 1980).

### 3. Access to Press

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

There is no question that prisoners retain significant First Amendment rights to communicate with the media by mail. While there may be a dispute between the lower courts as to whether mail to and from journalists is privileged (entitled to be opened only in the presence of the prisoner), there is no question that prison officials cannot censor or withhold such mail absent a legitimate governmental interest. See Proconier v. Martinez, 416 U.S. 396, 413 (1974) ("Prison officials may not censor

inmate correspondence simply to eliminate unflattering or unwelcome opinions or factually inaccurate statements."); Mujahid v. Sumner, 807 F.Supp. 1505, 1510-1511 (D. Haw. 1992) (applying Turner, prison regulations permitting prisoner correspondence with member of news media only if prisoner had friendship prior to commitment unconstitutional).

In terms of face-to-face interviews with journalists, however, the Supreme Court has interpreted the First Amendment much more narrowly. In Pell v. Proconier, the Court upheld a California regulation prohibiting face-to-face interviews of particular prisoners by the media. 417 U.S. 817, 827-828 (1974). Prison officials implemented the restriction in the wake of a 1971 escape attempt in which three state members and two prisoners were killed. Id. at 832. Prison officials contended that press interviews with prisoners who espoused a philosophy of noncooperation with prison rules encouraged others to follow suit, thereby undermining prison security. Id. at 831-832. The Pell court sustained the regulation based upon the articulated security concerns, and in light that it operated in a neutral fashion and alternative means of communicating with the media (e. g. mail) were open to prisoners. Id. at 824. See also: Houchins v. KOED, Inc., 438 U.S. 1, 5 n.2 (1978) (upholding denial of media requests for special inspection of prison and interviews with inmates, noting that inmates "retain certain fundamental rights of privacy" and "are not like animals in a zoo to be filmed and photographed at will by the public or by media reporters"); Saxbe v. Washington Post Co., 94 S. Ct. 2811 (1974) (prison regulation prohibiting face-to-face interviews by newsmen of individual prisoners did not violate First Amendment).

In light of Pell and its progeny, prisoners have no constitutional remedies when denied press interviews as long as alternative means of communication remain open (such as mail and telephone) and the restriction operates in a neutral fashion. See Johnson v. Stephan, 6 F.3d. 691, 692 (10th Cir. 1993) (same).

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

#### D. Retaliatory Conduct

Although state officials vehemently deny it, prisoners who speak out against prison conditions through media contacts, civil rights lawsuits, or internal grievances are often subject to retaliatory conduct. This can range from cell searches and denial of prison services to matters of a more serious nature, including misconduct reports, prison transfers, and parole rejection recommendations. In Abu-Jamal v. Price, the Third Circuit found that SCI-Greene officials' opening, reading and copying of confidential attorney-client mail of a former journalist mounting public pressure to do something about his writings was a constitutional violation. 154 F.3d 128, 134 (3d Cir. 1998). In Castle v. Clymer, the district court held that SCI-Dallas officials were liable for the retaliatory prison transfer of a prisoner who made statements about prison conditions to the media. 15 F. Supp. 2d 640, 666 (E. D. Pa. 1998). Other federal courts have found similar constitutional violations, suggesting that retaliatory conduct is a far greater

problem than state officials concede. See Trobaugh v. Hall, 176 F.3d 1087 (8th Cir. 1999) (prison officials liable for confining prisoner in isolation cell for filing grievances); Goff v. Burton, 91 F.3d 1188 (8th Cir. 1996) (prison officials liable for retaliatory prison transfer of prisoner who brought civil rights action claiming overcrowding conditions); Gomez v. Vernon, 255 F.3d 1118 (9th Cir. 2001) (finding that Idaho Department of Corrections had policy or custom of retaliating against inmate law clerks for providing legal assistance to prisoners, including prison transfers and misconduct reports). Even prison staff has repeatedly found themselves passed over for promotion and subject to other retaliatory sanctions for speaking out publicly regarding inmate abuse. See Allen v. Iranon, 283 F.3d 1070 (9th Cir. 2002) (prison physician denied job advancement and barred access to prison for reporting guard assault on prisoner).

The controlling Third Circuit decision in this area is Rausser v. Horn. 241 F.3d 330 (3d Cir. 2001). In Rausser, a prisoner objected on religious grounds to attending a drug and alcohol treatment program which required "participants to accept God as a treatment for their addictions." Id. at 332. As a result of his religious objections, Rausser alleged that he was transferred to another prison, deprived of a higher paying prison job, and denied a favorable parole recommendation. Id. The lower court agreed with Rausser that the religious program violated his constitutional rights under the Establishment Clause of the First Amendment. Id. However, the district judge dismissed the retaliatory claim, holding that Rausser had no federal constitutional right to parole, prison wages, or a specific place of confinement. Id.

The Third Circuit reversed, holding that "the relevant question is not whether Rausser had a protected liberty interest in the privileges he was denied, but whether he was denied those privileges in retaliation for exercising constitutional rights." Id. at 333. See also, Allah v. Sieverling, 229 F.3d 220, 224-225 (3d Cir. 2000) (governing actions which standing alone do not violate the

Constitution, may nonetheless be constitutional torts if motivated in substantial part by a desire to punish an individual for exercise of a constitutional right). Having established that, a prisoner litigating a retaliation claim need not prove that he had an independent liberty interest in the privileges he was denied. Id. Rauser sets forth the essential elements of a retaliatory claim:

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

2. Secondly, a prisoner must show that he suffered some "adverse action" at the hands of prison officials;

3. Thirdly, the prisoners must establish a causal connection between the first two elements by proving that his constitutionally protected conduct was "a substantial or motivating factor" in the adverse action taken against him;

4. Finally, if the prisoner proves that his constitutionally protected conduct was a substantial or motivating factor in the adverse action taken against him, the burden then shifts to prison officials to prove that they would have taken the same adverse action even in the absence of the protected activity.

Rauser, 241 F.3d at 333.

Applying these standards, the Third Circuit held that Rauser had adequately stated a retaliatory claim and remanded the matter back to the lower court. First, it was undisputed that Rauser's refusal to participate in the religious program was protected by the First Amendment. Id. Second, Rauser presented evidence that he suffered adverse action when he was denied parole, transferred to a distant prison, and given a lower-paying job. Id. Finally, Rauser presented evidence that his objection to the religious program was a motivating factor in the adverse action taken against him. Id. Thus, unless prison officials prove on remand that they would have taken the same

adverse action against Rauser "absent the protected conduct for reasons reasonably related to a legitimate penological interest," he could prevail on his retaliatory claim. Id.

### 1. Protected Conduct

The first prong of a retaliatory claim is to establish that the "conduct which led to the alleged retaliation was constitutionally protected." Id. at 333. Absent proof that a prisoner was engaged in constitutionally protected activity, there is no constitutional violation.

In Rauser, the Third Circuit held that the refusal to participate in a religious program was protected activity under the Establishment Clause of the First Amendment. Id. In Allah, the Third Circuit held that filing civil rights lawsuits against prison officials was protected activity under the constitutional right of access to the courts. 229 F.3d at 224. And in Bendy v. Ocean County Jail, the Third Circuit suggested that filing prison grievances was "arguably" conduct protected by the First Amendment. 341 Fed. Appx. 799, 802 (3d Cir. 2009).

Whether or not a prisoner's speech or conduct is constitutionally protected is a question of law. In considering this matter, one should bear in mind that not all prisoner speech or conduct is constitutionally protected. See Wilson v. Unknown Bedgeon, 248 Fed. Appx. 348 (3d Cir. 2007) (argument over cellblock television program is not protected speech); Corliss v. Varner, 247 Fed. Appx. 353 (3d Cir. 2007) (inmate abusive language in request slip form not constitutionally protected). Prison officials are allowed to enforce regulations restricting prisoners' First Amendment rights as long as they are reasonably related to legitimate penological interests. See Turner, 107 S.Ct. at 2261. Consequently, prisoners should not file retaliatory claims absent case law verifying that the speech or conduct in question is constitutionally protected.

### 2. Adverse Actions

A prisoner alleging retaliation must prove that he or she suffered some “adverse action” at the hands of prison officials. Rauser, 241 F.3d at 333. Whether or not particular state action is sufficiently “adverse” depends on whether it is one that would “deter a person of ordinary firmness from exercising his First Amendment rights.” Suppan v. Dadonna, 203 F.3d 228, 235 (3d Cir. 2000).

In Rauser, the Third Circuit held that the denial of parole, transfer to a distant prison and denial of a higher-paying prison job was sufficiently adverse to deter a prisoner from exercising his constitutional rights. 241 F.3d at 333. In Allah, the Third Circuit held that confinement in administrative segregation—with resulting loss of privileges—was sufficiently adverse action to deter a prisoner from exercising his constitutional rights. See also Mitchell v. Horn, 318 F.3d 523, 530 (3d Cir. 2003) (several months in disciplinary confinement sufficiently adverse); Montgomery v. Ray, 145 Fed. Appx. 738, 741 (3d Cir. 2005) (loss of telephone privileges for 365 days sufficiently adverse). On the other hand, in Burgos v. Canino, the Third Circuit agreed that urinalysis testing along with various threats was insufficient to establish adverse action. 358 Fed. Appx. 302, 306-307 (3d Cir. 2009) (“threats alone do not constitute retaliation”). And in Brightwell v. Lehman, the Third Circuit concluded that the filing of a misconduct report against a prisoner—which was subsequently dismissed—does not rise to the level of adverse action. 637 F.3d 187, 194 (3d Cir. 2011).

### 3. Causal Connection

The third element of a retaliatory claim requires the prisoner to link the first element (constitutionally protected conduct) to the second (adverse state action) by proving his constitutionally protected conduct was a “substantial or motivating” factor in the state’s decision to take adverse action. Rauser, 241 F.3d at 333. Unlike the first and second elements, this is a question of fact, not of law. And unlike the first and second

elements, this is extremely difficult to prove because there usually is no “smoking gun” evidence of retaliation; rather, the fact finder (whether judge or jury) must make difficult credibility judgments regarding the reasons behind prison officials’ actions.

For example, in Lindsay v. Chesney, a prisoner alleged he was confined in administrative custody and transferred to another prison for filing a religious accommodation request. 179 Fed. Appx. 867, 868 (3d Cir. 2006). The court agreed that filing the request was protected by the First Amendment and the prison transfer was adverse action. Id. at 869. The more difficult question, however, was determining whether the prison transfer stemmed from filing the request—as Lindsay contended—or resulted from a violation of prison rules—as prison officials argued. Id. In this case, the Third Circuit concluded that Lindsay failed to prove a causal connection between filing his request and the subsequent transfers. Id. “To the contrary, the defendants presented evidence that Lindsay was punished for engaging in unauthorized group activity.” Id.

Likewise, in Fortune v. Hamberger, an inmate alleged he was issued misconduct reports and transferred to another prison in retaliation for filing grievances. 379 Fed. Appx. 116, 120 (3d Cir. 2010). The Third Circuit dismissed the claim, finding that the misconduct reports stemmed from violations of prison rules and the transfer was due to poor adjustment at the prison. Id. at 122. The court concluded that Fortune failed to establish a “causal nexus” between the grievances and the adverse action.

Since there typically is no direct evidence or admission of a retaliatory purpose, prisoners must establish a causal connection between their constitutionally protected speech and adverse state action through circumstantial evidence. In Farrell v. Planters Lifesavers Co., the Third Circuit identified several factors relevant to a retaliatory inquiry. 206 F.3d 271 (3d Cir. 2000). First, evidence of “temporal proximity” between the exercise of the protected

speech and the adverse action suggests retaliatory motivation. Id. at 280. Second, evidence of “intervening antagonism” between exercise of the protected speech and the adverse action suggest retaliatory motivation. Id. Third, evidence of “inconsistent reasons” for the adverse action would likewise point toward a finding of retaliatory motivation. Id. at 281. Finally, the Farrell court made clear that while these three factors are relevant in determining whether a causal link exists, “we have been willing to explore the record in search of evidence, and our case law has set forth no limits on what we have been willing to consider.” Id.

In every case of retaliation, the plaintiff must establish: (a) that his or her speech or conduct was constitutionally protected; (b) that the state took sufficiently adverse action; and (c) that his or her constitutionally protected speech or conduct was a “substantial or motivating” factor in the state’s adverse action. Rauser, at 333. Prisoners proving these three elements have established a presumption of state retaliation. As this point, the burden then shifts to prison officials to rebut the presumption of retaliation by producing evidence that, absent the prisoner’s constitutionally protected speech, they had legitimate non-retaliatory penological reasons for taking the adverse action. Id.

In Carter v. McGrady, a prisoner alleged that he was subjected to cell searches and disciplinary action in retaliation for jailhouse lawyering. 292 F.3d 152, 153 (3d Cir. 2002). Prison officials argued that Carter’s cell was searched and misconduct charges filed—not for helping other inmates—but because of contraband found in his cell. Id. at 158. “Even if prison officials were motivated by animus to jailhouse lawyers, Carter’s offenses, such as receiving stolen property, were so clear and overt that we cannot say the disciplinary action taken against Carter was retaliatory.” Id. at 159.

In Toussaint v. Good, a prisoner alleged he was subjected to false disciplinary

charges in response to grievances he filed about housing. 335 Fed. Appx. 158, 160 (3d Cir. 2009). The Third Circuit examined the grievances, the misconduct reports, and Tousaint’s written statements and agreed that prison officials “would have issued the misconduct reports anyway, for legitimate penological reasons. Id. at 161.

In Prevet v. Barone, an inmate alleged the DOC officials refused to provide a positive parole recommendation in retaliation for filing grievances. 428 Fed. Appx. 218, 219 (3d Cir. 2011). The claim was dismissed. Even assuming that the failure to provide a favorable parole recommendation was due to filing grievances, the Third Circuit agreed that in light of Prevet’s prison record, prison officials “would have withheld a parole recommendation absent any retaliatory motive.” Id. at 220.

In Freeman v. Department of Corrections, an inmate alleged that a prison guard searched his cell, confiscated UCC material and confined him in the RHU in retaliation for filing a grievance. 447 Fed. Appx. 385, 386 (3d Cir. 2011). The claim was dismissed. Id. at 389. The Third Circuit noted that Freeman admitted violating prison rules by possessing the UCC material. Id. at 388. Consequently even assuming Freeman had a prima facie case of retaliation, it is clear “that Freeman would have been disciplined for his offense notwithstanding his grievances.” Id.

In Sims v. Vaughn, a prisoner alleged that he was transferred to another prison as retaliation for a prior lawsuit, 189 Fed. Appx. 139, 141 (3d Cir. 2006). Prison officials contended, and the Third Circuit agreed, that Sims would have been transferred despite the lawsuit, due to misconduct reports filed against him for violating prison rules. Id. at 141.

Keep in mind that misconduct reports, disciplinary action, and prison transfers will not be deemed retaliatory if they were in fact imposed for actual violations of prison rules. See Young v. Beard, 227 Fed. Appx. 138, 140 (3d Cir.

2007) (rejecting retaliation “because the record shows that each disciplinary charge had an evidentiary basis, and Young has not cited to any evidence undermining the Commonwealth’s claim that the challenged conduct was motivated by legitimate concerns”).

Without question, many judges give official versions of events greater credence than inmate versions. Although disciplinary charges may indeed be feigned or trumped up, the critical question in court is not what a prisoner believes but what he or she can prove. Prisoners speaking out against prison conditions-via grievances, media contacts, or litigation- should maintain strict obedience to prison rules and avoidance of self-defeating misconduct behavior. To do otherwise provides state officials and their counsel with evidence that will defeat or undermine any claim of unconstitutional retaliation.

### III. FOURTH AMENDMENT ISSUES

The purpose of the Fourth Amendment’s proscription against unreasonable searches and seizures “is to safeguard the privacy and security of individuals against arbitrary invasions by government officials.” Camara v. Municipal Court, 87 S.Ct. 1727, 1730 (1967).

Whether or not a particular search violates the Fourth Amendment requires a two-step analysis. First, a person must have standing to contest the search by demonstrating that he or she has a legitimate expectation of privacy in the place, person or object searched. See Rakas v. Illinois, 439 U.S. 128, 143 (1978). To satisfy this threshold requirement, a person must show that his subjective expectation of privacy is one that society is prepared to accept as objectively reasonable. See Minnesota v. Olson, 495 U.S. 91, 96-97 (1990).

If the court finds that a person has a reasonable expectation of privacy, only then does it proceed to the second part of the analysis, namely, determining whether the search was reasonable by balancing “the nature and quality of the intrusion on the individual’s Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion.” United States v. Place, 103 S.Ct. 2637, 703 (1983).

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

#### A. Cell Searches

In Hudson v. Palmer, the Supreme Court concluded that prisoners have no legitimate expectation of privacy in their cells and therefore are not entitled to Fourth Amendment protection. 468 U.S. 517, 525-526 (1984). The Court reasoned that our

“society is not prepared to recognize as legitimate any substantive expectation that a prisoner might have in his prison cell” because such recognition “is fundamentally incompatible with the close and continual surveillance of inmates and the cells required to ensure institutional security and internal order.” *Id.* at 526.

In light of Hudson, prisoners have absolutely no Fourth Amendment protection from unreasonable searches of their prison cells. Prison officials require neither a search warrant nor probable cause to enter and search a prisoner’s cell. *See Bell v. Wolfish*, 441 U.S. 520, 557 (1979) (“even the most zealous advocate of prisoners’ rights would not suggest that a warrant is required to conduct such a search”). Nor do prisoners possess a constitutional right to be present to observe cell searches. *See Block v. Rutherford*, 468 U.S. 576, 590 (1984) (county jail’s practice of conducting random “shakedown” searches of cells while detainees were away at meals, recreation and other activities upheld); *Bell* 441 U.S. at 557 (upholding regulation requiring unannounced searches of prisoner living areas when inmates were cleared of unit because it “simply facilitates the safe and effective performance of the search”).

In light of Hudson, the lower courts have routinely dismissed prison claims that cell searches violate the Fourth Amendment. *See Schlager v. Beard*, 398 Fed. Appx. 699, 702 (3d Cir. 2010); *McNeil-EI v. Diguqlielmo*, 271 Fed. Appx. 283, 286 (3d Cir. 2000); *Gilmore v. Jeffes*, 675 F.Supp. 219, 221 (M.D. Pa. 1987). The only viable remedy to redress the intentional or negligent destruction of inmate property is to utilize state remedies such as internal grievance systems. *See Hudson*, 468U.S. at 533 (state tort remedies may redress property destruction); *Parratt v. Taylor*, 451 U.S. 527, 538 (1981) (same); *Tindell v. Beard*, 351 Fed. Appx. 591, 594 (3d Cir. 2009) (confiscation of legal property not violation of Due Process if adequate post-deprivation remedies exist); *Barr v. Knauer*, 321 Fed. Appx. 101, 103 (3d Cir. 2009) (seizure of

electric razor not Due Process violation under Hudson where meaningful post-deprivation remedy was available in form of prison grievance process).

## B. Body Searches

The key precedent in this area is *Bell v. Wolfish*, where inmates brought suit challenging strip searches conducted after contact visits. 441 U.S. 520, 523 (1979). As to whether prisoners retain a reasonable expectation of privacy in their bodies against such searches, the *Wolfish* majority simply states that it was “assuming” that inmates do “retain some Fourth Amendment rights upon commitment to a corrections facility.” *Id.* at 558. *See also, Russell v. City of Philadelphia*, 428 Fed. Appx. 174, 178 (3d Cir. 2011) (“The District Court also correctly noted that inmates maintain a reasonable expectation of privacy in their bodies, and an unreasonable search of the body may therefore be unconstitutional.”).

Proceeding with its analysis, the *Wolfish* Court notes that the Fourth Amendment “prohibits only unreasonable searches and under the circumstances, we do not believe that these searches are unreasonable.” 441 U.S. at 558. Whether or not a particular search is reasonable “requires a balancing of the need for the particular search against the invasion of personal rights that the search entails.” *Id.* Among the factors the courts must consider are (1) the scope of the particular intrusion; (2) the manner in which it is conducted; (3) the justification for initiating it; and (4) the place in which it is conducted. *Id.* at 558.

Applying these factors to the case before it, the *Wolfish* majority concluded that the body cavity searches, in which inmates were required to expose their body cavities for visual inspection as part of a strip search, did not violate the reasonableness standard of the Fourth Amendment in light of the significant and legitimate security interests of the institution. *Id.* at 558-561.

In light of *Wolfish*, most courts have given their stamp of approval on prison body searches. They may be conducted absent

consent, probable cause and a search warrant. However, this does not mean prison officials can do as they please in this area. Even an otherwise justifiable search of limited intrusiveness may be unconstitutional if conducted in a particularly offensive manner or for reasons totally devoid of penological interests. Id.

### C. Pat-Down Searches

Clothed body searches—in which a prison guard runs his hands thoroughly over a prisoner's clothed body—have largely been upheld by the courts. Given the limited intrusiveness on bodily privacy that a “pat-down” or “frisk” search entails, most courts have sustained such searches under the Fourth Amendment in light of the state's interest in deterring the possession and movement of contraband. For example, in Grummett v. Rushen, a San Quentin prisoner brought suit on Fourth Amendment grounds challenging pat-down searches by female guards. 779 F.2d 491, 495 (9th Cir. 1985). Citing Wolfish, the Ninth Circuit held that “pat-down searches conducted by the female guards are not so offensive as to be unreasonable under the Fourth Amendment.” Id. at 496. The Grummett court noted that the searches were justified by security needs and were performed briefly and professionally while the prisoners were fully clothed. Id. at 495. See also, Timm v. Gunter, 917 F.2d 1093 (8th Cir. 1990); Smith v. Fairman, 678 F.2d 52 (7th Cir. 1982).

The only significant successful challenge to pat-down searches was decided on Eighth Amendment grounds. In Jordan v. Gardner, the Ninth Circuit held that random pat-down searches of female prisoners by male guards, including intrusive touching of breasts and genital area, was an unnecessary and wanton infliction of pain in violation of the Eighth Amendment. 986 F.2d 1521, 1526-15267 (9th Cir. 1983). The Jordan majority distinguished its prior decision in Grummett (upholding pat-down searches of male prisoners by female guards) on the basis that “women experience unwanted intimate touching by men

differently from men subject to comparable touching by women.” Id. at 1526. The Jordan majority also concluded that this infliction of pain on female prisoners was unnecessary because the security of the facility was not dependent upon the cross-gender searches. Id. at 1526-1527.

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

### D. Strip Searches

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

Once again, the key precedent is Bell v. Wolfish, in which the Supreme Court upheld strip searches after every contact visit

with a person outside the institution. 441 U.S. 520, 558 (1979). "The Fourth Amendment prohibits only unreasonable searches and under the circumstances, we do not believe that these searches are unreasonable. Id. (citation omitted). According to the Wolfish majority, the test of reasonableness "is not capable of precise definition" and "requires a balancing of the need for the particular search against the invasion of personal rights that the search entails. Id. at 559 Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted." Id.

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

In Millhouse v. Arbasak, a prisoner alleged he was strip searched every time he entered or exited the segregation unit 373 Fed. Appx. 135, 137 (3d Cir. 2010). He also contended that one search was abusive when a guard focused on his chest and genital areas. Id. The Third Circuit upheld prison officials, noting that the searches, "even if embarrassing and humiliating, do not violate the Constitution." Id.

In Brown v. Blaine, a prisoner alleged he was strip searched in an "unsanitary, demeaning, humiliating," manner on three separate occasions upon entry into the RHU. 185 Fed. Appx. 166, 169-170 (3d Cir. 2006). Despite allegations that he was required to "sweep" his mouth with his fingers

after being required to manipulate his genitals, the Third Circuit upheld the search under Wolfish. Id. at 170.

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

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

In Williams v. Price, the district court upheld a Pennsylvania policy requiring strip searches of all death-row inmates before and after non-contact attorney visits. 25 F.Supp.2d 605, 615 (W.D. Pa. 1997). The court noted that although the searches were offensive, they were conducted in the privacy of the prisoner's cell and were rationally connected to the prison's security interest in controlling contraband. Id.

Of course, an otherwise legitimate strip search may still violate the Fourth Amendment if conducted in a particularly offensive manner. Thus, in Goff v. Nix, the Eighth Circuit upheld as reasonable strip searches conducted before and after contact visits, before hospital appearances, and before and after movement outside segregation units. 803 F.2d 358, 366 (8th Cir. 1986). The court, however, did enjoin prison guards from engaging in verbal harassment during the searches. "It is

demeaning and bears no relationship to the prison's legitimate security needs, and we affirm the district court in this regard." *Id.* at 365. n.9. See also, Watson v. Secretary Department of Corrections, 436 Fed. Appx. 131 (3d Cir. 2001) (remanding case back to lower court for further proceedings where inmate alleged strip search was conducted in sexually abusive manner).

Whether or not strip searches of prisoners by opposite-sex guards are unreasonable (even if conducted for legitimate security reasons) under the Fourth Amendment is not settled. Certainly, an inadvertent or occasional sighting of a naked male prisoner by a female guard would not violate the Fourth Amendment. See Michenfelder v. Sumner, 860 F.2d 328, 338 (9th Cir. 1988). Nor would there occur a Fourth Amendment violation during an emergency such as a prison riot or disturbance. See Letcher v. Turner, 968 F.2d 508, 510 (5th Cir. 1992) (presence of female guards during strip search of male prisoner following food-throwing incident involving 18 prisoners upheld); Grummt v. Rushen, 779 F.2d 491, 496 (9th Cir. 1985) (holding that in emergency situations, observations of strip searches of male inmates by female guards justified by prison security).

Routine non-emergency strip searches by opposite-sex guards, however, are likely unreasonable under the Fourth Amendment, although case law is admittedly scant. For example, in Byrd v. Maricopa County Sheriff's Department, the Ninth Circuit declared that a strip search of a male pretrial detainee by a female cadet was unreasonable under the Fourth Amendment. 629 F.3d 1135, 1147 (9th Cir. 2011). In this case, the cross-gender search was conducted under non-emergency conditions--with male officers standing idly by--and included touching of the genital area. *Id.* at 1137.

As demonstrated above, most lower courts have upheld strip searches of inmates as long as they are justified by legitimate security interests and are conducted in a

reasonable manner and without abuse. Wolfish, 441 U.S. at 584. The lower courts have sustained strip searches before and after contact visits; before and after infirmary appointments; before and after library visits; before and after court appearances; and before and after movement of segregation prisoners from their cells. It would seem, absent evidence of specific physical abuse, there is not a single strip search that the courts will not sustain. Thus, until the Supreme Court heightens the standard for conducting these searches, the lower courts will continue to summarily affirm them.

That prospect was drastically diminished in Florence v. Board of Chosen Freeholders, where the Supreme Court upheld the strip search of an inmate confined in a county jail after his arrest for unpaid fees. 132 S.Ct. 1510, 1514 (2012). Citing Wolfish, the Court concluded that "reasonable suspicion" of contraband possession was not required to strip search detainees arrested and confined for minor offenses. *Id.* at 1520-1521. "Correctional officials have a legitimate interest, indeed a responsibility, to ensure that jails are not made less secure by reason of what new detainees may carry in on their bodies. *Id.* at 1513. Because the plaintiff in Florence was confined for a week in the county facility and intermingled with other inmates, the Court agreed that the state's interest in prison security outweighed any privacy concerns. However, the Court reserved for future determination whether a strip search or invasive touching of an arrestee detained for a short time pending bail release (and completely isolated from contact with other inmates) violated the Fourth Amendment. *Id.* at 1523.

#### E. Digital Body Cavity Searches

Finally, we turn to the highly intrusive digital body cavity search—which involves some degree of touching or probing of body cavities by prison officials. Once again, whether or not such intrusions upon bodily privacy violate the Fourth Amendment requires examination of "the scope of the

particular intrusion, the manner in which it is conducted, and the justification for initiating it and the place in which it is conducted.” Wolfish, 441 U.S. at 559.

In Bruscino v. Carlson, the Seventh Circuit upheld a policy requiring all prisoners entering Marion’s infamous Control Unit be given a probing rectal exam to uncover contraband. 854 F.2d 162, 164 (7th Cir. 1988). Given “the history of violence at the prison and the incorrigible, undeterrable character of the inmates,” the court held that the rectal searches were reasonable security measures to ensure the security and safety needs of the prison. Id. at 166. Of course, Bruscino was decided based upon an extraordinary factual background, including the numerous murders of inmates and two correctional officers. Id. at 165; see also: Cann v. Hayman, 346 Fed. Appx. 822, 824-825 (3d Cir. 2009) (where inmate failed metal detector check and refused to “squat and cough” during strip search, placement in “Body Orifice Security Scanner” chair did not violate the Fourth Amendment).

While digital body cavity searches must be conducted for legitimate security concerns, whether prison officials must have “reasonable suspicion” that the prisoner searches is secreting contraband is unsettled. Most lower courts have concluded that reasonable suspicion is not required. See Hemphill v. Kincheloe, 987 F.2d 589, 592 (9th Cir. 1993). The recent decision in Florence (upholding the strip search of an arrestee in a county jail) reveals a majority of justices reserving that issue for another case.

Even if digital body cavity searches conducted for legitimate security reasons but absent individualized suspicion are constitutional, they may nevertheless become unconstitutional if conducted in an unreasonable manner. At issue in Vaughan v. Rocketts, was a series of digital rectal cavity searches ordered to uncover gunpowder in a maximum security unit at an Arizona prison 859 F.2d 736, 738 (9th Cir. 1988). The Ninth Circuit concluded that it was unnecessary to resolve whether prison

officials had reasonable cause to conduct the searched because “the manner in which Vaughan alleges the searches were conducted violated clearly established standards.” Id. at 740. Prisoners were forced to lie on an unsanitary table in an open hallway visible to other inmates and prison staff who made jokes and insulting comments. Id. at 741. Medical assistants untrained in involuntary body cavity searches conducted the probes, often without washing their hands between searches. Id. Medical records were not inspected to ensure that individual prisoners did not have medical conditions that made the searches dangerous. Id. The Ninth Circuit held that “body cavity searches of inmates must be conducted in a reasonable manner, and that issues of privacy, hygiene and the training of those conducting the searches are relevant to determining whether the manner of search was reasonable.” Id. Under the circumstances of the case, the Ninth Circuit ruled that “no reasonable officer could believe that such searches were conducted in a reasonable manner.” Id.

In Bonitz v. Fair, Massachusetts officials, alarmed over allegations of drugs, prostitution, and gambling at a medium security prison for women, summoned two hundred state police officers to search the facility. 804 F.2d 164, 169 (1st Cir. 1986). While male police officers searched the cellblocks, female officers conducted body cavity searches of the prisoners, including putting their fingers in the plaintiffs’ noses, mouths, anuses, and vaginas. Id. Each female officer was provided only one set of gloves “and thus could not have changed their gloves during the search procedure.” Id. The body cavity probes were visible to male police officers “who peered through open doors or openings in closed doors.” Id. The prisoner-plaintiffs did not challenge the state’s security justifications for the search, but rather challenged the manner in which the searches were conducted. Id. at 173 n.10. Noting that Wolfish prohibits conducting body cavity searches in an abusive fashion, the First Circuit held that the intrusions

clearly violated the Fourth Amendment. Id. The court states “that a body cavity search of female inmates in a non-hygienic manner and in the presence of male officers was a clearly established violation of the inmates’ Fourth Amendment right to be free from an unreasonable search.” Id.

#### F. Blood And Urine Testing

Most correctional systems operate DNA and drug testing programs that collect and analyze inmate blood and urine samples. Whether these programs are effective in deterring illicit drug use and solving crime is debatable. What is undebatable is that these programs operate absent any individualized suspicion of wrongdoing and invade concepts of individual privacy.

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

In numerous cases involving plaintiffs outside the prison context, the Supreme Court has made clear that government-ordered collection and testing of blood and urine samples does intrude upon expectations of privacy that society has long recognized as reasonable. See Ferguson v. City of Charleston, 532 U.S. 67, 78 (2001) (urine tests conducted by state hospital on maternity patients subject to Fourth Amendment scrutiny); Skinner v. Railway Labor Executives’ Association, 489 U.S. 602, 617 (1989) (urine testing of railroad personnel involved in train accidents intrudes upon reasonable expectations of privacy); Schmerber v. California, 384 U.S. 757, 767 (1966) (blood sample “plainly involves the broadly conceived reach of a search and seizure under the Fourth Amendment”). Accordingly, the Supreme Court has consistently held that such intrusions constitute a “search” subject to the demands of the Fourth Amendment. See Skinner, 489 U.S. at 616.

Since state-ordered collection and testing of blood and urine intrudes into an area where prisoners have legitimate expectations of privacy, the question turns to whether such searches are reasonable. Keep in mind the Fourth Amendment does not proscribe all searches; rather it proscribes only those that are unreasonable. See Skinner, 489 U.S. at 618.

Although the Supreme Court has not reviewed an inmate drug testing program, it has upheld suspicion-less urine testing in high-school athletics in Vernonia School District 47J v. Acton, 515 U.S. 646 (1995); upheld urine testing of railroad workers in Skinner v. Railway Labor Executives’ Association, 489 U.S. 602; and upheld urine testing of customs officials in National Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989). In each of these decisions, the Supreme Court concluded that important governmental interest justified the privacy intrusion. But see Chandler v. Miller, 520 U.S. 305, 318 (1997) (Georgia drug testing program for public office candidates violates Fourth Amendment where no vital governmental interests are at stake.)

In light of compelling state interests in curbing illicit drug use in prison (See Block v. Rutherford, 468 U.S. 576, 588 (1984) (“unauthorized use of narcotics is a problem that plagues virtually every penal and detention center in the country”)) and recognition that inmates possess only a diminished expectation of privacy due to safety needs of the penal system, it is highly probable that the Supreme Court would sustain inmate drug testing. See Hudson v. Palmer, 468 U.S. 517 (1984) (no expectation of privacy in cells); Lucero v. Gunter, 17 F.3d 1347, 1350 (10th Cir. 1994) (“random urine collection and testing of prisoners is a reasonable means of combating the unauthorized use of narcotics and does not violate the Fourth Amendment”); Forbes v. Trigg, 976 F.2d 308, 315 (7th Cir. 1992) (upholding prison policy of urine testing of all prisoners every ninety days). See also Majewski v. Fischl, 372 Fed. Appx. 300, 303-304 (3d Cir. 2010) (breathalyzer test of

prison guard upheld where guard enjoyed only diminished expectation of privacy due to his position as corrections officer, test was minimally intrusive, and test results focused solely upon alcohol level in bloodstream).

The collection and testing of prisoners' blood—whether for law enforcement DNA databases or for institutional public health needs—is also judged by balancing the intrusion on the prisoner's privacy against legitimate governmental interests.

In United States v. Sczubelek, the Third Circuit upheld a federal DNA collection program which required federal prisoners and parolees, convicted for specific crimes, to provide a DNA blood sample. 402 F.3d 175, 185-186 (3d Cir. 2005). The court held that the government's interest in the investigation of crimes and identification of criminals outweighed any minimal expectation of privacy for prisoners, particularly in light of the minimal intrusion that a blood sample requires. *Id.* at 184-185. Other courts have adopted identical reasoning.

In Dunn v. White, the Tenth Circuit upheld a mandatory blood testing program enacted to identify prisoners infected with the AIDS virus. 880 F.2d 1188, 1196 (10th Cir. 1989). The Dunn court concluded that state interests in treating those infected with the deadly disease and preventing further transmission outweighed any privacy interests of prisoners. *Id.* Other courts have joined Sczubelek and Dunn in upholding blood collection and testing programs. See Jones v. Murray, 962 F.2d 302 (4th Cir. 1992); Roe v. Marcotte, 193 F.3d 72 (2d Cir. 1999).

### G. Searches Of Prison Visitors

While prisoners do not forfeit all constitutional protections while imprisoned for crime, the fact of confinement as well as the legitimate goals and policies of the penal institution limits their retained constitutional rights. See Pell v. Procunier, 417 U.S. 817, 822 (1974). Thus, prisoners have no Fourth Amendment expectation of privacy in their

cells given the security needs of the prison, see Hudson v. Palmer, 468 U.S. 517, 536 (1984), and retain only a diminished expectation of privacy in their bodies. See Bell v. Wolfish, 441 U.S. 520, 557 (1979).

Family members who visit their loved ones in prison, on the other hand, do not shed constitutional protections at the penitentiary door. Courts have held that prison visitors enjoy a reasonable expectation of privacy in their bodies to warrant Fourth Amendment protection from unreasonable searches. See Boren v. Deland, 958 F.2d 987, 988 (10th Cir. 1992) (wife of prisoner "had a legitimate expectation of privacy when she entered the prison to visit her husband"); Cochrane v. Quattrocchi, 949 F.2d 11, 13 (1st Cir. 1991) (prison visitors possess diminished, but still present, expectations of privacy). At the same time, the states have a compelling governmental interest in preventing contraband introduction into the facility to maintain prison security. See Bell v. Wolfish, 441 U.S. at 546 (maintaining institutional security and preserving internal order "are essential goals" of corrections); Block v. Rutherford, 468 U.S. at 586 ("Visitors can easily conceal guns, knives, drugs or other contraband in countless ways and pass them to an inmate unnoticed by even the most vigilant observers.").

To reconcile these competing interests, courts have held that pat-down or metal detector sweeps of prison visitors are constitutional, even in the absence of individualized suspicion of contraband possession. See Spear v. Sowders, 71 F.3d 626, 630 (6th Cir. 1995) ("Visitors can be subjected to some searches such as a pat-down or a metal detector sweep, merely as a condition of visitation, absent any suspicion."). In such cases, the security needs of the prison outweigh or justify the limited intrusion on personal privacy that a pat-down search entails. See also: Allegheny County Prison Employees Independent Union v. County of Allegheny 124 Fed. Appx. 140 (3d Cir. 2005) (random pat-down searches of prison employees upheld).

As the intrusiveness of the search on bodily privacy increases, however, so does the level of constitutional scrutiny. In cases of strip searches of prison visitors, the courts have agreed that prison officials need not secure a search warrant or have probable cause. See Spear, 71 F.3d at 630 ("Those courts that have examined the issue have concluded that even for strip and body cavity searches, authorities need not secure a warrant or have probable cause. However, the residual privacy interests of visitors in being free from such an invasive search require that prison authorities have at least a reasonable suspicion that the visitor is bearing contraband before conducting such a search."); Varrone v. Bilotti, 123 F.3d 75, 78 (2d Cir. 1997) ("the law was clearly established that correctional officers needed reasonable suspicion to strip search prison visitors without violating their constitutional rights").

In order to justify a strip search of a prison visitor under the "reasonable suspicion" standard, prison officials must point to specific facts and rational inferences from those facts which would lead to a reasonable conclusion that the visitor is engaged in contraband smuggling. Hunter v. Auger, 672 F.2d 668, 674 (8th Cir. 1982). Mere hunches or unspecified suspicions are not sufficient. Id. Nor are uncorroborated anonymous tips lacking any indicia of reliability. Id. "Reasonable suspicion does not mean evidence beyond a reasonable doubt, or by clear and convincing evidence, or even by a preponderance of the evidence. Reasonable suspicion is not even equal to a finding of probable cause. Rather, reasonable suspicion requires only specific objective facts upon which a prudent official, in light of his experience, would conclude that illicit activity might be in progress." Spear v. Sowders, 71 F.3d at 631. In determining whether reasonable suspicion exists to justify a strip search of a prison visitor, the factors that may be considered include: (1) the nature of the tip or information; (2) the reliability of the informant; (3) the degree of corroboration; and (4) other factors

contributing to suspicion or lack thereof." See Varrone v. Bilotti, 123 F.3d at 79.

In Daugherty v. Campbell, 33 F.3d 554 (6th Cir. 1994), prison officials stripped searched a prisoner's wife based upon two anonymous letters indicating that she was smuggling drugs into the prison. Id. at 555. Prison officials also searched her vehicle. Id. Applying the reasonable suspicion standard, the Sixth Circuit held that prison officials' "reliance on a wholly uncorroborated tip is, under the facts of this case, insufficient to constitute reasonable suspicion." Id. at 557. "Clearly, strip searches of prison visitors based upon bare allegations of illegal activities, whether by anonymous informants or a corrections officer who later denies making such allegations, contravene the "well-established protections of the Fourth Amendment." Id.

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

In Spear v. Sowders, prison officials conducted a strip search on a prisoner's female visitor based on an informant's statement that the prisoner "was receiving drugs every time a young unrelated female visitor visited." 71 F.3d 626, 629 (6th Cir. 1995). The informant in question had given reliable information in the past which included the termination of a prison guard for engaging in a romance with a prisoner. Id. Given the history of reliability and the information provided, the Sixth Circuit upheld

the search, concluding that prison officials had reasonable suspicion. *Id.* at 631.

In Hunter v. Auger, three prison visitors brought suit alleging unreasonable strip searches when they visited their family members. 672 F.2d 668,670-671(8th Cir. 1982). Each strip search was based on an anonymous tip that the visitor would attempt to smuggle drugs into the facility. *Id.* The searches revealed no drugs or other contraband. *Id.* Applying the reasonable suspicion standard, the Eighth Circuit held that the searches violated the Fourth Amendment, noting that they were based upon "uncorroborated anonymous tips" without any information to evaluate the tipster's reliability. *Id.* at 674; see also Romo v. Champion, 46 F.3d 1013, 1020 (10th Cir. 1995) (prison officials had reasonable suspicion for strip search where drug interdiction canine alerted authorities to presence of narcotics).

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

It is well settled that a search which would otherwise be unlawful under the Fourth Amendment may become legal through the consent of the person searched. However, consent to search must be voluntarily given and not contaminated by duress or coercion. Schneckloth v. Bustamonte, 412 U.S. 218, 227 (1973). In the context of visitor strip searches, several courts have held that consent is the product of coercion when prison officials condition the privilege of visitation upon submission to a strip search. See Cochrane v. Quattrocchi, 949 F.2d 11, 14-15 (1st Cir. 1991) (there was no valid consent to search where visitor was given choice between being denied visitation

indefinitely or waiving her constitutional rights to be free from unreasonable search). Finally, only those persons whose privacy is invaded by a search have standing to object. Thus, a prisoner does not have standing to challenge the strip search of his girlfriend. See Wool v. Hogan, 505 F.Supp. 928, 931 (D. Vt. 1981).

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

Strip searches of prison visitors, on the other hand, violate the Fourth Amendment unless prison officials have "reasonable suspicion" that the visitor in question is concealing contraband. "Reasonable suspicion" is not satisfied by anonymous tips absent corroborating facts. "Reasonable suspicion" is not satisfied by vague information from inmate informants without any history of reliability. Given the substantial intrusion on individual privacy that a strip search entails, the courts will closely examine prison officials' justifications for such searches to determine whether it constitutes "reasonable suspicion."

Finally, in a precedent-setting ruling, the Third Circuit upheld warrantless and suspicionless vehicle searches of Pennsylvania prison visitors. See Neumeyer v. Beard, 421 F.3d 210 (3d Cir. 2005). In Neumeyer, the court sustained a DOC policy allowing prison guards to conduct random searches of visitor vehicles absent a warrant, probable cause, or even individualized suspicion. *Id.* at 216. Despite the standardless nature of these searches and the focus upon criminal possession of illegal narcotics, the Third Circuit upheld the

intrusions under the so-called "special needs" doctrine of the Fourth Amendment, thus reducing further the privacy rights of ordinary citizens.

#### IV. PROCEDURAL DUE PROCESS

The Due Process Clause of the Fourteenth Amendment guarantees that no state shall "deprive any person of life, liberty, or property without Due Process of law." U.S. Const. Amend XIV. The purpose of the Due Process Clause is to protect the individual from arbitrary state action by requiring some kind of hearing prior to the deprivation of "life, liberty, or property." See Wolff v. McDonnell, 418 U.S. 539, 2976 (1974) ("The touchstone of Due Process is protection of the individual against arbitrary action of government.").

While the purpose of Due Process is to protect the individual from arbitrary deprivations of liberty and property, the Supreme Court has made clear that "only a limited range of interests fall within this provision." Hewitt v. Helms, 459 U.S. 460, 466 (1983). As to which state deprivations qualify for Due Process protection, the Supreme Court has implemented a two-part inquiry.

The first or threshold inquiry requires the lower courts to determine whether the deprivation in question falls within the contemplation of the "liberty or property" language of the Fourteenth Amendment. See Morrissey v. Brewer, 408 U.S. 471, 481 (1972). If government action implicates a "liberty or property" interest within the meaning of the Due Process Clause, the courts then proceed to the second inquiry to determine the amount of process due to protect the individual against unwarranted deprivations. See Id. ("Once it is determined that Due Process applies, the question remains what process is due."). See also Shoats v. Horn, 213 F.3d 140, 143 (3d Cir. 2000).

A liberty or property interest deserving of the procedural protections of the Due Process Clause may arise from two sources: (1) the federal Constitution itself; or (2) state statutes, regulations and practices. See Hewitt v. Helms, 459 U.S. at 471.

Some deprivations are so severe or so different from normal conditions of confinement that they are considered outside

the terms of an inmate's imposed sentence. Transfer to a state mental hospital, the revocation of parole, and involuntary treatment with antipsychotic medication are examples of severe state deprivations which trigger Due Process. In such cases, the Supreme Court has held that the federal Constitution itself confers a liberty interest entitled to Due Process protection. See Vitek v. Jones, 445 U.S. 480 (1980) (involuntary transfer of prisoner to state mental hospital is outside the range of a normal prison sentence and implicates a liberty interest protected by the Constitution itself).

If conditions of confinement are within the range of punishment authorized by a criminal sentence, the prisoner must look to state law to justify application of procedural Due Process safeguards. The key precedent here is Sandin v. Conner, where the Court agreed that state law may create interests protected by Due Process but restricted those interests to state action that imposes "atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." 515 U.S. 472, 483 (1995). As will be demonstrated below, Sandin's "atypical and significant hardship" test is extremely difficult to satisfy and has freed state officials from Due Process accountability in most areas of prison administration.

#### **A. Administrative Segregation**

In most correctional systems there are two basic types of solitary confinement: disciplinary segregation and administrative segregation. Disciplinary segregation is punitive in nature, imposed upon prisoners for violating prison rules. Administrative segregation, on the other hand, is non-punitive in nature, imposed upon prisoners for security and safety concerns.

Do prisoners have a protected liberty interest, derived from the Constitution itself, in freedom from administrative segregation? The answer is no. In Hewitt v. Helms, a prisoner was removed from his general population cell at SCI-Huntingdon and placed in administrative custody pending

investigation into his alleged participation in a prison riot. 459 U.S. at 476 (1983). The Supreme Court rejected Helms' assertion that the Due Process clause itself creates a liberty interest in remaining in the general prison population. Id. at 477. The Court explained that since administrative segregation is something every prisoner can expect to face at some point during his imprisonment, the transfer of a prisoner to more restrictive quarters for non-punitive reasons is "well within the terms of confinement ordinarily contemplated by a prison sentence." Id. at 468.

Do prisoners have a protected liberty interest, derived from state law, in freedom from administrative segregation? If a prisoner can prove that his or her confinement in administrative segregation imposes an "atypical and significant hardship" in relation to the "ordinary incidents of prison life," the answer is yes. Otherwise, federal Due Process is not required.

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

The Third Circuit's decision in Griffin that fifteen months' solitary confinement does not rise to the level of an "atypical and significant hardship" grants prison officials a license to segregate prisoners without any federal Due Process oversight. Sandin requires the lower courts to make the "atypicality" determination by comparing the prisoner's conditions of confinement against the "ordinary incidents of prison life." 515

U.S. at 484. In Griffin, the Third Circuit rejected general population as the baseline for the "ordinary incidents of prison life." Griffin, at 486. Accordingly, unless a prisoner's solitary confinement is substantially longer in duration (than Griffin's 15 months) or substantially harsher in conditions than other inmates in administrative custody, such confinement is neither "atypical" nor a "significant hardship" under Sandin. See Nifas v. Beard, 374 Fed. Appx. 241, 244 (3d Cir. 2010) (178 days' administrative custody not atypical and significant hardship); Jenkins v. Murray, 352 Fed. Appx. 608, 610 (3d Cir. 2009) (90 days' administrative custody not atypical and significant hardship); Allah v. Seiverling, 229 F.3d 220, 224 (3d Cir. 2000) ("Sandin instructs that placement in administrative confinement will generally not create a liberty interest").

Prisoners reading Helms will notice that the Supreme Court ruled that the plaintiff had a protected liberty interest based upon prison regulations that certain procedures "shall" and "must" be employed and that administrative segregation would not occur absent specific substantive predicates. 459 U.S. at 470-471. Unfortunately, the 1995 Sandin decision overturned this aspect of Helms and replaced the so-called entitlement doctrine with the "atypical and significant hardship" test. See Sandin, 515 U.S. at 484. See also Wilkinson v. Austin, 545 U.S. 209, 223 (2005) (stating that state-created liberty interests are no longer based upon the language of regulations but rather upon the nature of prison conditions); Hodges v. Wilson, 341 Fed. Appx. 846, 849 n. 4 (3d Cir. 2009) (stating that the mandatory language test articulated in Helms was "abandoned" in Sandin).

The sole focuses for a state-created liberty interest in the post-Sandin era are the conditions of confinement. Do such conditions rise to the level of an "atypical and significant hardship"? That is the decisive question. As the cases below indicate, only the most severe prison conditions fall within

the scope of Sandin's "atypical and significant hardship" universe.

In Shoats v. Horn, the Third Circuit held that confinement in virtual isolation for eight years—with no visits, no contact with other inmates, lockdown, no programs, and no prospect of release—did constitute an "atypical and significant hardship" under Sandin. 213 F.3d 140, 144 (3d Cir. 2000). Given the extraordinary harsh conditions facing Shoats, the Third Circuit agreed that his solitary confinement was exceedingly more severe both in duration and degree of restriction than other prisoners in administrative confinements Id. at 144. Due process was required.

In Gans v. Rozum, the Third Circuit held that a prisoner confined in administrative custody for eleven years constituted an "atypical and significant hardship" under Sandin. 267 Fed. Appx. 178, 180 (3d Cir. 2008). Citing its previous decision in Shoats, the court agreed that Due Process was required "because of the length of time he has spent in administrative custody." Id. at 180.

In Serrano v. Francis, the Ninth Circuit held that a mere two-month stay in administrative segregation gave rise to a state-created liberty interest. 345 F.3d 1071, 1079 (9th Cir. 2003). In this unusual case, a disabled prisoner's wheelchair was confiscated, depriving him (unlike other segregated inmates) of showers, yard activity, and ready access to his bunk and toilet. Id. at 1074. The Ninth Circuit agreed that confinement of a disabled prisoner in a segregation unit that was not handicap-accessible was a "novel situation" and satisfied Sandin's "atypical and significant hardship." Id. at 1079.

If a prisoner establishes that his administrative custody is so different -- either in duration or conditions from other similarly segregated inmates, Sandin's "atypical and significant hardship" test is met. The courts then examine the procedures provided by state authorities to determine whether a prisoner's liberty interest in freedom from

segregation satisfies the Due Process Clause.

In Hewitt v. Helms, the Supreme Court ruled that prisoners removed from the general population and confined in administrative custody are only entitled to an "informal, non-adversary evidentiary review." 459 U.S. at 472 (1983). "An inmate must merely receive some notice of the charges against him and an opportunity to present his views to the prison official charged with deciding whether to transfer him to administrative segregation." Id. at 476. "So long as this occurs, and the decision maker reviews the charges and then-available evidence against the prisoner, the Due Process Clause is satisfied." Id. In terms of long-term isolation in administrative segregation, the Helms Court made clear that "administrative segregation may not be used as a pretext for indefinite confinement of an inmate. Prison officials must engage in some sort of periodic review of the confinement of such inmates." Id. at 477n.9.

In Shoats, the Third Circuit held that his confinement in isolation for over eight years constituted an "atypical and significant hardship." 213 F.3d at 144. Turning to the question of whether state procedures were adequate, the Court held that the notices provided Shoats and his opportunity to be heard at thirty-day periodic reviews "comport with the minimum constitutional standards for Due Process." Id. at 147. Likewise, in Gans, the Third Circuit held that Due Process was satisfied where prison officials held periodic reviews every ninety days to review Gans' status. 267 Fed. Appx. at 180. See also Delker v. McCullough, 103 Fed. Appx. 694, 695 (3d Cir. 2004).

In conclusion, there is no "liberty" interest, derived from the Federal Constitution itself, in freedom from administrative segregation. Nor does there exist a state-created liberty interest absent proof that administrative custody constitutes an "atypical and significant hardship." Unless an inmate's isolation exceeds several years

in duration or involves extraordinary conditions (not inflicted upon other similarly segregated inmates), Sandin's atypical and significant hardship test will not be satisfied.

## B. Classification Decisions

Prison classification decisions regarding security levels, housing assignments, and job placements are considered outside the protection of the Due Process Clause. In Moody v. Daggett, the Supreme Court held that a prisoner assigned a higher security classification due to a parole detainer was not entitled to Due Process. 429 U.S. 78, 87n.9 (1976). Even if the detainer impacted his qualification for rehabilitative programs, the Court agreed that a prisoner "has no legitimate statutory or constitutional entitlement sufficient to invoke Due Process." Id.

In Padilla v. Beard, a prisoner alleged a Due Process violation when he was given an escape-risk "H-Code" classification, rendering him ineligible for inmate programs. 206 Fed. Appx. 123, 124 (3d Cir. 2006). The Third Circuit agreed that application of the "H-code" policy did not implicate a liberty interest stemming from the Due Process Clause itself or state law. Id. at 125-126. "Restriction from employment and prison programs are among the conditions of confinement that Padilla should reasonably anticipate during his incarceration; thus, application of the H-Code policy does not implicate a liberty interest protected by the Due Process Clause." Id. at 125.

In Marti v. Nash, (3d Cir. 2007) a prisoner alleged denial of Due Process when prison officials assigned him a security classification of the "greatest severity." 227 Fed. Appx. 148, 150 (3d Cir. 2007). The Third Circuit dismissed the case, noting that a prisoner "has no Due Process right to any particular security classification." Id. See also Bacon v. Minner, 229 Fed. Appx. 96, 98-99 (3d Cir. 2007) (Delaware's classification and housing policies are not the type of hardships warranting Due Process protection and are not atypical of the ordinary incidents of prison life); Hodges v. Wilson, 341 Fed.

Appx. 846, 849 (3d Cir. 2009) (removal of single-cell "z-o code" classification does not constitute atypical and significant hardship).

Inmate employment decisions are likewise considered beyond Due Process protection. The leading Third Circuit decision is James v. Quinlan, 866 F.2d 627 (3d Cir. 1989). Although rendered before Sandin, the Court held that prisoners have no liberty or property interests in prison job assignments. Id. at 629-630. "Traditionally, prisoners have had no entitlement to a specific job, or even to any job." Id. at 630. See also Dawson v. Frias, 397 Fed. Appx. 739, 741 (3d Cir. 2010) (stating prisoners "have neither a liberty or property interest in prison employment"); Mims v. Unicor, 386 Fed. Appx. 32, 35 (3d Cir. 2010) ("prisoners do not have constitutionally protected interests in retaining employment").

Only one specific classification matter has been declared sufficient to warrant Due Process protection. In Renchenski v. Williams, state authorities labeled a prisoner a sex offender in the absence of a sex offense conviction. 622 F.3d 315, 320 (3d Cir. 2010). Facing the prospects of inmate abuse and mandatory programming, Renchenski filed suit, claiming denial of Due Process. Id. at 320. The Third Circuit agreed that a liberty interest is at stake when state officials label a prisoner a sex offender. Id. at 326. The court reasoned that a sex offense label is so severe and stigmatizing that it triggers a liberty interest emanating from the Due Process Clause itself." Id. at 328. As for the required procedural safeguards, the court agreed that a "new adversary criminal trial" was not required before labeling a prisoner a sex offender. Id. at 331. However, officials must provide an inmate with a written notice, a hearing before an impartial decision maker, the opportunity to present witnesses and confront opposing evidence, and a statement of the decision, including reasons for the classification. Id.

### C. Clemency Decisions

Clemency is an important part of our criminal justice system. It permits the governor to grant mercy and correct injustice for lawfully convicted individuals who otherwise have no remedy to reduce or eliminate their sentence. Unfortunately, these decisions are not subject to Due Process protection.

In Connecticut Board of Pardons v. Dumschat, a life-sentenced prisoner brought suit claiming that the failure of the Connecticut Board of Pardons to provide a written explanation for denying his commutation application violated Due Process. 452 U.S. 458, 461 (1981). In a pre-Sandin ruling, the Supreme Court held that an inmate has no independent constitutional right to commutation of sentence. Id. at 466. As to whether Dumschat retained a state-created liberty interest in clemency, the Court concluded that a prisoner's expectation of clemency "is simply a unilateral hope." Id. at 465. "No matter how frequently a particular form of clemency has been granted, the statistical probabilities standing alone generate no constitutional protections." Id.

In Ohio Adult Parole Authority v. Woodard, a death-row inmate brought suit, claiming that state clemency hearings without counsel violated Due Process. 523 U.S. 272 (1998). In a plurality opinion, the Supreme Court held Woodard's petition for clemency did not rise to the level of an interest protected by the Due Process Clause itself. Id. at 283. Nor did Woodard have a state-created liberty interest since the denial of clemency did not impose an atypical and significant hardship. "A denial of clemency merely means that the inmate must serve the sentence originally imposed." Id. See also District Attorney's Office v. Osborne, 557 U.S. 52, 67 (2009) ("noncapital defendants do not have a liberty interest in traditional state executive clemency").

Like Connecticut and Ohio, Pennsylvania also maintains a clemency and pardons system. See Pa. Const. Art. IV, section 9. Pennsylvania prisoners have no Due Process-protected liberty interest

originating from the Constitution itself or from state law. See Hennessey v. Pennsylvania Board of Pardons, 655 A.2d 218, 220 (Pa. Cmwlth. 1995) ("A prisoner has no liberty interest in the possibility of commutation of his sentence.").

In light of Dumschat and Woodard, state clemency proceedings conducted without counsel or written explanation do not violate Due Process. Inmates are also not entitled to other standard Due Process safeguards such as presence at adversarial proceedings, cross-examination of witnesses, a timely hearing or appeal of adverse rulings.

This does not mean that state officials have *carte blanche* regarding clemency hearings. In a separate concurring opinion in Woodard, Justice O'Connor noted that inmates are not completely stripped of Due Process protection. "Judicial intervention might, for example, be warranted in the face of a scheme whereby a state official flipped a coin to determine whether to grant clemency, or in a case where the State arbitrarily denied a prisoner any access to its clemency process." 523 U.S. at 289 (O'Connor, concurring).

Justice Stevens also disagreed with the proposition that clemency proceedings could never violate Due Process, "I think, for example, that no one would contend that a Governor could ignore the commands of the Equal Protection Clause and use race, religion, or political affiliation as a standard for granting or denying clemency." Id. at 292 (Stevens, J., concurring).

Unfortunately, neither Justice O'Connor nor Stevens remain on the Supreme Court. And their hypothetical assumptions about Due Process violations have yet to be tested in a real case. Thus, the general rule is that clemency decisions are non-reviewable by the courts. However, in extreme cases where state clemency officials use bizarre and whimsical criteria or procedures (such as flipping a coin), a Due Process claim may be asserted.

#### D. Disciplinary Sanctions

Wolff v. McDonnell is the Supreme Court's seminal decision addressing prisoners' Due Process rights. At issue in the case was the disciplinary process of the Nebraska correctional system in which the revocation of good-time credits and solitary confinement were imposed for "flagrant or serious misconduct." 418 U.S. 539, 546 (1974). The Supreme Court recognized that the Constitution does not require Nebraska to provide prisoners with good-time credits. Id. at 557. However, since Nebraska had created a statutory right to good-time credits, the prisoner's interest "has real substance and is sufficiently embraced within Fourteenth Amendment 'liberty' to entitle him to those minimum procedures appropriate under the circumstances and required by the Due Process Clause to insure that the state-created right is not arbitrarily abrogated." Id. The Wolff Court also agreed that solitary confinement was "a major change in the conditions of confinement" which warranted procedural safeguards "as a hedge against arbitrary determination of the factual predicate for imposition of the sanction." Id. at 571 n.19. Unfortunately, this aspect of Wolff is no longer valid in light of Sandin.

Do prisoners have a protected liberty interest, derived from the Constitution itself, in freedom from arbitrarily imposed disciplinary punishment for misconduct? The answer is no. The Supreme Court has made clear that as long as conditions of confinement are "within the sentence imposed" and "not otherwise violative of the Constitution," the Due Process Clause itself does not subject an inmate's treatment to judicial oversight. See Montanye v. Haymes, 427 U.S. 236, 242 (1976) (applying this "within the sentence imposed" test in the prison disciplinary context, the Supreme Court has ruled that the Due Process Clause itself does not give rise to any protected interests in good-time credits).

Do prisoners have a protected liberty interest, derived from state law, in freedom from arbitrarily imposed disciplinary sanctions for misconduct? The answer to this question is yes, but only if the prisoner can

prove that the disciplinary sanction in question "imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." Sandin, 515 U.S. at 484.

What exactly did the Sandin Court mean by "atypical and significant hardship" and "ordinary incidents of prison life"? Which punishments qualify as an atypical and significant hardship? Until the Supreme Court reviews another case, all we know for certain is that confinement in disciplinary segregation for thirty days does not rise to the level of an atypical and significant hardship. See Sandin, 515 U.S. at 486.

In the years following Sandin, the lower courts began the task of applying the decision to the prison disciplinary process. In regards to minor disciplinary penalties such as cell restriction and loss of privileges the courts have agreed that federal Due Process is not required. See Wolff, 418 U.S. at 571 n.19 (stating that Due Process is not required for lesser penalties such as loss of privileges); Perry v. Lackawanna County, 345 Fed. Appx. 723, 726 (3d Cir. 2009) (30 days' segregation in addition to loss of prison job and visiting privileges not atypical and significant hardship); Malchi v. Thaler, 211 F.3d 953, 958 (5th Cir. 2000) (30 day loss of commissary privileges and cell restriction not subject to Due Process).

At the other end of the disciplinary spectrum are severe penalties such as the forfeiture of good-time credits which directly impact a prisoner's liberty by affecting the duration of his or her incarceration. Most courts have concluded that the deprivation of good-time credits as a punitive sanction for misconduct does rise to the level of an atypical and significant hardship. See Jackson v. Sneizek, 342 Fed. Appx. 833, (3d Cir. 2009) (procedural protections apply when a prisoner's good-time credit is at stake); Colon v. Williamson, 319 Fed. Appx. 191, 193 (3d Cir. 2009) (same).

The most difficult aspect in applying Sandin to the disciplinary process concerns solitary confinement. At what point, if ever,

does disciplinary isolation become an "atypical and significant hardship" entitled to Due Process oversight?

The answer is rarely, if ever. In Williams v. Bitner, the Third Circuit held that 90 days' disciplinary segregation was not an atypical and significant deprivation under Sandin. 307 Fed. Appx. 609, 611 (3d Cir. 2009). In Torres v. Fauver, the Third Circuit held that disciplinary detention for 15 days and administrative segregation for 120 days was also insufficient to implicate the Due Process Clause. 292 F.3d 141, 151 (3d Cir. 2002). And in Pressley v. Johnson, the Third Circuit agreed that confinement in disciplinary custody for 360 days did not constitute an atypical and significant hardship. 268 Fed. Appx. 181, 184 (3d Cir. 2008). See also Burns v. Pa. Department of Corrections, 642 F.3d 163, 171 (3d Cir. 2011) ("inmates are generally not entitled to procedural Due Process in prison disciplinary hearings because the sanctions resulting from those hearings do not usually affect a protected liberty interest").

Whether disciplinary isolation can ever rise to the level of an atypical and significant hardship under Sandin depends upon two factors: (1) the duration of the solitary confinement; and (2) the degree of restrictions involved in the confinement as compared to others similarly isolated. See Sandin, 515 U.S. at 486 (noting that Conner's thirty days segregation "did not exceed similar, but totally discretionary, confinement in either duration or degree of restriction").

Confinement in disciplinary segregation for years—not mere days, weeks, or even months—may qualify as an atypical and significant deprivation. See Shoats, 213 F.3d 140, 144. In addition, if a prisoner's restrictions are significantly more onerous than others confined in disciplinary segregation, a state-created liberty interest may exist. Id. Absent proof that a prisoner's confinement in disciplinary custody is abnormally lengthy or encompasses oppressive conditions not imposed upon

other similarly segregated prisoners, Sandin's atypical and significant hardship test will not be met.

A recent ruling by the Third Circuit may bring some disciplinary action within the parameters of Due Process oversight. In Burns v. Pa. Department of Corrections, an inmate was found guilty of assaulting another prisoner and sentenced to 180 days disciplinary confinement, along with loss of prison job and financial assessment of the victim's medical expenses. 544 F.3d 279, 280 (3d Cir. 2011). The Court agreed that the 180 days isolation and loss of prison job were sanctions unworthy of Due Process protection. Id. In regards to the monetary sanctions, however, the Third Circuit agreed that the assessment of Burns' prison account for medical expenses implicated a "property" interest sufficient to warrant Due Process scrutiny. Id. at 291. In this case, the Court concluded that Due Process was violated when the hearing examiner refused to review a videotape that may have exonerated Burns. Id.

One final observation before moving on: Sandin's atypical and significant hardship test does not apply to pretrial detainees. See Sandin, 515 U.S. at 484 (distinguishing pretrial detainees from convicted prisoners since disciplinary infractions for convicted prisoners fall within the expected parameters of their sentences). Although the Supreme Court has not yet reviewed a Due Process liberty interest claim of a pretrial detainee accused of prison misconduct, a growing number of lower courts have decided that Sandin does not apply. See Surprenant v. Rivas, 424 F.3d 5, 17 (1st Cir. 2005); Benjamin v. Fraser, 264 F.3d 175, 189 (2d Cir. 2001); Fuentes v. Wagner, 206 F.3d 335, 342 n.9 (3d Cir. 2000). This does not mean, however, that pretrial detainees are immune from the disciplinary process because county officials still retain a legitimate interest in prison safety and security. It simply means that pretrial detainees accused of misconduct must be provided a Wolff-type Due Process hearing

regardless whether the sanction imposed constitutes an atypical and significant hardship.

Assuming a prisoner can establish that a particular disciplinary sanction satisfies Sandin's atypical and significant hardship standard, he or she is entitled to those procedures mandated by the Supreme Court in Wolff v. McDonnell, 418 U.S. 539 (1974). In Wolff, the Supreme Court made clear that "disciplinary proceedings are not part of a criminal prosecution and the full panoply of the rights due a defendant in such proceedings does not apply." Id. at 556. Nonetheless, the Court held that the following procedural safeguards must be provided at prison disciplinary hearings to satisfy Due Process: (a) advance written notice of the charges; (b) impartial disciplinary decision-making; (c) right to call witnesses and present documentary evidence when not unduly hazardous to institutional security; (d) assistance from a fellow prisoner or staff member where an illiterate inmate is involved or where the issues are complex; and (e) written statement by the fact finders as to the evidence relied upon and the reasons for the disciplinary action taken. Id. at 571-581.

Prisoners facing disciplinary proceedings are entitled to written notice of the charges at least 24 hours prior to the hearing. Wolff, 418 U.S. at 564. The purpose of providing the accused with a misconduct notice "is to give the charged party a chance to marshal the facts in his defense and to clarify what the charges are, in fact." Id.

To comply with Due Process, misconduct reports must be written rather than oral. Id. at 564; Dzana v. Foti, 829 F.2d 558, 562 (5th Cir. 1987) (oral notice violates Due Process). Written misconduct reports must also be provided to the charged party no less than 24 hours prior to the hearing to permit preparation of a defense. Wolff, 418 U.S. at 564; Benitez v. Wolff, 985 F.2d 662, 665 (2d Cir. 1993) (providing misconduct report more than 24 hours before the hearing, but reclaiming the misconduct report

after 5 hours and requiring the prisoner to remember the details without access to the report violates Due Process). Finally, misconduct reports must be sufficiently detailed to apprise prisoners of the facts underlying the charges. See McGill v. Martinez, 348 Fed. Appx. 718, 720 (3d Cir. 2009) (misconduct report adequate where it specified date and time contraband was found but not specific location). Minor technical errors during misconduct notice preparation do not violate Due Process. See Barner v. Williamson, 233 Fed. Appx. 197 (3d Cir. 2007) (failure to provide inmate misconduct report within 24 hours of *infraction* as required by prison rules not Due Process violation since Wolff contains no such mandate); Holt v. Caspari, 961 F.2d 1370, 1373 (8th Cir. 1992) (failure of misconduct report to specify whether charge was serious or minor not Due Process violation since factual basis for charges provided); Millhouse v. Bledsoe, 458 Fed. Appx. 200, 203 (3d Cir. 2012) (failure to provide inmate misconduct notice within 24 hours of *incident* was not constitutional violation).

Turning to the disciplinary hearing itself, it is clear that the hearing should occur within a reasonable time after expiration of the 24-hour Wolff requirement. What is a "reasonable time," however, varies according to the circumstances facing prison officials. See Layton v. Beyer, 953 F.2d 839, 850 (3d Cir. 1992). Disciplinary hearings may be postponed due to emergency conditions like a riot. See Gray v. Creamer, 465 F.2d 179, 185 n.6 (3d Cir. 1972). In such cases, once the emergency condition has passed, disciplinary hearings must be promptly provided. See Hughes v. Rowe, 449 U.S. 5, 11 (1980) ("segregation of a prisoner without a prior hearing may violate Due Process if the postponement of procedural protections is not justified by apprehended emergency conditions"). However, there is no constitutionally mandated time for the hearing to commence other than the 24-hour notice provision. See Ortiz v. Holt, 390 Fed. Appx. 150, 152 (3d Cir. 2010) ("Wolff did not

require that a hearing be held within three days where any delay in holding his hearing did not prejudice him.").

The Supreme Court held that prisoners facing disciplinary proceedings do not enjoy a constitutional right to counsel. Wolff, 418 U.S. at 559 (1974). However, where an illiterate prisoner is involved or there exist complex legal or factual issues, prisoners are entitled to assistance from another inmate or staff member. Id. at 579; See also Horne v. Coughlin, 795 F.Supp. 72, 76 (N.D.N.Y. 1991) (failure to provide mentally disabled prisoner with assistance violated Due Process); Macia v. Williamson, 219 Fed. Appx. 229, 233 (3d Cir. 2007) (failure to provide representation not Due Process violation "because Macia was not illiterate and the issues in his case were not complex"). Where lay assistance is constitutionally required, prison officials must permit the accused prisoner and his representative a reasonable opportunity to prepare a defense. See Grandison v. Cuyler, 774 F.2d 598, 604 (3d Cir. 1985) (requiring prison officials to justify mere five minute meeting prior to hearing between accused and assistant).

The Wolff Court also held that "the inmate facing disciplinary proceedings should be allowed to call witnesses and present documentary evidence when permitting him to do so will not be unduly hazardous to institutional safety or correctional goals." 418 U.S. at 556. Thus, the right to call witnesses and present evidence is not absolute; according to Wolff, prison officials must have the necessary discretion "to keep the hearing within reasonable limits" and may refuse to call any witness for irrelevance and lack of necessity in addition to legitimate security concerns. Id.

The Wolff Court also concluded that inmates are not entitled to confront and cross examine adverse witnesses due to "considerable potential for havoc inside the prison walls." Id. at 567. When prison officials refuse to call a witness, Due Process requires they explain the reasons why the

witness was not permitted to testify. However, they can do so either as part of the disciplinary record or subsequently in court if the hearing is challenged on Due Process grounds. See Ponte v. Real, 471 U.S. 491, 497 (1985).

Applying these precepts, the lower courts have deferred to prison officials' discretion to exclude witnesses so long as those decisions are based upon legitimate security concerns or keeping the hearing within reasonable limits. See Tapp v. Proto, 404 Fed. Appx. 563, 568 (3d Cir. 2010) (where inmate admitted charges, failure to call witnesses not Due Process violation since they were unnecessary); Moles v. Holt, 221 Fed. Appx. 92, 95 (3d Cir. 2007) (where testimony of 14 inmates would have been cumulative to the 3 inmate witnesses allowed, no Due Process violation); Garrett v. Smith, 180 Fed. Appx. 379, 381 (3d Cir. 2006) (no Due Process right to retain and present expert witness).

On the other hand, if the refusal to call a witness is not logically related to prison security or other legitimate correctional goals, prison officials have violated Due Process. See Brooks v. Andolina, 826 F.2d 1266, 1269 (3d Cir. 1987) (where witnesses would not have impaired security, refusal violated due process); Whitlock v. Johnson, 153 F.3d 380 (7th Cir. 1998) (prison policy of denying virtually all requests for witnesses violates Due Process). These same principles also apply to the introduction of documentary evidence. See Burns, 642 F.3d at 171 (refusal of hearing examiner to review prison videotape Due Process violation).

An essential element of Due Process is an impartial decision maker. In Wolff, the Supreme Court found that the composition of the Nebraska Adjustment Committee was "sufficiently impartial to satisfy the Due Process Clause. 418 U.S. at 571.

In Meyers v. Alldredge, the Third Circuit held that any official who had "substantial involvement" in the circumstances underlying the misconduct report are not allowed to sit on the

disciplinary body. 492 F.2d 296, 306 (3d Cir. 1974). This would normally include only those such as the charging and the investigating staff officers who were directly involved in the incident." Id. In Meyers, the court held that the presence of an Associate Warden on the disciplinary committee violated the inmates' rights to an impartial hearing due to his substantial involvement in controlling a work stoppage. Id. at 305-306.

In Lasko v. Holt, the Third Circuit held that mere allegations that a hearing officer was "immoral, not impartial, and not unbiased" were insufficient to establish a Due Process violation. 334 Fed. Appx. 474, 476 (3d Cir. 2009). In Adams v. Gunnell, the court held that a prior unrelated grievance did not disqualify a staff member from sitting on the disciplinary panel. 729 F.2d 362, 370 (5th Cir. 1984). And in Redding v. Holt, the Third Circuit agreed that simply because a hearing officer was not trained in the law does not bar him from rendering a decision. 252 Fed. Appx. 488, 489 (3d Cir. 2007).

Pursuant to Meyers, only those state officials with substantial involvement in the circumstances underlying the misconduct charge are barred from sitting on the disciplinary tribunal. For example, in Merritt v. De Los Santos, an inmate was denied Due Process when a state official witnessed the underlying incident, drafted a report, and then sat on the disciplinary committee. 721 F.2d 598, 600-601 (7th Cir. 1983). And in Diercks v. Durham, the Court found a Due Process violation when a prison supervisor sat on the disciplinary body despite ordering a subordinate to charge the inmate. 959 F.2d 710, 713 (8th Cir. 1992).

Prisoners facing disciplinary hearings are also entitled to a written statement by the fact finders as to the evidence relied upon and the reasons for the disciplinary action taken. Wolff, 418 U.S. at 564. The purpose of a written record is "to ensure that administrators, faced with possible scrutiny by state officials and the public, and perhaps even the courts, where

fundamental constitutional rights may have been abridged, will act fairly." Id. at 565.

In order to satisfy the written statement mandate, prison disciplinary officials must do more than give simple statements that they accept the officer's misconduct version. Rather, they must engage in specific fact-finding, detailing the evidence supporting their verdict. For example, in Dyson v. Kocik, a prisoner was found guilty of contraband possession and issued a written statement indicating, "Inmate is guilty of misconduct as written." 689 F.2d 466, 468 (3d Cir. 1982). The Third Circuit held that "the rationale which supports the findings in this case is so vague that the verdict constitutes a violation of the minimum requirements of Due Process." Id. at 468. See also Redding v. Fairman, 717 F.2d 1105, 1115 (7th Cir. 1983) (written statements indicating inmates were guilty "based on all available evidence" inadequate).

Finally, we examine the quantity of evidence necessary to convict inmates of prison misconduct. In Superintendent v. Hill, the Supreme Court concluded that the requirements of Due Process are satisfied if "some evidence" exists to support the disciplinary decision. 472 U.S. 445, 455 (1985). "Ascertaining whether this standard is satisfied does not require examination of the entire record, independent assessment of the credibility of witnesses, or weighing of the evidence. Instead, the relevant question is whether there is any evidence in the record that could support the conclusion reached by the disciplinary board." Id. at 455-456.

In light of Hill, prison disciplinary action complies with Due Process when the findings of the disciplinary board are supported by "some" or "any" evidence. Thus, in Howard v. Werlinger, the Third Circuit held that an officer's report describing inmate behavior in the visiting room was "some evidence" to support the misconduct conviction. 403 Fed. Appx. 776, 777 (3d Cir. 2010). In Pachtinger v. Grondolsky, the Third Circuit held that allegations contained in the

misconduct report along with the inmate's incriminating statement at the hearing constituted "some evidence." 340 Fed. Appx. 774 (3d Cir. 2009). And in Thompson v. Owens, the Third Circuit held that a positive urinalysis result constitutes "some evidence" to support a charge of illegal drug use. 889 F.2d 500, 502 (3d Cir. 1989).

On the other hand, Due Process is violated when disciplinary action is taken absent any evidence to support a guilty verdict. See Burnsworth v. Gunderson, 179 F.3d 771, 773 (9th Cir. 1999) (Due Process violated where no evidence presented to substantiate escape charge); Zavaro v. Coughlin, 970 F.2d 1148, 1153 (2d Cir. 1992) (Due Process violated where no evidence presented that inmate participated in riot).

In conclusion, convicting a prisoner of misconduct without any evidence violates Due Process even if the accused prisoner has received a complete Wolff hearing. When federal courts review the sufficiency of the evidence in a prison disciplinary proceeding, the question is not whether there was substantial evidence or evidence beyond a reasonable doubt or a preponderance of the evidence. The sole issue is whether there is "some" or "any" evidence in the record to support the finding of guilt. If there is "some" evidence, no matter how weak, the federal courts will conclude under Hill that Due Process was satisfied.

#### E. Involuntary Medication

As noted previously, the Sandin Court concluded that absent proof that prison conditions constitute an "atypical and significant hardship," they are not subject to the requirements of the Due Process Clause. 515 U.S. at 484. Classification decisions, confinement in administrative segregation, and prison transfers (with a few exceptions) are all considered outside the purview of Due Process. Such matters are considered within the normal range of custody which a valid conviction and sentence has authorized the state to impose. See Meachum v. Fano, 27 U.S. 215, 224 (1976).

Some conditions of confinement, however, are not authorized by a valid conviction and sentence. Some conditions of confinement are so severe and bizarre that they are considered outside the terms of the imposed sentence. In such cases, the Supreme Court has ruled that the Constitution itself confers a liberty interest protected by the Due Process Clause. One such matter concerns the pharmaceutical control of prisoners.

In Washington v. Harper, a prisoner filed suit, claiming that the involuntary administration of antipsychotic medication (without a prior hearing) violated his Due Process rights. 494 U.S. 210, 216 (1990). The Supreme Court agreed that prisoners possess liberty interests in avoiding such treatment under the Due Process Clause itself. Id. at 220. "The forcible injection of medication into a non-consenting person's body represents a substantial interference with that person's liberty." Id. at 229.

As to the process required, the Harper Court held that the State may treat an inmate who has a serious mental illness with involuntary medication "if the inmate is dangerous to himself or others and the treatment is in the inmate's medical interest." Id. at 227. As to who makes these critical decisions, the Court agreed that a medical professional not directly involved in the inmate's treatment could make the requisite findings that the inmate suffers from a mental disorder and is dangerous to himself or others. Id. at 231.

Additionally, the inmate must be provided with prior notice, the right to be present at an adversarial hearing, and the right to present and cross-examine witnesses. Id. at 229. Appointment of counsel was not constitutionally required; a lay advisor who understands psychiatric issues was deemed sufficient. Id. at 235.

## F. Prison Transfers

Several years ago Pennsylvania authorities shipped hundreds of prisoners to Michigan and Virginia to alleviate overcrowding. Inmates were processed and

placed on buses without notice or opportunity to be heard. This was consistent with Supreme Court precedent that state officials may transfer any convicted prisoner, at any time, to any prison, for any reason, so long as it does not otherwise violate the Constitution.

In Meachurn v. Fano, prisoners brought suit alleging that their transfers from a medium to a maximum security prison without adequate hearings violated Due Process. 427 U.S. 215, 222 (1976). The Supreme Court held that the Due Process Clause itself does not "protect a duly convicted prisoner against transfer from one institution to another within the state prison system." Id. at 224. "Confinement in any of the State's institutions is within the normal limits or range of custody which the conviction has authorized the state to impose." Id. at 225. "That life in one prison is much more disagreeable than in another does not in itself signify that a Fourteenth Amendment liberty interest is implicated when a prisoner is transferred to the institution with the more severe rules." Id. The Court also concluded that Massachusetts law did not confer any state-created liberty interest deserving of Due Process protection since transfers were not conditioned upon the occurrence of specific events. Id.

In Montanye v. Haymes, a New York prisoner was transferred to another facility based upon his circulation of a petition protesting the denial of legal assistance 427 U.S. 236, 237 (1976). The Supreme Court rejected the proposition that prisoners transferred because of rule violations are entitled to hearings. Id. at 242. "As long as the conditions or degree of confinement to which the prisoner is subjected is within the sentence imposed upon him and is not otherwise violative of the Constitution, the Due Process Clause does not in itself subject an inmate's treatment [including transfer] by prison authorities to judicial oversight." Id. The Court also agreed that no state-created liberty interest existed in light of New York law. Id.

In Olim v. Wakinekona, a prisoner challenged on Due Process grounds his transfer from a state prison in Hawaii to one in California. 461 U.S. 238, 240 (1983). Despite the 3,000 mile distance, the Supreme Court again concluded that neither the Constitution itself, nor Hawaiian state law, created a liberty interest entitled to federal Due Process protection. Id. at 248. "A conviction, whether in Hawaii, Alaska, or one of the contiguous 48 states, empowers the state to confine the inmate in any penal institution in any state unless there is a state law to the contrary or the reasons for confining the inmate in a particular institution are themselves constitutionally impermissible." Id. at 248 n.9.

In light of Meacham, Montanye, and Olim, prisoners have no liberty interest, derived from the Due Process Clause itself, against prison transfers. The fact that conditions in the receiving facility are more burdensome is irrelevant. The fact that transfers were disciplinary responses to inmate misconduct is irrelevant. Given a valid conviction, confinement in any prison in another state is considered within the normal range of custody which the conviction has authorized the state to impose.

Further obstructing legal challenges is the Supreme Court's subsequent ruling in Sandin v. Conner, 515 U.S. 472 (1995). According to Sandin, only those prison conditions amounting to an "atypical and significant hardship" warrant state-created liberty interest status. Id. at 483. Since most prison transfers are routine, not atypical, and not severe enough to qualify as a "significant hardship," it would appear that Due Process challenges are basically futile. See Ball v. Beard, 396 Fed. Appx. 826, 827 (3d Cir. 2010) ("Ball has no entitlement to incarceration to any particular prison"); Green v. Williamson, 241 Fed. Appx. 820, 822 (3d Cir. 2007) (transfer claim dismissed where prisoner failed to prove atypical and significant hardship); Jerry v. Williamson, 211 Fed. Appx. 110, 112 (3d Cir. 2006) (inmate had no protected liberty interest in transfer); Thomas v. Rosemeyer, 199 Fed.Appx. 195,

197 (3d Cir. 2006) (prisoner transferred and housed in RHU did not suffer atypical and significant hardship).

There do exist a few exceptions to the Meachum-Montanye-Olim line of cases. In Vitek v. Jones, the Supreme Court held that a prisoner's transfer to a mental hospital triggered a liberty interest that entitled him or her to procedural protections (notice, hearing, witnesses, written decision, counsel) under the Due Process Clause directly. 445 U.S. 480, 491 (1980). The Vitek Court distinguished by holding that "involuntary commitment to a mental hospital is not within the range of conditions of confinement to which a prison sentence subjects an individual." Id. at 493. Unlike a normal prison-to-prison transfer, a prison-to-mental hospital commitment is "qualitatively different" because the prisoner will suffer "stigmatizing consequences" and may be forced to participate in behavior modification programs. Id. at 494. But see Fortune v. Bitner, 285 Fed. Appx. 947, 950 (3d Cir. 2008) (two-week transfer to mental assessment unit did not trigger Due Process under Vitek where he was never subjected to involuntary medication or other treatment and never even spoke with doctor).

The second exception concerns pretrial detainees confined in county jails. In Cobb v. Aytch, 643 F.2d 946 (3d Cir. 1981), a class action suit was brought against Philadelphia County challenging the transfer of over two hundred county inmates to distant Pennsylvania state prisons. Id. at 948-949. Citing Meachum and Montanye, the Cobb Court agreed that *sentenced county inmates* had no liberty interest, rooted in the Due Process Clause itself or state law, which would entitle them to procedural safeguards prior to a prison transfer. Id. at 953. *Pretrial detainees*, on the other hand, "have federally protected liberty interests that are different in kind from those of sentenced inmates." Id. at 951. Noting that transfers to distant state prisons interfered with their Sixth Amendment rights to counsel and speedy trial, the Cobb Court held that "pretrial detainees have a liberty interest firmly

grounded in federal Constitutional law. Id. at 957. Thus, pretrial detainees were entitled to Due Process (notice and hearing) in conjunction with those transfers. Id. at 961.

The final exception is Wilkinson v. Austin, in which the Supreme Court held that prisoner transfers into Ohio's "supermax" facility satisfied Sandin's atypical and significant hardship standard. 545 U.S. 209, 224 (2005). In Austin, prisoners considered disruptive and dangerous to staff and the general population were transferred to the supermax facility. Id. at 213. Prisoners so confined were denied all inmate-to-inmate contact; were subject to 24-hour cell lighting; were limited to one hour of isolated exercise; were disqualified from parole eligibility; and were subject to indefinite stays in supermax status, limited only by the prisoner's sentence. Id. at 224. The Austin Court remarked that while "any of these conditions standing alone might not be sufficient to create a liberty interest; taken together they impose an atypical and significant hardship within the correctional context. Id. The Austin Court was particularly disturbed with the indefinite nature of such isolation, and the parole disqualification in reaching its conclusion. Id. Accordingly, prisoners transferred to the supermax facility were entitled to notice, hearing, written decision, and appeal rights. Id. at 227.

### G. Pre-Release Programs

Many states, including Pennsylvania, have enacted pre-release programs to reduce prison overcrowding and begin the process of reintegrating offenders back into society. To what extent do these programs implicate the procedural protections of the Due Process Clause?

With respect to the application process where prison officials assessed a prisoner's eligibility to enter a pre-release program, it is well settled that rejection of a prisoner's application does not implicate Due Process concerns. See DeTomaso v. McGinnis, 970 F.2d 211, 213 (7th Cir. 1992) (Illinois eligibility regulations for work release do not create liberty or property interests);

Baumann v. Arizona Department of Corrections, 754 F.2d 841, 845 (9th Cir. 1985) (Arizona prison regulations for work release and furlough programs did not give rise to liberty interests).

Bear in mind that the Supreme Court has long recognized a distinction between the revocation of liberty one enjoys and the denial of liberty one desires. For example, in Greenholtz v. Inmates of Nebraska Penal and Correctional Complex, the Supreme Court held that the mere possibility of parole did not by itself generate a liberty interest entitled to Due Process protection. 442 U.S. 1, 9 (1979). Greenholtz rejected the prisoner's argument that the parole release decision is sufficiently analogous to parole revocation to entitle prisoners to a hearing. Id. According to the Court there "is a crucial distinction between being deprived of a liberty one has, as in parole, and being denied a conditional liberty one desires." Id. In similar fashion, there is a significant difference between pre-release revocation, in which an inmate is deprived of his liberty at the halfway house and returned to prison, and pre-release denial, in which a prisoner's application is rejected. Only the former may implicate Due Process. A state's decision to deny a prisoner's admittance into a pre-release program is not a withdrawal of something he has, but merely a rejection of something he or she hopes to have.

In Young v. Harper, the Supreme Court agreed to decide whether an Oklahoma prisoner in pre-release status was entitled to Due Process prior to his removal from the program. 117 S.Ct. 1148, 1150 (1997). Under the terms of the program, Harper "was released from prison before the expiration of his sentence. He kept his own residence; he sought, obtained and maintained a job; and he lived a life generally free of the incidents of imprisonment." Id. at 1152. In light of the extraordinary liberty granted Harper, the Supreme Court concluded that the Oklahoma program was "no different from parole" as described in Morrissey," thereby triggering a liberty interest under the Due Process Clause itself.

Id. at 1151. Harper was therefore entitled to a notice, hearing, witnesses, and written statement as required in Morrissey. Id.

The problem with Harper is that most pre-release programs do not provide the extraordinary freedom and liberty as accorded Oklahoma inmates. For example, in Asquith v. Department of Corrections, a prisoner suspected of alcohol consumption was removed from a New Jersey halfway house and returned to prison. 186 F.3d 407, 409 (3d Cir. 1999). Unlike the pre-release program in Harper, Asquith lived in a "strictly monitored halfway house" and was subject to curfew, standing count, and intensive monitoring of his movements in the community. Id. at 411. The Third Circuit distinguished Harper by concluding that while Asquith's liberty was greater in the halfway house than prison, it was still "institutional confinement." Id. at 411. Citing Meachum and Montanye, the Third Circuit held that Asquith did not have a liberty interest under the Due Process Clause itself because "while a prisoner remains in institutional confinement, the Due Process Clause does not protect his interest in remaining in a particular facility." Id. at 411

The Third Circuit also rejected the argument that Asquith's return to prison from pre-release status triggered a state-created liberty interest protected by Due Process. Id. at 412. Citing Sandin, the Third Circuit noted that state deprivations do not create protected liberty interests absent proof of an "atypical and significant hardship." Id. at 412. "Since an inmate is normally incarcerated in prison, Asquith's return to prison did not impose atypical and significant hardship on him in relation to the ordinary incidents of prison life and, therefore, did not deprive him of a protected liberty interest." Id.

Because Pennsylvania state pre-release programs normally require inmates to reside in state-owned or state-contracted facilities and impose curfews and other restrictions upon movement, they are likely distinguishable from the parole-like program in operation in Harper. Indeed, several courts

have concluded that Pennsylvania state prisoners do not have any protected liberty interest—stemming from the Due Process Clause itself or state law entitling them to a hearing prior to, or subsequent, the revocation of pre-release status. See Feliz v. Kintock Group, 297 Fed. Appx. 131, 136 (3d Cir. 2008) (pre-release inmate had no right to notice and hearing before his return to SCI-Graterford); Lott v. Arroyo, 785 F. Supp. 508, 509 (E.D. Pa. 1991) (transfer from group home back to state prison does not violate Due Process); Wilder v. Department of Corrections, 673 A.2d 30, 33 (Pa. Cmwlth. 1996) (same).

#### H. Parole Release

Whether the Due Process Clause applies to parole release has been addressed by the Supreme Court in several cases. In each one, prisoners alleged that state officials violated their Fourteenth Amendment rights by conducting parole hearings which failed to satisfy Due Process requirements.

In each decision, the Supreme Court first made clear that prisoners do not enjoy a protected interest, emanating from the Constitution itself, in obtaining parole release. See Greenholtz v. Inmates of Nebraska Penal & Correctional Complex, 442 U.S. 1, 7 (1979) ("There is no constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence."); Board of Pardons v. Allen, 482 U.S. 369, 373 (1987) ("the presence of a parole system by itself does not give rise to a constitutionally protected liberty interest in parole release"); Swarthout v. Cooke, 131 S.Ct. 859, 862 (2011) ("There is no right under the Federal Constitution to be conditionally released ... and the states are under no duty to offer parole").

Since there is no entitlement to parole under the Constitution directly, prisoners must look to state law to base any Fourteenth Amendment claim to Due Process. In Greenholtz, the Supreme Court held that a Nebraska statute, mandating that

the Board of Parole "shall" release the offender - "unless" one of four specified reasons for deferral of release was found - created an expectation of parole release that was entitled to Due Process protection. 442 U.S. at 9. In Allen, the Court held that a Montana law specifying that its Board of Pardons "shall" release on parole a prisoner who is "able and willing to fulfill the obligations of a law-abiding citizen" also created a protected liberty interest. 482 U.S. at 378. And in Swarthout, the Supreme Court assumed (but did not review) that the California state law requiring a parole release date absent public safety concerns also created a liberty interest entitled to Due Process protection. 131 S.Ct. at 861.

Having found a protected liberty interest, stemming from state law, the Greenholtz Court then considered what procedures were necessary to ensure that the prisoner's interest was not arbitrarily abrogated. Noting that Due Process remains a flexible concept and calls only for such procedural protections as the particular situation demands, the Greenholtz Court ruled that an inmate is entitled only to: (a) an opportunity to be heard; and (b) the reasons for parole rejection. 442 U.S. at 6. If these minimal procedures are furnished, Due Process is satisfied. See also Swarthout, 131 S.Ct. at 862 (refusing to expand procedural protections to include requirement of "some evidence").

While state-created liberty interests were found to exist in Greenholtz and Allen, Pennsylvania prisoners should keep in mind the Supreme Court's warning that those statutes contained "unique structure and language" that may not be found in other state parole statutes. 442 U.S. at 11. Indeed, parole release statutes in most states do not contain the magical "shall release" language that was considered pivotal in Greenholtz and Allen. See Sultenfuss v. Snow, 35 F.3d 1494, 1502 (11th Cir. 1994) (Georgia); Creel v. Kane, 928 F.2d 707, 712 (5th Cir. 1987) (Texas).

In terms of the Commonwealth, it was previously established that Pennsylvania's former parole release statute, see 61 Pa. Stat. § 331.21, did not create an expectation or entitlement to parole sufficient to trigger Due Process. See Rauso v. Vaughn, 79 F.Supp.2d 550, 552 (E.D. Pa. 2000) ("parole is not a protected liberty interest in Pennsylvania"); Tubbs v. Pennsylvania Board of Probation and Parole, 620 A.2d 584, 586 (Pa. Cmwlth. 1993). (recognizing the Parole Board's "broad discretion to determine if and when a prisoner under its jurisdiction should be released on parole.").

In 2010, Pennsylvania repealed § 331.21 and replaced it with new parole laws. See 61 Pa.C.S. § 6137. Unfortunately, the new parole statute is no more Due Process-friendly than the former law. According to the statute, the Parole Board "may" parole any inmate (except those sentenced to death or life) whenever: (a) the best interests of the inmate justify parole; and (b) the Commonwealth's interests will not be injured by the inmate's parole. Id. Such statutory language is not even close to the mandatory specifications considered in Greenholtz. See Newman v. Beard, 617 F.3d 775, 783 (3d Cir. 2010) (Pennsylvania state inmates have the right to apply for parole and have parole fairly considered, but there is no protected liberty interest). The lack of mandatory language ("shall release") along with substantive predicates is not the only problem facing Due Process challenges to parole decisions. In Sandin v. Conner, the Supreme Court criticized the "mandatory language" methodology used in Greenholtz and Allen and replaced it with an "atypical and significant hardship" test. 515 U.S. at 484 (1995). Since parole rejection simply means that the affected inmates must serve their entire sentences (rather than impose a new significant hardship), Sandin's measurement of a state created liberty interest will not likely be satisfied.

## I. Property

In addition to protecting the individual against unwarranted deprivations of liberty, the Fourteenth Amendment also prohibits the states from depriving any person of property without Due Process of law. Unfortunately, Supreme Court precedent has determined that Due Process may be satisfied by the existence of adequate post-deprivation state remedies (such as grievance systems and tort actions) to challenge property deprivations.

In Parratt v. Taylor, an inmate brought suit, alleging that the loss of his mail ordered hobby materials by prison officials violated his property rights under the Due Process Clause. 451 U.S. 527, 529 (1981). The Supreme Court agreed that the hobby kit constituted property, and that the loss, even though negligently-caused, amounted to a deprivation. Id. at 535. However, the Court also ruled that post deprivation remedies made available by the states can satisfy the requirements of Due Process. Id. at 543. In this case, Nebraska provided statutory remedies for persons who suffered property losses at the hands of state officials. Id. The Court concluded that such statutory remedies, if adequate, could satisfy Due Process. Id.

At issue in Hudson v. Palmer, was whether the intentional destruction of inmate property during a cell search violated Due Process. 468 U.S. 517, 520 (1984). The Supreme Court ruled "that an unauthorized intentional deprivation of property by a state employee does not constitute a violation of the procedural requirements of the Due Process Clause of the Fourteenth Amendment if a meaningful post-deprivation remedy for the loss is available." Id. at 533. Since Virginia provided Palmer with post-deprivation remedies in which he could seek compensation for the destruction of his property, he was not denied Due Process. Id. at 535.

In Reynolds v. Wagner, county inmates argued that a \$3 charge for medical visits, absent a hearing, violated their Due Process rights. 128 F.3d 166, 170 (3d Cir.

1997). The Third Circuit agreed that inmates "have a property interest in funds held in prison accounts" and are "entitled to Due Process with respect to any deprivation of this money." Id. at 179. However, the Court dismissed the claim, finding that inmates had prior notice of the medical policy and that the prison's grievance system constituted an adequate post deprivation forum to challenge unjustified medical assessments. Id. at 179-181. The court further agreed that medical assessments could be deducted from inmate accounts without their express authorization. Id. at 180.

In Tillman v. Lebanon County Correctional Facility, a prisoner alleged he was deprived of Due Process when county officials assessed a \$10 per day housing fee, resulting in a debt of \$4,000. 221 F.3d 410, 413 (3d Cir. 2000). Although the Third Circuit agreed that Tillman had a property interest in his prison account, it concluded that he was provided Due Process since he had notice of the cost recovery program and a grievance program existed that constituted "an adequate post-deprivation remedy." Id. at 422.

In Pressley v. Johnson, a prisoner alleged that state officials denied him Due Process by destroying his property absent a hearing. 268 Fed. Appx. 181, 183 (3d Cir. 2008). Citing Hudson v. Palmer, the Third Circuit noted that "even an intentional deprivation of property in the prison setting is not a Due Process violation if the prison provides an adequate post-deprivation remedy." Id. The case was dismissed since "Pennsylvania's inmate grievance procedure is an adequate post-deprivation remedy." Id. See also Monroe v. Beard, 536 F.3d 198, 210 (3d Cir. 2008) (confiscation of legal material not Due Process violation since prison grievance-process "furnished the plaintiffs with a meaningful post-deprivation remedy"); Tapp v. Proto, 404 Fed. Appx. 563, 567 (3d Cir. 2010) (confiscation of photograph not Due Process violation where adequate post-deprivation remedies existed in either prison grievance process or state tort action); Crosby v. Piazza, 465 Fed.

Appx. 168, 172 (3d Cir. 2012) (where inmate had post-deprivation remedies via grievance system and state tort action, inmate not deprived of Due Process when property was confiscated).

## V. EIGHTH AMENDMENT ISSUES

The Eighth Amendment to the United States Constitution protects convicted prisoners<sup>1</sup> against the infliction of "cruel and unusual punishment." It is the primary source of constitutional protection for prisoners subject to inhumane conditions of confinement. See Helling v. McKinney, 509 U.S. 25, 31 (1993) ("It is undisputed that the treatment a prisoner receives in prison and the conditions under which he is confined are subject to scrutiny under the Eighth Amendment.").

The Supreme Court has established a two-prong inquiry for determining whether prison conditions violate the Eighth Amendment. See Farmer v. Brennan, 511 U.S. 825, 834 (1994). The first prong consists of a judicial examination into the objective component of the Eighth Amendment. The inquiry will focus on whether conditions of confinement are objectively serious enough to justify Eighth Amendment scrutiny. Id. at 834 (the deprivation alleged must be "sufficiently serious"). When considering this matter, bear in mind that simply because prison conditions are harsh is insufficient because the Constitution "does not mandate comfortable prisons." Rhodes v. Chapman, 452 U.S. 337, 339 (1981). Prisoners claiming Eighth Amendment violations must prove that they are either deprived of "the minimal civilized measure of life's necessities" such

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<sup>1</sup> The Eighth Amendment prohibits cruel and unusual punishment of people who have already been convicted. Because pretrial detainees may not be punished, conditions for pretrial detainees are reviewed under the Fourteenth Amendment Due Process Clause. Regulations such as searches, handcuffs, and other security processes are not considered punishments because they are related to the jail's need for safety. Bell v. Wolfish, 441 U.S. 520, 564 (1979). Pretrial detainees have at least as much protection from cruel and unusual punishment as those convicted of crimes. Id. at 545. Although the rights of pretrial detainees are based on a different Amendment, the Third Circuit uses the same analysis as an Eighth Amendment claim. See Stevenson v. Carroll, 495 F.3d 62, 67-68 (3d Cir. 2007).

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

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

#### **A. Health Care**

In Estelle v. Gamble, the Supreme Court considered a prisoner's claim that the inadequacy of medical care constituted an Eighth Amendment violation. 429 U.S. 97 (1976). Gamble, a Texas prisoner, brought suit alleging that he received inadequate medical care following a back injury sustained while working. Id. at 107. The Supreme Court held that "deliberate indifference to serious medical needs of prisoners" constitutes the "unnecessary and

wanton infliction of pain" proscribed by the Eighth Amendment. Id. at 291. The Court reasoned that since incarceration denied prisoners the ability to care for themselves, the government has an obligation to provide medical care for them. Id. at 103. The Estelle Court went to great lengths to point out, however, that not every claim by a prisoner that he was denied medical treatment states an Eighth Amendment violation. Id. at 104. An accidental or inadvertent failure to provide medical care does not rise to an Eighth Amendment level. Id. at 105. Nor do claims of negligence or medical malpractice constitute constitutional violations. Id. at 106. "In order to state a cognizable claim, a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs." Id.

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

As in every Eighth Amendment case, the standard enunciated by the Estelle Court is two-pronged. It requires the prisoner's medical needs be serious (the objective component) and it requires deliberate indifference on the part of prison officials (the subjective component). See Giles v. Kearney, 571 F.3d 318, 330 (3d Cir. 2009); Gravley v. Tretinik, 414 Fed. Appx. 391, 393-394 (3d Cir. 2011); Propst v. Beard, 412 Fed. Appx. 536, 538 (3d Cir. 2011).

The Estelle deliberate indifference standard applies to pretrial detainees as well as convicted, sentenced prisoners. Pretrial detainees, however, must ground their constitutional rights to medical care based

upon the Due Process Clause of the Fourteenth Amendment. Unlike prisoners, pretrial detainees have not been convicted of crime and are not protected by the Eighth Amendment. See Bell v. Wolfish, 441 U.S. 520, 535 n.16 (1979) ("The State does not acquire the power to punish with which the Eighth Amendment is concerned until after it has secured a formal adjudication of guilt in accordance with Due Process of law. Where the state seeks to impose punishment without adjudication, the pertinent constitutional guarantee is the Due Process Clause of the Fourteenth Amendment."). Applying this rationale, the Third Circuit has agreed that the Estelle standard applies to pretrial detainees, holding that deliberate indifference to serious medical needs violates the Due Process Clause of the Fourteenth Amendment. Boring v. Kozakiewicz, 833 F.2d 468, 471-472 (3d Cir. 1987); Brown v. Borough of Chambersburg, 903 F.2d 274, 278 (3d Cir. 1990).

Before proceeding with our Estelle analysis, it should be pointed out that the deliberate indifference standard applies to serious mental or emotional illnesses as well as physical needs. See Inmates of Allegheny County Jail v. Pierce 612 F.2d 754, 763 (3d Cir. 1979) ("Although most challenges to prison medical treatment have focused on the alleged deficiencies of medical treatment for physical ills, we perceive no reason why psychological or psychiatric care should not be held to the same standard.").

1. Are Prisoners' Medical Needs "Serious"?

According to Estelle, only "acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs" rise to the level of an Eighth Amendment violation. Estelle, 429 U.S. at 106. Exactly what constitutes a "serious medical need" is determined on a case-by-case basis. In general, a serious medical need is defined as one that has been diagnosed by a physician as requiring treatment or one that is so obvious that a lay person would easily recognize the necessity

for a doctor's attention. See Monmouth County Correctional Institutional Inmates v. Lanzaro, 834 F.2d 326, 347 (3d Cir. 1987).

Applying this definition, the Third Circuit has concluded that life-threatening emergencies and injuries or illnesses are indeed serious medical needs within the meaning of Estelle. See Stewart v. Kelchner, 358 Fed. Appx. 291, 295 (3d Cir. 2009) (MRSA skin infections are serious); Merritt v. Fogel, 349 Fed. Appx. 742, 745 (3d Cir. 2009) (Hepatitis C virus is serious); Rouse v. Plantier, 182 F.3d 192, 197 (3d Cir. 1999) (insulin-dependent diabetes is serious); Kost v. Kozakiewicz, 1 F.3d 176, 189 (3d Cir. 1993) (heatstroke is serious).

On the other hand, the Third Circuit has found minor ailments not to be "serious" medical needs and unworthy of Eighth Amendment protection. See Tsakonas v. Cicchi, 308 Fed. Appx. 628, 632 (3d Cir. 2009) (weight loss, eczema of the feet, seborrhea of the scalp, athlete's foot, constipation, and swollen knuckles not serious injuries); Kost, 1 F.3d at 189 (lice infestation not serious).

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

In Boring v. Kozakiewicz, the Third Circuit resolved this matter by holding that in questionable cases, expert testimony is necessary to show that a prisoner's illness was "serious" within the meaning of Estelle. 833 F.2d 468, 473 (3d Cir. 1987). In Boring, three prisoners brought suit against the Allegheny County Jail alleging inadequate medical treatment for a variety of minor

ailments including nerve injury, temporary tooth fillings, and migraine headaches. Id. at 469-470. The Third Circuit affirmed the lower court's finding that there existed no evidence in the record indicating such ailments were "serious" medical needs. Id. at 473. The court held that without expert medical opinion, "the jury would not be in a position to decide whether any of the conditions described by plaintiffs could be classified as serious." Id. at 473. The Third Circuit further warned prisoners that an inability to pay for expert testimony would not be a valid excuse. Id. at 474. See also Mitchell v. Gershen, 466 Fed. Appx. 84 (3d Cir. 2011) (expert testimony required to establish that foot infection was serious).

In light of Boring, it is clear that the burden is upon prisoners to prove that a particular illness constitutes a "serious medical need." Where the severity is acknowledged by prison doctors or would be apparent to a lay person, expert testimony may not be required. See Boring, 833 F.2d at 473. During the discovery phase of a civil action, prisoners should seek medical records and submit interrogatories to prison authorities to satisfy their Estelle burden. See Brightwell v. Lehman, 637 F.3d 187, 194 n.8 (3d Cir. 2011) (serious medical need can be met by other forms of extrinsic proof such as records and photographs). In cases of minor ailments, where the severity is contested by the defendants, prisoners must present expert testimony as required by Boring.

## 2. Were State Officials Deliberately Indifferent?

Establishing that a prisoner's illness or injury is "serious" is only the first half of the Estelle test. The Eighth Amendment also contains a subjective component, which requires proof of deliberate indifference. Estelle, 429 U.S. at 106. See also Erickson v. Pardus, 551 U.S. 89, 90 (2007) (allegation that prisoner's life was in danger due to termination of hepatitis C medication stated deliberate indifference claim).

What is "deliberate indifference?" According to the Supreme Court, deliberate

indifference is a state of mind more blameworthy than mere negligence but less culpable than purposeful misconduct. See Farmer v. Brennan, 511 U.S. 825, 834 (1994). Deliberate indifference means that a prison official will be held liable under the Eighth Amendment "only if he knows that inmates face a substantial risk of serious harm and disregard that risk by failing to take reasonable measures to abate it." Id. at 847. Inmates "need not show that a prison official acted or failed to act believing that harm actually would befall an inmate; it is enough that the official acted or failed to act despite his knowledge of a substantial risk of serious harm." Id. at 842.

Under the Supreme Court's deliberate indifference standard, a prison official cannot be held liable for the denial of medical care unless the prisoner proves: (1) that the official had knowledge of the inmate's serious medical need; and (2) despite such knowledge, he failed to take reasonable action to abate it. See Farmer, 511 U.S. at 848.

### (a) Knowledge Requirements

The Supreme Court's deliberate indifference test requires proof of two key elements: knowledge and failure to act despite such knowledge. Unless a prisoner proves that a prison official possessed knowledge of his serious medical need, that official must be exonerated of the Eighth Amendment liability. See Farmer, 511 U.S. at 837 ("an official's failure to alleviate a significant risk that he should have perceived but did not, while no cause for commendation, cannot under our cases be condemned as the infliction of punishment").

The Supreme Court's knowledge requirement limits the Eighth Amendment's reach to only those state officials who are aware that a prisoner faces a serious medical risk. See Farmer, 511 U.S. at 837 ("the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference"). Absent proof that the official in question knew of the

prisoner's serious medical condition, liability will not be sustained. For example, in Singletary v. Pennsylvania Department of Corrections, the mother of a Rockview prisoner (who committed suicide) brought suit, claiming that the prison warden was deliberately indifferent to her son's mental health needs. 266 F.3d 186, 189 (3d Cir. 2001). Citing Farmer, the Third Circuit affirmed dismissal of the suit, holding that the mother failed to provide evidence showing that the warden knew or was aware of her son's serious medical needs. Id. at 192 n.2.

In Williams v. Pennsylvania, the Third Circuit dismissed a medical indifference claim where the plaintiff failed to prove that the defendant prison official knew that he had a serious hernia condition. 289 Fed. Appx. 483, 485 (3d Cir. 2008).

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

will obviously be much easier."). See also Reed v. McBride, 178 F.3d 849, 854 (7th Cir. 1999) (finding that prison officials had knowledge of prisoner's medical condition in light of prisoner's written grievances).

#### (b) Failure to Act

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

What is "reasonable action" in light of a prisoner's serious medical need? Under Estelle, state officials "act reasonably" when they provide whatever treatment the medical professional decides is appropriate. In contrast, state officials act unreasonably or with "deliberate indifference" when they deny, delay, obstruct or otherwise interfere with needed or prescribed medical treatment. See Estelle, 429 U.S. at 109 (deliberate indifference can be manifested "by prison doctors in their response to the prisoner's needs or by prison guards in intentionally denying or delaying access to medical treatment or intentionally interfering with the treatment once prescribed"); Rouse v. Plantier, 182 F.3d 192, 197 (3d Cir. 1999) (finding "deliberate indifference in a variety of circumstances, including where the prison official (1) knows of a prisoner's need for medical treatment but intentionally refuses to provide it; (2) delays necessary medical treatment based on a non-medical reason; or (3) prevents a prisoner from receiving

needed or recommended medical treatment.”).

The Third Circuit has distinguished medical deliberate indifference claims into two groups: those against non-medical staff (such as guards, wardens, and administrative personnel) and those against medical staff themselves (such as doctors and nurses).

If an inmate is receiving treatment from medical staff, non-medical personnel can be sued for deliberate indifference only upon proof that the employee in question had knowledge that the inmate was being mistreated or not being treated at all. See Spruill v. Gillis, 372 F.3d 218, 236 (3d Cir. 2004) (“absent a reason to believe (or actual knowledge) that prison doctors or their assistants are mistreating (or not treating) a prisoner, a non-medical prison official... will not be chargeable with the Eighth Amendment”); Durmer v. O’Carroll, 991 F.2d 64, 68 (3d Cir. 1992).

For example, in Brown v. Deparlos, an inmate filed a deliberate indifference case due to a herniated disc. 492 Fed. Appx. 211 (3d Cir. 2012), Brown received treatment from medical staff ranging from a cervical collar and medication to an MRI scan and surgery. Citing Spruill, the Third Circuit upheld dismissal of claims against the non-medical personnel since he was under the care of medical staff and there existed no evidence that Brown was being mistreated or not treated at all. See also Heffran v. Mellinger, 324 Fed. Appx. 176, 180 (3d Cir. 2009); Jones v. Falor, 135 Fed. Appx. 554, 556 (3d Cir. 2005); Ali v. Terhune, 113 Fed. Appx. 431, 437 (3d Cir. 2004).

In light of Spruill and Durmer, inmates who are receiving medical treatment cannot sue non-medical defendants absent evidence that such defendants knew the inmate was being “mistreated” or not treated at all. Spruill, 372 F.3d at 236. What constitutes mistreatment? Keep in mind that “considerable latitude” is given to medical authorities in the diagnosis and treatment of inmates and courts will not “second guess” a

particular course of treatment as long as it stems from a “sound professional judgment.” Inmates of Allegheny County Jail v. Pierce, 612 F.2d 754, 762 (3d Cir. 1979). Thus, unless the treatment is so absurd to constitute unsound medical judgment (such as Tylenol for severe head trauma), the courts will not conclude that the course of action taken constitutes medical mistreatment.

Of course, non-medical staff (such as guards) can be found guilty of deliberate indifference if they block inmate access to a medical professional. For example, in Fielder v. Boshard, 590 F.2d 105 (5th Cir. 1979), a prisoner suffering from delirium tremens was denied medical treatment by county officials based upon their belief he was faking. Id. at 108. The prisoner’s condition tragically worsened, eventually culminating in his death. Id. The Fifth Circuit affirmed the damages award to his family, agreeing that deliberate indifference existed. Id. at 110. See also Aswegan v. Bruhl, 965 F.2d 676, 677-678 (8th Cir. 1992) (deliberate indifference found when prison officials denied 70-year-old inmate access to medical personnel for coronary heart disease and denied timely access to prescribed medication); Hill v. Marshall, 962 F.2d 1209, 1211 (6th Cir. 1992) (deliberate indifference found when prison official interrupted prisoner’s prescribed tuberculosis medication); Lawson v. Dallas County, 286 F.3d 257, 262-264 (5th Cir. 2002) (affirming deliberate indifference verdict where prison staff failed to follow treatment prescribed by outside physician to alleviate ulcers of paraplegic inmate). These cases confirm that when prison officials deny a prisoner access to a medical professional or intentionally block that professional’s prescribed medical treatment, deliberate indifference exists.

Non-medical prison staff who intentionally delay a prisoner’s access to a medical professional or impede that professional’s medical treatment also exhibit deliberate indifference. See Estelle, 429 U.S. at 104; Ali v. McAnany, 262 Fed. Appx. 443, 445 (3d Cir. 2000) (prisoner stated Eighth

Amendment claim where staff refused to process request slip for medical treatment based on inmate's failure to sign sick call slip). However, deliberate indifference will not be sustained absent proof that such delay exposed the inmate to unnecessary pain or harm. See Estelle, 429 U.S. at 106 (inmate must allege acts or omissions "sufficiently harmful" to evidence deliberate indifference). See also Berry v. Bunnell, 39 F.3d 1056, 1057 (9th Cir. 1994) (two-hour delay in treatment for bladder infection not deliberate indifference absent proof of harm); Harris v. Coweta County, 21 F.3d 388, 393-394 (11th Cir. 1994) ("The tolerable length of delay in providing medical attention depends on the nature of the medical need and the reason for the delay").

The courts have also made clear that when non-medical prison guards and other administrative staff intentionally deny or delay a prisoner's access to a medical professional or interfere with the professional's prescribed treatment, deliberate indifference exists. To do otherwise would pose grave threats to inmate health.

What happens, however, when claims of inadequate medical care are alleged against the medical professional himself? As noted previously, the Third Circuit gives tremendous deference to the opinions of medical doctors and nurses in deciding the proper course of treatment. See Lasko v. Watts, 373 Fed. Appx. 196, 203 (3d Cir. 2010) ("The standard for evaluating a prisoner's deliberate indifference claim is highly deferential to the medical practitioner's professional judgment."). Under Estelle, a prisoner is constitutionally entitled to whatever treatment the medical professional deems reasonably appropriate under the circumstance.

What does this mean? Quite simply, if a prisoner receives treatment for a serious medical condition, the Courts will not find Eighth Amendment liability even if the diagnosis and treatment ultimately prove incorrect and result in further pain and

illness. See Farmer v. Brennan, 511 U.S. at 844 (state official who responds reasonably to serious risk is free of Eighth Amendment liability "even if the harm ultimately was not averted").

For example, in Oliver v. Beard, 358 Fed. Appx. 297 (3d Cir. 2009), an inmate alleged that a prison doctor violated his Eighth Amendment rights by failing to properly treat a wrist injury. Id. at 299. The Third Circuit dismissed the claim, noting that Oliver received treatment for his injury, including an x-ray, an arm sling, and medication. Id. at 301. "Although Oliver alleged that this treatment was inadequate, disagreement over the proper course of treatment does not amount to a constitutional violation." Id. at 301.

In James v. Pennsylvania Department of Corrections, an inmate alleged an Eighth Amendment violation after a prison dentist extracted an abscessed tooth as opposed to James' preference for less drastic action. 230 Fed. Appx. 195, 196 (3d Cir. 2007). The claim was dismissed. "Although James may have preferred a different course of treatment, his preference alone cannot establish deliberate indifference as such second-guessing is not the province of the courts." Id. at 197. See also Iseley v. Dragovich, 90 Fed. Appx. 577, 581 (3d Cir. 2004) (where inmate was given prescribed diet, vitamins and pain medication for Hepatitis C, no deliberate indifference despite preference for Interferon medication); Fortune v. Hamberger, 379 Fed. Appx. 116, 122 (3d Cir. 2010) (where migraine medication was changed from Cafergot to Midrin, no Eighth Amendment liability despite claim that Cafergot was more effective). In short, an inmate who has received reasonable treatment for a serious medical need has no Eighth Amendment case against a prison physician even if an alternative course of action would have been more effective.

And in Falciglia v. Erie County Prison, a prisoner alleged that prison authorities were deliberately indifferent when

they refused to provide him with an AMA-approved diabetic diet. 279 Fed. Appx. 138, 141 (3d Cir. 2008). The claim was dismissed for failure to prove that their prescribed diet was inappropriate for a diabetic. Id. at 141.

Under Estelle, claims of negligence or medical malpractice by prison doctors also do not rise to the level of an Eighth Amendment violation. 429 U.S. at 106. Thus, in Brown v. Chambersburg, a prisoner's claim of deliberate indifference was dismissed despite a prison doctor's conclusion that inmate chest pains stemmed from a mere bruise instead of two actual broken ribs. 903 F.2d 274, 278 (3d Cir. 1990). "The most that can be said of plaintiff's claim is that it asserts the doctor's exercise of deficient professional judgment." Id.

The Estelle Court has made clear that mere disagreements between prisoners and their physicians do not rise to the level of deliberate indifference. 429 U.S. at 106. The Estelle Court has made clear that mere allegations of medical malpractice and negligence do not rise to the level of deliberate indifference. Id. The Estelle Court has made clear that an accidental or inadvertent failure to provide medical care does not rise to the level of deliberate indifference. Id. What does violate the Eighth Amendment is when prisoners receive no treatment whatsoever for a serious medical need, or the treatment provided was so absurd to warrant a conclusion of deliberate indifference. See Mandel v. Doe, 888 F.2d 783, 787-789 (11th Cir.1989) (providing only Motrin for fractured hip amounted to no treatment at all).

The courts have also made clear that differences of opinions between medical professionals do not constitute Eighth Amendment violations. Thus, in Davis v. Collins, 230 Fed. Appx. 172 (3d Cir. 2007), an inmate's Eighth Amendment claim was dismissed despite a prison dentist's rejecting of an oral surgeon's recommendation and instead proceeding with a tooth extraction. Id. at 173. The Third Circuit concluded that

failure to follow the oral surgeon's course of treatment "only constituted a medical disagreement" which is "insufficient to establish a constitutional claim." Id. at 173. See also Hodge v. U.S. Dept. of Justice, 372 Fed. Appx. 264, 268 (3d Cir. 2010) (failure to follow specialist's dietary recommendation for Hepatitis C not deliberate indifference where alternative medical diet provided); Davila-Bajana v. Sherman, 278 Fed. Appx. 91, 92-93 (3d Cir. 2008) (failure to provide surgery as suggested by surgeon not deliberate indifference where alternative treatment provided); White v. Napoleon, 897 F.2d 103, 110 (3d Cir. 1990) ("No claim is stated when a doctor disagrees with the professional judgment of another doctor. There may, for example, be several acceptable ways to treat an illness.").

In conclusion, once a prisoner's illness or injury is determined to be serious, Estelle requires that he or she receive treatment deemed necessary by the medical professional. The State cannot overrule that decision based solely upon non-medical financial or budgetary considerations. See Monmouth County Correctional Inmates v. Lanzaro, 834 F.2d at 337 ("economic factors may ... be considered in choosing the methods used to provide meaningful access to constitutionally-mandated services. But the cost of protecting a constitutional right cannot justify its total denial.") (citations omitted, alterations added); Harris v. Thigpen, 941 F.2d 1495, 1509 (11th Cir. 1991) (lack of funds will not excuse the failure of corrections system to maintain a minimum level of medical services). As long as the inmate receives treatment deemed medically necessary by the prison doctor, he or she has no basis to file an Eighth Amendment claim.

## B. Prison Conditions

It is well-settled that "the treatment a prisoner receives in prison and the conditions under which he is confined are subject to scrutiny under the Eighth Amendment." Helling v. McKinney, 509 U.S. at 31. (1993). In this section, we address the point when

prison conditions violate the Cruel and Unusual Punishment Clause. As will be seen below, the courts will uphold an Eighth Amendment challenge to prison conditions only when inmates prove: (1) that prison conditions are serious in the sense they deprive them of basic human needs and life necessities; and (2) prison officials were deliberately indifferent to those serious prison conditions.

The two key precedents are Rhodes v. Chapman, 452 U.S. 337 (1981), and Wilson v. Seiter, 501 U.S. 294 (1991). At issue in Rhodes was whether housing two inmates in a cell designed for one constitutes cruel and unusual punishment. 452 U.S. at 339. While acknowledging that confinement in prison is a form of punishment subject to Eighth Amendment scrutiny, the Rhodes Court rejected prisoners' claims that housing two inmates in a single cell constitutes cruel and unusual punishment. Id. at 352. The Court reasoned that "the Constitution does not mandate comfortable prisons," Id. at 349, and to "the extent that such conditions are restrictive and even harsh, they are part of the penalty that criminal offenders pay for their offenses against society." Id. at 347. The Court did note that prison conditions "alone or in combination may deprive inmates of the minimal civilized measure of life's necessities" and thus violate the Eighth Amendment. Id. at 347. In the case of the Ohio prison before it, however, double-celling had not deprived prisoners of essential food, medical care, or sanitation. Id. at 348. Nor had it increased violence or created other-intolerable conditions. Id. Hence, the Court concluded that overall prison conditions were not serious enough to form the basis for an Eighth Amendment violation. Id.

In 1991 the Supreme Court agreed to decide "whether a prisoner claiming that conditions of confinement constitute cruel and unusual punishment must show a culpable state of mind on the part of prison officials, and, if so, what state of mind is required." Wilson v. Seiter, 501 U.S. at 296. In Wilson, a prisoner alleged that his Eighth Amendment rights were violated due to his

confinement in an overcrowded facility with inadequate heating and cooling, improper ventilation, unsanitary restroom and dining facilities, excessive noise, and insufficient locker and storage space. Id.

Writing for the majority, Justice Scalia held that in addition to Rhodes' requirement that prison deprivations must be objectively serious, prisoners alleging cruel and unusual punishment must also prove a subjective component, which shows that prison officials "possessed a culpable state of mind." Id. at 297. In the context of adverse conditions of confinement, Justice Scalia held that deliberate indifference "would constitute sufficient wantonness to satisfy the Eighth Amendment." Id. at 298.

Applying these standards to the case before it, the Supreme Court remanded Wilson back to the lower court for further proceedings. Id. at 306. In regards to the seriousness of prison conditions, the Court held that Wilson must prove that conditions deprived him of "life's necessities" or of "a single identifiable human need" such as food, warmth or exercise. Id. at 304. Secondly, Wilson must establish that prison officials were deliberately indifferent to such serious conditions. Id. at 305. In other words, it is no longer sufficient for a prisoner to prove that he is confined under intolerable conditions. He must also prove that prison officials had knowledge of those conditions and yet failed to take any reasonable action to correct them. Id.

What are basic life necessities which the Supreme Court deems worthy of Eighth Amendment protection? There is no precise list. However, in Rhodes, the Court cited food, medical care, sanitation and protection from violence as basic life necessities. 452 U.S. at 348. In Wilson, the Court identified food, warmth and exercise as basic human needs. 501 U.S. at 304. In Hope v. Pelzer, the Court held that depriving a prisoner of water and bathroom breaks -- while handcuffed to an outside hitching post -- was sufficiently serious to warrant Eighth Amendment scrutiny. 536 U.S. 730, 744

(2002). And in Helling v. McKinney, the Court agreed that exposure to unreasonable levels of tobacco smoke (which posed a serious health risk) was subject to Eighth Amendment review. 506 U.S. at 33. In short, basic life necessities include those needs considered essential to physical health and well-being. When prison conditions threaten such needs, Eighth Amendment scrutiny is warranted.

In contrast, the Supreme Court has stated that the denial of job and educational opportunities are not life necessities since their deprivation does not inflict pain or jeopardize inmate health. Rhodes, 452 U.S. at 348. The Supreme Court has also concluded that a two-year ban on visitation was not an Eighth Amendment violation because it did not "create inhumane prison conditions, deprive inmates of basic necessities, or fail to protect their health or safety." Overton v. Bazzetta, 539 U.S. 126, 137 (2003). In light of such reasoning, the Third Circuit has concluded that the loss of minor privileges is not worthy of constitutional protection. See Johnson v. Burris, 339 Fed. Appx. 129, 131 (3d Cir. 2009) (loss of privileges insufficient to rise to level of serious deprivation); McDowell v. Litz, 419 Fed. Appx. 149 (3d Cir. 2011) (suspension of telephone privileges and loss of prison job are not basic necessities).

Whether or not a particular prison condition warrants Eighth Amendment scrutiny turns not only on the nature and severity of the condition, but also on its duration. See Hutto v. Finney, 437 U.S. 678, 686 (1978) (a filthy overcrowded cell and diet of "grue" may be tolerable for a few days but intolerably cruel for weeks or months). Short-term or temporary deprivations with no ill effects do not rise to the 'severity of Eighth Amendment standards. See Fortune v. Hamberger, 379 Fed. Appx. 116, 122 (3d Cir. 2010) (denial of showers, exercise and hygienic materials during fifteen-day RHU confinement "insufficiently serious to implicate the Eighth Amendment"); Norwood v. Vance, 572 F.3d 626, 633 (9th Cir. 2009) (although exercise is a basic human

necessity, a temporary denial of outdoor exercise with no medical effects is not serious); Booth v. King, 228 Fed. Appx. 167, 171 (3d Cir. 2007) (brief confinement in cell with broken windows does not amount to "extreme deprivation" required for Eighth Amendment); Richardson v. Spurlock, 260 F.3d 495, 498 (5th Cir. 2001) (intermittent exposure to second-hand tobacco smoke during bus rides not objectively serious).

The Third Circuit has in several cases applied these principles to inmate claims of overcrowded prisons. In Hassine v. Jeffes, the Third Circuit rejected a claim that conditions at SCI-Graterford violated the Eighth Amendment. 846 F.2d 169, 175 (3d Cir. 1988). Although acknowledging that conditions were sub-standard, the Court held that they had not reached the point of depriving inmates of basic necessities. Id. at 175. In Peterkin v. Jeffes, 855 F.2d 1021 (3d Cir. 1988), the Third Circuit rejected a claim that death-row conditions at SCI-Graterford and SCI-Huntingdon violated the Eighth Amendment. Id. at 1022. Conditions were not dangerous, intolerable or shockingly substandard, and hence, not serious enough to deprive inmates of basic human needs. Id. at 1027. On the other hand, in Tillery v. Owens, 907 F.2d 418 (3d Cir. 1990) the Third Circuit upheld an Eighth Amendment challenge to SCI-Pittsburgh prison conditions. Id. at 428. In that case, the plaintiffs proved that overcrowded, violent, unsanitary and dilapidated conditions deprived inmates of their basic needs to sanitation, safety and medical care. Id. at 428.

In conclusion, prison conditions must deprive inmates of some basic human necessity in order to be considered serious enough to trigger Eighth Amendment review. Absent such proof, a claim of cruel and unusual punishment will not be sustained. See Gannaway v. Berks County Prison, 439 Fed. Appx. 86 (3d Cir. 2011) (disciplinary "nutruloaf" diet did not deprive inmates of basic life necessities); Stewart v. Beard, 417 Fed. Appx. 117 (3d Cir. 2011) (constant low intensity lights in RHU cells not sufficiently

serious absent proof of physical or mental harm); Hubbard v. Taylor, 538 F.3d 229 (3d Cir. 2008) (requiring inmates to sleep on floor mattresses due to overcrowding not serious where prisoners enjoyed access to day rooms). Compare Graves v. Arpaio, 623 F.3d 1043, 1049 (9th Cir. 2010) (dangerously high air temperatures on cellblock were sufficiently serious health hazard to inmates taking psychotropic medication).

Of course, it is insufficient to prove that prison conditions are objectively serious. Prisoners claiming Eighth Amendment violations must also prove that prison authorities have a "sufficiently culpable state of mind" which, in prison conditions litigation has been defined as deliberate indifference. See Wilson, 501 U.S. at 303. Accordingly, "a prison official may be held liable under the Eighth Amendment for denying humane conditions of confinement only if he knows that inmates face a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it. Farmer, 511 U.S. at 847; See also, Beers-Capitol v. Whetzel, 256 F.3d 120, 138 (3d Cir. 2001) (deliberate indifference standard "requires more than evidence that the defendants should have recognized the excessive risk and responded to it; it requires evidence that the defendant must have recognized the excessive risk and ignored it").

In Ward v. Lamanna, inmates alleged their Eighth Amendment rights were violated due to an excessive risk of lung cancer stemming from contaminated air in a prison factory. 334 Fed. Appx. 487, 489 (3d Cir. 2009). The case was dismissed due to failure to prove deliberate indifference. Citing Wilson, the Court concluded that the plaintiffs failed to prove that prison staff was aware of unreasonable health risks due to poor air quality. Id. at 491.

In Heffran v. Mellinger, inmates alleged that exposure to dangerous fumes in the prison's shoe shop constituted cruel and unusual punishment. 324 Fed. Appx. 176, 178 (3d Cir. 2009). In this case, prison staff

issued inmates face masks, jumpsuits, and insulated gloves. Id. at 179. Inmates were also trained in the use of chemical products. Id. Citing Farmer, the Third Circuit dismissed the case, concluding that prison officials had acted reasonably in the face of a known risk to inmate health. Id. at 179.

In Palmer v. Johnson, an Eighth Amendment claim was filed alleging that prison officials ordered an inmate labor detail to remain overnight in a field as punishment. 193 F.3d 346, 349 (5th Cir. 1999). The Fifth Circuit sided with the plaintiffs. First, the refusal of authorities to provide inmates protection from the wind and cold constituted denial of basic life necessities. Id. at 353. Secondly, the Court held that the prison warden exhibited deliberate indifference to the inmates' health and safety needs because he ordered the disciplinary action. Id. at 353.

In Simmons v. Cook, two paraplegic prisoners successfully sued prison officials for denying them food while confined in a segregation unit. 154 F.3d 805, 808 (8th Cir. 1998). The Eighth Circuit agreed that the plaintiffs satisfied both the objective and subjective components of the Eighth Amendment. Id. Denial of food is a life necessity, yet the defendants, upon being informed that the inmates' wheel chairs could not reach the cell door, intentionally ignored the problem. Id.

Finally, it should be noted that prison officials, and their attorneys, often argue that "accreditation by the American Correctional Association is proof that the conditions in question don't violate the Eighth Amendment." Gates v. Cook, 376 F.3d 323, 337 (5th Cir. 2004). This is a false proposition that has been thoroughly rejected by the Supreme Court. See Bell v. Wolfish, 441 U.S. 520, 543n. 27 (1979) ("And while the recommendations of these various groups may be instructive in certain cases, they simply do not establish the Constitutional *minima*; rather, they establish goals recommended by the organization in question."); Gates, 376 F.3d at 337

("Compliance with ACA Standards may be relevant consideration" but "is not *per se* evidence of constitutionality"). In fact, the lower courts have found Eighth Amendment violations despite ACA accreditation awards. See Gates, 376 F.3d at 337 (finding cruel and unusual punishment due to filthy cells, excessive heat, and inadequate lighting despite compliance with ACA standards). Of course, this is a double-edged sword affecting prisoners as well as their jailers: just as adherence to ACA standards does not necessarily mean compliance with Eighth Amendment requirements, noncompliance with ACA standards does not necessarily mean cruel and unusual punishment.

### C. Prison Violence

The key Eighth Amendment precedent regarding inmate violence is Farmer v. Brennan, 511 U.S. 825 (1994). The Court held that prison officials have a duty to protect prisoners from violence at the hands of other inmates. Id. at 833. However, not every inmate assault translates into constitutional liability for prison officials. Id. at 834. "Our cases have held that a prison official violates the Eighth Amendment only when two characteristics are met." Id. First, a prisoner must prove "that he is incarcerated under conditions posing a substantial risk of serious harm." Id. Secondly, a prisoner must also prove that prison officials were "deliberately indifferent" to this substantial risk of serious harm. Id. at 831. A prison official will be held liable under the Eighth Amendment for failure to protect "only if he knows that inmates face a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it." Id. at 847.

The Third Circuit has reviewed numerous failure-to-protect cases. For example, in Jones v. Burlington County Board of Chosen Freeholders, an inmate (Jones) filed suit claiming his rights were violated when he was attacked, without warning or provocation, by another inmate (Hill). 428 Fed. Appx. 131 (3d Cir. 2011). The case was dismissed. "In his deposition,

Jones acknowledged that he had never informed the defendants that he feared that he would be attacked by Hill, and he has presented no evidence that the defendants were independently aware that Hill posed a threat to him or was generally prone to violence." Id. at 133.

In Thrower v. Alvies, an inmate filed suit alleging that prison officials violated his rights after he was sexually assaulted by two inmates. 425 Fed. Appx. 102, 103 (3d Cir. 2011). The case was dismissed. Evidence revealed that Thrower submitted a request form prior to the assault, seeking a cell transfer because of other inmates' "nonsense" and "disrespect." Id. The Third Circuit concluded that the request form was insufficient to alert authorities of any specific danger. Id. at 105.

In Robinson v. Johnson, a Pennsylvania RHU inmate brought suit after he was attacked (while handcuffed) by another RHU inmate (whose handcuffs had been removed). 449 Fed. Appx. 205, 206 (3d Cir. 2011). Applying Farmer, the Third Circuit rejected the Eighth Amendment claim. First, Robinson conceded that prison officials had no prior knowledge of the impending attack. Id. at 208. Secondly, he failed to show evidence indicating that a substantial risk of harm existed due to the RHU policy of exposing cuffed inmates to uncuffed inmates during entry into the fenced exercise area. Id. at 208.

In Jones v. Beard, 145 Fed. Appx. 743 (3d Cir. 2005), an inmate (Jones) alleged that prison officials failed to protect him from an assault by his cellmate (Marshall). Id. at 744. In this case, Jones had told several guards that he and Marshall "were not getting along" and asked for a cell transfer. Id. at 745. Citing Farmer, the Third Circuit held that "the record is devoid of evidence establishing that Jones articulated specific threats of serious harm" and thus, guards had no actual knowledge of a serious risk. Id.

Under Farmer, a prison official will be held liable under the Eighth Amendment

for failure to protect only if he knows that an inmate faces a risk of serious harm (objective component) and disregards that risk (subjective component) by failing to take reasonable measures to abate it. 511 U.S. at 847. For example, when prison officials actually witness an assault by one prisoner upon another and fail to take reasonable action, deliberate indifference exists. See Stubbs v. Dudley, 849 F.2d 83, 86-87 (2d Cir. 1988) (prison guard liable for failure to offer protection to inmate being chased by armed prisoners); Walker v. Norris, 917 F.2d 1449, 1453 (6th Cir. 1990) (where prison guards failed to restrain and disarm inmate, and permitted attack to continue, deliberate indifference to serious risk of harm existed).

Another scenario which would support liability under Farmer is when prison officials have knowledge of a substantial risk of harm involving a particular inmate yet fail to take reasonable action to avert the subsequent violence. For example, in Hamilton v. Leavy, an inmate claimed prison officials knew of and disregarded an excessive risk to his safety by placing him in the general population. 117 F.3d 742 (3d Cir. 1997). In this case, the plaintiff (Hamilton) was transferred out of Delaware and into the federal prison system for his own protection after several attacks by other inmates for cooperating with investigators about drug trafficking. Id. at 745. Upon return to Delaware, Hamilton was placed in the general population and assaulted yet again. Id. The Third Circuit held, first, that in light of Hamilton's prior history of being assaulted and his cooperation with state authorities, placing him in the general population posed a significant risk of harm. Id. at 747. Secondly, the Court stated that the failure to confine Hamilton in protective custody, despite the recommendation of staff and personal knowledge of the risks facing Hamilton, suggested deliberate indifference. Id. at 747-748.

In Scott v. Mahlmeister, a prisoner (Scott) informed a staff member (Mahlmeister) that another inmate had threatened him. 319 Fed. Appx. 160, 161 (3d

Cir. 2009). Despite knowledge of this threat, Mahlmeister took no action, and shortly thereafter, Scott was attacked with a razor. Id. The Third Circuit affirmed the jury verdict in favor of Scott. "The jury returned with a verdict finding that Mahlmeister violated Scott's civil rights because she knew that there was a substantial risk that the other inmate (Paige) would attack Scott but deliberately disregarded it." Id.

These cases confirm that when a serious risk of harm exists regarding a particular prisoner, prison officials will be held accountable under the Eighth Amendment when they have knowledge of that risk and fail to respond with reasonable safety measures. See also Robinson v. Prunty, 249 F.3d 862 (9th Cir. 2001) (where prison officials had prior knowledge of racial fights in segregation yard, placing inmates of different races in yard at same time suggests deliberate indifference); Newman v. Holmes, 122 F.3d 650 (8th Cir. 1997) (deliberate indifference to serious risk of harm existed when prison guard opened cell of inmate on lockdown status, permitting attack upon other prisoners); Marsh v. Butler County, Alabama, 268 F.3d 1014 (11th Cir. 2001) (where prison warden knew of defective locks, availability of homemade weapons, and inadequate classification system, deliberate indifference to a serious risk of harm existed).

On the other hand, where prison officials lack knowledge of a substantial risk of harm, a plaintiff's Eighth Amendment claim will fail under Farmer. See Klebenowski v. Sheehan, 540 F.3d 633, 639 (7th Cir. 2008) (prisoner's statement that he "was afraid for his life" not specific enough to alert prison officials of substantial risk of harm); Butera v. Cottey, 285 F.3d 601 (7th Cir. 2002) (inmate's vague statements to guards that he "was having problems on the block" deemed insufficient to give notice of a specific risk). Allegations that an inmate assault resulted from official negligence are also insufficient to state an Eighth Amendment case. See Bailey v. U.S. Marshals Service, 426 Fed. Appx. 44 (3d Cir. 2011) (allegation that authorities were negligent in housing him in

county jail insufficient). Finally, prison officials who actually know of a substantial risk to inmate safety may escape liability if they respond reasonably to the risk, even if harm was not averted. See Farmer, 511 U.S. at 844; Arnold v. Jones, 891 F.2d 1370, 1373 (8th Cir. 1989) (failure to stop fight not deliberate indifference where responding guards were outnumbered and intervention may have escalated disturbance).

In summary, an Eighth Amendment failure-to-protect case will not be sustained absent proof: (1) that a substantial risk of serious harm existed; and (2) prison officials were deliberately indifferent to this substantial risk in the sense they possessed knowledge of the risk yet failed to take reasonable safety measures to abate it. Farmer, 511 U.S. at 847n.9. Since all prisons are potentially dangerous, the mere fact of being incarcerated is not sufficient by itself to constitute a substantial risk. Rather, there must exist facts indicating the risk of assault was serious. For example, a prisoner required to double-cell with an inmate with a long history of predatory behavior may face a substantial risk of assault. Likewise, certain prisoners (inmate informants, child sex offenders, young and weaker inmates, and rival gang members) placed in dangerous housing may face a substantial risk of assault. Finally, any prisoner incarcerated in a facility in which violence and chaos is pervasive and widespread may also face a substantial risk of serious harm. Before filing suit, however, extensive research must be conducted to locate other cases with similar factual backgrounds to determine what evidence should be presented to satisfy Farmer's requirement of serious risk of harm.

Of course, establishing a substantial risk of harm is only the first half of Farmer. Prisoners must also establish deliberate indifference, that is, proof that prison officials had knowledge of a substantial risk of harm yet failed to take any reasonable action to avert an assault. Satisfying the knowledge requirement can be accomplished by introducing documentary evidence (e.g., request forms and grievances) verifying that

a particular state official had direct knowledge of a specific and substantial risk of harm. See Farmer, 511 U.S. at 832 (urging inmates to utilize the grievance system to verify their claims). As for the failure to act reasonably in the face of a known risk, the requisite proof will depend on the circumstances of the assault. Prison officials who take no action whatsoever, despite knowledge of a serious risk of harm, are most vulnerable to liability under Farmer.

#### D. Sexual Abuse Of Female Prisoners

In Farmer v. Brennan, 511 U.S. at 832 the Supreme Court agreed that while the Constitution does not mandate comfortable prisons, it does not permit inhumane ones either. Id. at 1976. Being violently assaulted in prison is simply not part of the penalty that criminal offenders pay for their offenses. Id. at 1977. In this section, we review Eighth Amendment claims involving allegations of sexual assaults of female prisoners by male prison guards.

According to Farmer, a prison official will be held liable under the Eighth Amendment "only if he knows that inmates face a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it." Id. at 1984. Absent proof of these elements a serious risk of harm and deliberate indifference to that risk, Eighth Amendment liability will not be sustained. Id. at 1982 ("prison officials who lacked knowledge of a risk can't be said to have inflicted punishment").

In most Eighth Amendment sexual assault cases, female prisoners file suit against two sets of individual defendants: (a) the male guard who committed the sexual assault; and (b) the supervisors with oversight responsibilities of the male guard. See Beers-Capitol v. Whetzel, 256 F.3d 120 (3d Cir. 2001). With regard to each defendant, the prisoner must allege and prove: (1) that there existed a serious risk of sexual assault; and (2) that the defendant was deliberately indifferent to that risk in the

sense he possessed knowledge of the risk yet failed to take reasonable safety measures to abate it. Farmer, 511 U.S. at 831.

Before analyzing cases of sexual misconduct, we strongly recommend that female prisoners who have been sexually assaulted (or threatened with assault) by male prison guards report the crime immediately without hesitation. No matter how degrading and intrusive post-assault medical examinations and official inquiries are, the alternative is infinitely worse. Sexual predators rarely stop. By reporting the assault immediately, physical evidence can be gathered and preserved, and credibility will be sustained. Bear in mind that male prison guards confronted with accusations of sexual misconduct will vehemently deny the charge given the enormous stakes at issue (criminal charges and incarceration; termination of job and pension loss; divorce and public humiliation). See Institutional Sexual Assault Statute, 18 PA.C.S.A. § 3124.2 (any Pennsylvania prison employee, engaged in sexual relations with an inmate, commits a first-degree misdemeanor). The fact that the accuser is a convicted felon only increases the likelihood that the accused staff member will deny the assault and rely upon a strategy of testing the female prisoner's credibility. Accordingly, it is critical that the misconduct be immediately reported in order that physical evidence is preserved and the sexual predator is scientifically linked to his assault.

Assuming a female prisoner can prove that she was in fact sexually assaulted by a male prison guard, satisfying Farmer's Eighth Amendment deliberate indifference standards against the sexually assaultive prison guard should be relatively easy. See Carrigan v. Davis, 70 F. Supp.2d 448 (D. Del. 1999) (female inmate kept condom for testing rather than throw it away as ordered by guard); Morris v. Eversley, 205 F.Supp.2d 234 (S.D.N.Y. 2002) (female prisoner retained bed sheet which later confirmed the presence of semen).

First off, many judges agree that the presence of a sexually assaultive male prison guard poses a significant risk of harm to female inmates. See Beers-Capitol, 256 F.3d at 130 (noting that both parties agreed that Whetzel's sexual assaults upon female juveniles constituted an objectively serious risk of harm). Secondly, a sexually-assaultive prison guard cannot escape liability by claiming a lack of knowledge of his own misconduct or that he acted reasonably under the circumstances. See Carrigan, 70 F.Supp.2d at 452 (sexual contact between a prison inmate and a prison guard constitutes deliberate indifference toward the inmate's well-being, health and safety). Accordingly, Eighth Amendment claims against the sexually-assaultive guard himself should prove easy under Farmer. See Beers-Capitol, 256 F.3d at 125 (noting a \$200,000 judgment against a sexually-assaultive male staff member at a juvenile facility).

Establishing Eighth Amendment liability against a prison supervisor, on the other hand, is very difficult under Farmer. Farmer, 511 U.S. at 844 (prison officials may show "that they did not know of the underlying facts indicating a sufficiently substantial danger and that they were therefore unaware of a danger, or that they knew the underlying facts but believed that the risk to which the facts gave rise was insubstantial or nonexistent"). Consequently, a female litigant must determine whether any evidence exists that the supervisor had knowledge that a male prison guard was committing sexual misconduct. Unless a female prisoner is confined in a prison where the risk is pervasive and longstanding, it is challenging to satisfy Farmer's deliberate indifference standards. See Farmer, 511 U.S. at 540-541; Newby v. District of Columbia, 59 F.Supp.2d 35 (D.D.C. 1999) (Eighth Amendment violation where females were forced by guards to participate in strip shows); But see Morris v. Eversley, 282 F.Supp.2d at 208 (supervisory officials not liable for sexual assault absent proof that officials had knowledge of guard's behavior).

The key Third Circuit decision in this area is Beers-Capitol v. Whetzel, 256 F.3d 120 (3d Cir. 2001) where two former female juveniles brought suit claiming a violation of their Eighth Amendment rights after being sexually assaulted by a male staff member (Whetzel). Id. at 125. Having obtained a \$200,000 judgment against Whetzel plaintiffs sought additional damages against Whetzel's supervisors and coworkers for failing to take reasonable safety measures. Citing Farmer, the Third Circuit held that the defendants could be found liable only if the officials knew of and disregarded an excessive risk to inmate health and safety. Id. at 131. In this case, the Third Circuit agreed that all defendants except one did not have knowledge of Whetzel's sexual assaults against female juveniles. Id. at 140. Accordingly, all defendants were absolved of Eighth Amendment liability with the exception of one counselor who "had heard general rumors from the residents that Whetzel was having sex with some of the female residents." Id. at 141. The Third Circuit remanded the case back to the lower court to determine whether such rumors were sufficient to provide the counselor with enough information so as to trigger reasonable action under Farmer to protect the plaintiffs from sexual assault. Id. at 144.

Likewise, in Hovater v. Robinson, a female prisoner brought suit alleging that her Eighth Amendment rights were violated when she was sexually assaulted by a prison guard. 1 F.3d 1063, 1064 (10th Cir. 1993). The Tenth Circuit held that Hovater failed to establish a claim against the sheriff since there existed no evidence that the sheriff had knowledge that the prison guard was a threat to female inmates. Id. at 1068. See also Daniels v. Delaware, 120 F.Supp. 2d (supervisors not liable where no evidence presented that they knew of or acquiesced in guard's misconduct); Berry v. Oswalt, 143 F.3d 1127, 1131 (8th Cir. 1998) (supervisors not liable where evidence failed to show they knew prison guard was a threat to female inmates).

The Farmer Court held that state authorities violate the Eighth Amendment only if "the official knows of and disregards an excessive risk to inmate health or safety." 511 U.S. at 487. While satisfying this standard against supervisory officials is difficult in sexual assault cases (since sexual predator guards attempt to conceal such criminal acts), it is not impossible.

For example, at issue in Ortiz v. Jordan, was whether a defendant may appeal a denial of qualified immunity after a full trial on the merits. 131 S.Ct. 884, 888 (2011). In this case, a female prisoner (Ortiz) was sexually assaulted by a prison guard on two consecutive evenings. After the first assault, Ortiz reported the incident to her case manager (Jordan). Id. Jordan merely advised Ortiz to "hang out" with friends so that the guard would not be alone with her. Id. at 890. That very evening, however, Ortiz was sexually assaulted again. Id. The Supreme Court ruled in favor of Ortiz in terms of the qualified immunity issue and sustained the damages award against Jordan and another official. Key to the jury's verdict was evidence establishing that Jordan knew of the first assault yet failed to take reasonable safety measures to prevent the second attack. Id. at 890.

In Ware v. Jackson County, Mo., a female prisoner (Ware) brought suit against prison authorities after a prison guard (Toomer) raped her at the county jail. 150 F.3d 873, 876 (8th Cir. 1998). The Eighth Circuit affirmed the \$50,000 damages award against the County and the Director of the jail. Id. In this case, the evidence revealed that sexual assaults against female prisoners were not limited to a single rogue guard or "bad apple." Rather, there existed "a continuing, widespread, and persistent pattern of unconstitutional conduct." Id. at 881. Citing Farmer, the Eighth Circuit agreed the County's deliberate indifference "is evidenced by its failure to discipline CO Toomer and other officers who engaged in sexual misconduct when there was ample evidence that female inmates were placed at substantial risk of serious harm." Id. at 883;

see also Riley v. Oik-Long, 282 F.3d 592 (8th Cir. 2002) (where prison warden and security director had prior knowledge of guard's sexual misconduct yet allowed him unsupervised contact with inmates, deliberate indifference established).

These cases confirm that a supervisor can be held liable for Eighth Amendment violations under Farmer if he knows of and disregards an excessive risk to inmate safety. 511 U.S. at 487. If a supervisor has knowledge of a subordinate's sexually assaultive behavior, yet fails to take reasonable safety measures to protect inmates, liability will be sustained under Farmer.

#### E. Excessive Force

The use of force to quell prison disturbances and unruly prisoners is a common occurrence in Pennsylvania's correctional systems. Overcrowded prison conditions and repressive rules combine with angry and sometimes violent prisoners to produce a tinderbox ready to explode. While prison officials are accorded wide latitude in responding to disturbances and defiant prisoners, their use of force becomes unconstitutional when it is not applied "in a good faith effort to maintain or restore discipline," but rather is applied "maliciously and sadistically for the very purpose of causing harm." Whitley v. Albers, 475 U.S. at 320.

At what point the use of force crosses the line to constitute cruel and unusual punishment has been addressed by the Supreme Court in two cases. At issue in the first case, was an Oregon prison riot in which a prison guard was taken hostage. Whitley, 475 U.S. at 314. Whitley, the prison's security manager, led an armed assault team into the cellblock to rescue the hostage. Id. at 1082. Shooting erupted and Albers, a prisoner not involved in the riot, was wounded in the leg. Id. The Supreme Court granted review to decide what standard governs a prisoner's right to be free from cruel and unusual punishment when

that prisoner is shot by officials attempting to quell a prison disturbance.

The Whitley Court held that the Eighth Amendment is not violated when prison officials use force to suppress a prison disturbance as long as the force is used in a "good faith effort to maintain or restore discipline" and is not used "maliciously and sadistically for the very purpose of causing harm." Id. at 320. In determining whether prison officials acted in "good faith" or "maliciously and sadistically" depends upon the evaluation of such factors as: (1) the need for the application of force; (2) the relationship between the need and the amount of force actually used; (3) the extent of injury inflicted; (4) the extent of the threat to the safety of staff and inmates, as reasonably perceived by responsible officials on the basis of the facts known to them; and (5) the efforts made to lessen the severity of the use of force. Id. at 321.

Applying these factors to the case at hand, the Supreme Court concluded that prison officials had not violated Albers' Eighth Amendment rights because the shooting "was part and parcel of a good-faith effort to restore prison security." Id. at 1087.

Whereas Whitley focused upon the subjective component of the Eighth Amendment and held that a "malicious and sadistic" test was the appropriate level of proof in an excessive force case, the Supreme Court's review in Hudson v. McMillian, would focus on the objective component. 503 U.S. 1 (1992). At issue in Hudson was the beating of Louisiana prisoner Keith Hudson by two prison guards. Id. at 4. According to the record, the guards punched and kicked Hudson while he was handcuffed and shackled. Id. Their supervisor watched the beating but merely told the officers "not to have too much fun." Id. As a result, Hudson suffered minor bruises and swelling of his face in addition to loosened teeth and a cracked dental plate. The Supreme Court granted review to determine whether the use of excessive force against a prisoner constitutes cruel and

unusual punishment when the prisoner does not suffer serious injury.

The Hudson Court agreed that the use of excessive force against a prisoner may constitute cruel and unusual punishment "whether or not significant injury is evident." Id. at 9. According to the Court, the seriousness of an injury is but one factor to consider when determining whether the force was used in a good faith effort to maintain or restore discipline or was a malicious and sadistic infliction of harm. Id. at 6. Other determining factors include whether the force was necessary, the relationship between the necessity and the amount of force applied, the threat to the prison official's safety and any efforts made to temper the severity of a forceful response. Id. Thus, while the extent of a prisoner's injuries is one factor that the courts may consider, significant injury to the prisoner is not a threshold or dispositive requirement for an excessive force claim. Id. at 9.

The Hudson Court went on to note, however, that not "every malevolent touch by a prison guard gives rise to a federal cause of action. Id. The Eighth Amendment's prohibition of cruel and unusual punishment excludes from recognition a "*de minimis*" use of force (such as a push and shove). Id. at 10. In this case, however, the Court determined that Hudson's injuries, including bruises, swelling, loosened teeth, and a cracked dental plate "are not *de minimis* for Eighth Amendment purposes.

In Wilkins v. Gaddy, the Supreme Court reaffirmed Hudson in a case brought by a North Carolina inmate alleging that he was slammed to the floor and punched, kicked, kneed and choked by a prison guard. 130 S.Ct. 1175, 1177 (2010). The lower courts dismissed the claim, concluding that Wilkins' injuries were "*de minimis*" and had not required medical attention. Id. at 1177. The Supreme Court reversed, concluding that the circuit had strayed from the clear holding in Hudson. Id. at 1178. The core judicial inquiry is not whether a certain quantum of injury was sustained, but rather

whether the force was applied maliciously and sadistically to cause harm. Id. at 1179. The case was remanded back to permit Wilkins to prove that the assault violated the Eighth Amendment.

In light of Whitley, Hudson, and Wilkins, it is clear that whether the force used constitutes cruel and unusual punishment hinges on one pivotal question: Was the force applied in a good faith effort to maintain or restore discipline, or was it applied maliciously and sadistically to cause harm? In making this determination, the lower courts must examine all of the Whitley factors and not simply the extent of the prisoner's injuries.

For example, in Brooks v. Kyler, 204 F.3d 102 (3rd Cir, 2000), a Camp Hill prisoner brought suit, claiming that prison guards repeatedly punched and kicked him while he was handcuffed to a waist restraint belt. Id. at 104. The district court granted summary judgment to the defendants, accepting their argument that the medical evidence in the record only revealed a few scratches to Brooks' neck and wrists and therefore constituted only a *de minimis* use of force. Id. at 105. The Third Circuit reversed and remanded the case back to the lower court. Id. at 109. First, the Third Circuit held that Brooks' allegations of three guards repeatedly punching and kicking him, rendering him unconscious, "rises far above the *de minimis* level" and thus created a dispute of material fact which could not be resolved on summary judgment. Id. at 107. Secondly, the Third Circuit held that the extent of injury is but one factor to be considered in the Hudson analysis and "that the absence of objective proof of non-*de minimis* injury does not alone warrant dismissal." Id. at 108.

So what evidence should a prisoner submit to establish an Eighth Amendment violation under Whitley and Hudson? First, he should submit proof (such as medical records) verifying all injuries sustained during the incident. Keep in mind that if a prisoner's injuries were not *de minimis*, the use of force

creating such injuries was not *de minimis* either. Failure to establish something more than *de minimis* injury is not fatal to excessive force claim under Whitley; however, it is a step towards case dismissal. See Washam v. Klopotoski, 403 Fed. Appx. 636, 640 (3d Cir. 2010) ("Although *de minimis* injuries alone are not enough to justify a grant of summary judgment on an excessive force claim, in this instance they are indicative of the fact that the force utilized was also *de minimis*.").

A prisoner's injury is only one of the Whitley factors. Other factors include the reason for the force and the existence of any threats to other inmates and staff. 475 U.S. at 321. For example, shooting an unarmed prisoner was not considered excessive in Whitley given the need to rescue a hostage and the dangers posed by a prison riot. 475 U.S. at 323. On the other hand, pulling a non-resisting handcuffed prisoner off a truck by his ankles, resulting in head trauma, was considered excessive given the absence of danger to staff. See Davis v. Locke, 936 F.2d 1208 (11th Cir. 1991). The Whitley decision requires judges to evaluate evidence concerning the reason for the force and also whether the force used was proportional to the threat facing prison authorities. 475 U.S. at 321. In other words, as the threat to human life and institutional safety escalates, so does the amount and severity of the force to control that threat.

The courts must also examine evidence concerning official efforts to lessen the severity of the use of force. Id. Did prison officials halt the use of force at the point control was reestablished and the prisoner was subdued? Was the prisoner provided medical treatment? For example, in Jones v. Shields, the use of pepper spray was not considered "malicious or sadistic where it was not used in excessive quantities and the prisoner was provided immediate medical assistance. 207 F.3d 491, 497 (8th Cir. 2000). On the other hand, in Fouk v. Charrier, 262 F.3d 687 (8th Cir. 2001), the use of pepper spray was considered excessive where the inmate was needlessly

sprayed a second time and had no access to water or medical attention to clean his face of the chemical agent. Id. at 701-702.

Each of the Whitley factors requires analysis and evidentiary support. Keep in mind that Whitley does not prohibit the use of force; it prohibits only the malicious and sadistic use of force. Inmates that barricade their cells or refuse to comply with lawful orders (particularly while videotaped) can expect little sympathy from federal judges. As long as prison officials halt the use of force upon obtaining control of the inmate, the courts will conclude that it was a "good faith effort to restore prison security." Id. at 326. It is only when prison guards continue to punch, kick and injure a prisoner after he has been subdued is there a malicious and sadistic use of force. See Giles v. Kearney, 571 F.3d 318, 327 (3d Cir. 2009) ("No reasonable officer could agree that striking and kicking a subdued, non-resisting inmate in the side, with force enough to cause a broken rib and collapsed lung, was reasonable or necessary under established law.").

In Adderly v. Ferrier, 419 Fed. Appx. 135 (3d Cir. 2011) the Third Circuit rejected the excessive force claims of an inmate subjected to pepper spray during several cell extractions. In this case, the inmate refused to submit to handcuffing and barricaded his cell door. Although the plaintiff alleged he was repeatedly punched by the extraction team, the Court was more persuaded by the videotape showing "the defendants used only the amount of force necessary to diffuse a threat caused by Adderly's refusal to comply with simple orders." Id.

In Tindell v. Beard, 351 Fed. Appx. 591 (3d Cir. 2009) the Third Circuit concluded that prison officials had not used malicious and sadistic force when they confiscated property from an inmate's cell. Id. at 596. Reviewing videotape of the incident, the court held that force was necessary given the inmate's refusal to comply with the officer's orders and was not excessive given the absence of any physical injuries. Id.

In Banks v. Mozingo, 423 Fed. Appx. 123 (3d Cir. 2011) the Third Circuit rejected excessive force claims made by an inmate who was sprayed with mace and tasered during several cell extractions. Applying Whitley, the Court concluded that force was not malicious or sadistic given the absence of injury and was necessary after the inmate refused to be handcuffed. Id.

And in Austin v. Tennis, the Third Circuit rejected yet another excessive force claim. 381 Fed. Appx. 128 (3d Cir. 2010). In this case, prison officials sought to remove a prisoner from his cell to check his health due to a self-imposed hunger strike. Although alleging that he was rendered unconscious due to guards forcing his head down while handcuffed and shackled, the court was more persuaded by the videotape. Id. at 134. Citing Whitley, the court concluded that the mandate "used only the amount of force necessary to transport Austin to a treatment building for evaluation." Id. at 134. Austin did not allege any injury during the extraction or that he was refused medical attention.

All of these cases confirm that the courts will not sustain a prisoner's Eighth Amendment claim unless he introduces evidence satisfying the Whitley malicious-and-sadistic test. The use of force becomes unconstitutional when the intent of prison guards is not to maintain or restore discipline but rather to maliciously and sadistically cause harm to the inmate. To make this requisite proof, prisoners should closely examine all the circumstances surrounding the use of force in light of the Whitley factors to determine what evidence exists to support a malicious-and-sadistic standard. If the incident was videotaped and reveals an inmate defying lawful orders, prison officials have the right to use force to restore discipline. Absent proof that the force continued after the inmate was brought under control, claims of excessive force are extremely difficult to prove.

## VI. EQUAL PROTECTION

The Equal Protection Clause of the Fourteenth Amendment mandates that no state "shall deny to any person within its jurisdiction the equal protection of the laws." To prevail on an equal protection claim, a plaintiff must prove: (1) that the state treated him differently from others who were similarly situated; and (2) that the difference in treatment was not rationally related to any legitimate governmental interest. See Willowbrook v. Olech, 528 U.S. 562, 564 (2000) (equal protection requires plaintiff to allege "that 'she has been intentionally treated differently from others similarly situated and that there is no rational basis for' the difference in treatment.").

The threshold question in every equal protection challenge to state policy is whether the plaintiff was treated differently from others who were "similarly situated." Unless the group or class of persons which received favorable treatment is similarly situated to the plaintiff, there are no grounds to file an Equal Protection Claim.

For example, in Green v. Williamson, an inmate alleged an equal protection violation after prison officials rejected his requests for a transfer to a medium security facility due to his sentence. 241 Fed. Appx. 820, 821 (3d Cir. 2007). The Third Circuit dismissed the case, holding that Green "failed to show that inmates who receive a transfer to a medium security facility were otherwise similarly situated to him with respect to the seriousness of his offense." Id. at 822.

In Castillo v. FBOP, FCI Fort Dix, an inmate alleged an equal protection violation after prison officials imposed an eight year loss of telephone and visiting privileges for illegal possession of a cell phone. 221 Fed. Appx. 172, 174 (3d Cir. 2007). The Third Circuit rejected the case, finding that Castillo failed to prove that inmates who have received lighter penalties were "similarly situated" to him. Id. at 175.

In Timm v. Gunter, male prisoners brought suit alleging that their equal

protection rights were violated because female prisoners were provided more privacy protection at all-female facilities than male prisoners were afforded at all-male institutions. 917 F.2d 1093, 1103 (8th Cir. 1990). The Eighth Circuit rejected the claim, finding that male prisoners and female prisoners were not similarly situated since the security concerns at male prisons (greater violence, escapes and contraband) were different from the security concerns at female facilities. In summary, equal protection of the law requires that all persons similarly situated be treated alike; where persons of different classes are treated differently, there is no equal protection violation.

When state officials or state law treats similarly situated persons differently, the difference in treatment will be upheld "so long as it bears a rational relation to some legitimate end." Romer v. Evans, 517 U.S. 620, 631 (1996). See also City of Cleburne Texas v. Cleburne Living Center, 473 U.S. 432, 440 (1985) ("The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest."). "Rational relationship" review is "the most relaxed and tolerant form of judicial scrutiny under the equal protection clause." Dallas v. Stanglin, 490 U.S. 19, 26 (1989). State policy is presumed constitutional and will be upheld against equal protection challenge if there exists any rational basis for the different treatment. See F.C.C. v. Beach Communications Inc., 508 U.S. 307, 315 (1993). Even apparently irrational policies will generally be upheld because "a legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data." Id. Therefore, a claim based on legislation which is not supported empirically will be insufficient to sustain an equal protection challenge. Id. Simply proving that state policy is unfair, unwise and lacks logic is also insufficient to sustain an equal protection challenge. Romer v. Evans, 514 U.S. at 632. Equal protection

plaintiffs claiming they were treated differently from other similarly situated persons must prove that there exists no rational basis for the disparity. As seen below, this standard is extremely difficult to satisfy.

For example, in Glauder v. Miller, a prisoner alleged that his equal protection rights were violated because Nevada law required only sex offenders obtain pre-parole certification that they were "not a menace to the health, safety, or morals of others." 184 F.3d 1053, 1054 (9th Cir. 1999). The Ninth Circuit rejected the challenge, finding that since sex offenders have a higher recidivism rate than other criminals, the requirement that only sex offenders obtain pre-parole certification was rationally related to the state's legitimate interest in crime prevention.

In Williams v. Sebek, a prisoner alleged an equal protection violation arising from prison policy allowing RHU capital inmates access to a typewriter while denying the same privileges to non-capital RHU inmates. 299 Fed. Appx. 104, 106 (3d Cir. 2008). The Third Circuit dismissed the claim, concluding that the policy was rationally related to the prison's security interests. Id.

In Pressley v. Pennsylvania Department of Corrections, an RHU prisoner filed an equal protection claim contending that he was entitled to the same access to education and parole programs as other inmates. 365 Fed. Appx. 329, 332 (3d Cir. 2010). The Third Circuit rejected the claim holding first that Pressley was not similarly situated to general population inmates, and secondly, rational reasons existed for such disparities. Id. Since "rational relationship" review is extremely deferential to state authority, it is not surprising that prisoners' equal protection challenges are rarely successful. This test presumes state action is constitutional and the courts may invalidate state laws only where the plaintiffs prove that no rational relationship to any legitimate governmental interest exists to justify the difference in treatment.

When state law, policy or action targets a "suspect class," however, a different standard of equal protection review called "strict scrutiny" comes into play. What is a "suspect class"? According to the Supreme Court, a "suspect class" refers to a group that has suffered a history of discrimination and exhibits obvious distinguishing characteristics that define them as a discreet group. Thus far, the Supreme Court has identified three "suspect classifications" warranting strict scrutiny review: race, alienage, and national origin. See City of Cleburne, 473 U.S. at 440 (rational basis review gives way to strict scrutiny "when a statute classifies by race, alienage, or national origin").

The courts have repeatedly held that prisoners are not a "suspect class" warranting a heightened standard of equal protection review. See Abdul-Akbar v. McKelvie, 239 F.3d 307, 317 (3d Cir. 2001) ("Neither prisoners nor indigent are suspect classes."). The Supreme Court has also determined that other individual characteristics such as age, mental retardation, poverty and homosexuality are likewise non-suspect classes requiring only rational basis review. See City of Cleburne, 473 U.S. at 446.

If state law or policy explicitly treats similarly situated persons differently based on suspect classifications such as race, the law or policy will be upheld only if it is narrowly tailored to service a compelling state interest. Id. at 440. For example, if state law or state officials explicitly singled out a racial group for exclusion in state programs, the state would be required to prove that a compelling governmental interest exists to justify the racial classification.

In Lee v. Washington, the Supreme Court upheld a lower court's decision that certain Alabama statutes requiring prison racial segregation violated the Fourteenth Amendment. 390 U.S. 333 (1968). Likewise, in Johnson v. California, the Supreme Court held that "strict scrutiny" review applied to a policy of double-celling inmates of the same

race for a 60-day period at reception centers 543 U.S. 499 (2005). Johnson did not decide whether the California policy violated equal protection. Id. at 509. It held that "strict scrutiny" was the applicable standard of review and remanded for subsequent proceedings. Id. In both of these cases, however, a racial criterion was explicitly used to formulate state policy. And in both cases, the Supreme Court noted that race-based policies could be sustained only if they were narrowly drawn to serve a compelling governmental interest such as prison security.

If state law is facially neutral, that is, it does not employ suspect classifications on its face, then the strict scrutiny test comes into play only if the plaintiff can prove that the law is intentionally enforced or applied using suspect classifications. See Hunt v. Cromartie, 526 U.S. 541, 546 (1999) ("A facially neutral law, on the other hand, warrants strict scrutiny only if it can be proved that the law was motivated by a racial purpose or object, or if it is unexplainable on grounds other than race.").

Whether or not state action is motivated by intentional or purposeful discrimination "is an inherently complex endeavor, one requiring the trial court to perform a sensitive inquiry into such circumstantial and direct evidence of intent as may be available. Id. at 541.

For example, in Williams v. Federal Bureau of Prisons and Parole Commission, an inmate alleged he was denied a pay promotion due to racial reasons. 85 Fed. Appx. 299, 305 (3d Cir. 2003). Although inmates have no right to a prison job, the Third Circuit agreed that prison officials may not discriminate against an inmate due to race. Id. at 305. The Third Circuit remanded the case back to the lower court to determine whether the action taken was motivated by race (as the plaintiff contended) or motivated by a lack of seniority or some other legitimate nondiscriminatory reason (as the defendant argued). Id. at 305.

## VII. EX POST FACTO LAWS

The United States Constitution prohibits the states from passing "*ex post facto*" laws. U.S. Const. Art. I § 10. Any law that retroactively alters the definition of criminal conduct or increases the punishment for criminal acts after their commission would be considered an *ex post facto* law. See Collins v. Youngblood, 497 U.S. 37, 42 (1990).

The constitutional protection against *ex post facto* laws is based upon two simple principles: First, citizens are entitled to "fair warning" of legislative acts in order to conform their behavior in accordance with the law. Weaver v. Graham, 450 U.S. 24, 28 (1981). Secondly, the coercive power of government must be restrained from enacting "arbitrary and potentially vindictive" legislative acts. Id. at 29.

The Supreme Court has recognized four categories of *ex post facto* criminal laws. A law violates the Ex Post Facto Clause when it:

1. punishes as a crime an act previously committed, which was innocent when done;
2. makes more burdensome the punishment for a crime, after its commission;
3. deprives one charged with crime of any defense available according to law at the time when the act was committed; or
4. changes the rules of evidence by which less or different testimony is sufficient to convict than was then required."

Collins, 497 U.S. at 42, 45-46.

Since our focus is upon the constitutional rights of prisoners, not criminal defendants facing trial, we limit our analysis to the second category of Ex Post Facto laws which increase the punishment for crimes after their commission. Retroactive changes in laws governing good-time credits, parole, and executive clemency (among other areas)

have prompted numerous *ex post facto* lawsuits in state and federal courts.

Some prisoners believe that application of new laws to past convictions automatically violates *ex post facto*. That is false. The Supreme Court has rejected the notion that "the Ex Post Facto Clause forbids any legislative change that has conceivable risk of affecting a prisoner's punishment." California Department of Corrections v. Morales, 514 U.S. 499, 508 (1995). "Our cases have never accepted this expansive view of the Ex Post Facto Clause, and we will not endorse it here." Id. A retroactive application of criminal law violates *ex post facto* only upon proof of specific elements.

First, the law must be retroactive, meaning it must apply to events occurring before its enactment. Secondly, it must create a significant risk of increasing or prolonging a prisoner's punishment. See Garner v. Jones, 529 U.S. 244, 257 (2000). Laws which are non-punitive in nature, even if retroactively applied, do not violate *ex post facto*. See Smith v. Doe, 538 U.S. 84, 90 (2003) (sex offender registration act was not *ex post facto* violation since it was non-punitive regulatory attempt to protect public); Johnson v. Pennsylvania Board of Probation and Parole, 163 Fed. Appx. 159 (3d Cir. 2006) (state law requiring collection of blood samples was not *ex post facto* violation since it was non-punitive).

While determining whether a law is retroactive is relatively easy, the question whether it creates a significant risk of increasing punishment is quite difficult. Absent proof of these two critical elements, however, an *ex post facto* challenge will be rejected.

As noted earlier, the Supreme Court has reviewed a number of *ex post facto* cases. In Weaver v. Graham, the Court determined that a new Florida law reducing good-time credits violated *ex post facto* because it effectively postponed the date inmates would become eligible for early release. 450 U.S. 24, 25. In California Department of Corrections v. Morales, the

Supreme Court held that a new California law, changing the frequency of parole hearings from once a year to every three years, was not an *ex post facto* violation because it did not increase a prisoner's punishment. 514 U.S. 499, 509. In Lynce v. Mathis, the Supreme Court held that another Florida law eliminating "provisional credits" violated *ex post facto* because it prolonged punishment by preventing the early release of prisoners who had accumulated the credits. 519 U.S. 433, 449 (1997). And in Garner v. Jones, the Supreme Court remanded the case back to the lower court to determine whether a new Georgia law, changing parole hearings for life-sentenced prisoners from once every three years to once every eight years created a significant risk of increasing punishment. 529 U.S. at 257.

In light of these decisions, it is clear that the Supreme Court has rejected the idea that the Ex Post Facto Clause forbids all retroactive legislative changes that impact a prisoner's punishment. The Ex Post Facto Clause was never intended to result in judicial "micromanagement of an endless array of legislative adjustments to parole and sentencing procedures." Morales, 514 U.S. at 1603. Only those legislative acts that are both retroactive (applicable to past crimes) and which create a significant risk of prolonging a prisoner's incarceration constitute *ex post facto* violations. See Garner, 529 U.S. at 255.

In Mickens-Thomas v. Vaughn, a former life-sentenced prisoner (granted clemency) challenged parole laws enacted 30 years after his arrest. 321 F.3d 374, 376 (3d Cir. 2003). The new laws (enacted in 1996) required greater focus upon public safety during the parole evaluation process. Id. at 377. The Third Circuit determined that retroactive application of the new criteria decreased Thomas' possibility of ever obtaining release, and hence, violated *ex post facto*. Id. at 393. The Court found significant Thomas's evidence that he was the only commuted life-sentenced prisoner not granted parole.

In Richardson v. Pennsylvania Board of Probation and Parole, the Third Circuit rejected the claim that the very same 1996 amendments to Pennsylvania's parole laws (stressing public safety as the primary consideration) constitute a *per se* violation of *ex post facto*. 423 F.3d 282, 291 (3d Cir. 2005). The Third Circuit concluded that, unlike Mickens-Thomas, Richardson failed to provide evidence that the new public safety criteria increased his risk of increased punishment. Id. at 293. The panel found significant that Richardson was denied parole both before and after the effective date of the 1996 amendments, thus suggesting that the new criteria did not prejudice him or increase his risk of additional punishment. Id. at 293-294. See also Farmer v. McVey, 448 Fed. Appx. 178, 180 (3d Cir. 2011) (rejecting *ex post facto* claim because "Farmer has failed to make the requisite showing that he was disadvantaged by the amendment to the parole code").

In Spuck v. Ridge, the Third Circuit rejected a prisoner's claim that retroactive application of new DOC furlough policies violated *ex post facto*. 347 Fed. Appx. 727, 729 (3d Cir. 2009). Although obtaining a furlough was made more difficult or impossible under the new policy, such changes did not lengthen Spuck's sentence. "The mere fact that furlough opportunities are now not available to him does not make his punishment more onerous." Id.

And in Pennsylvania Prison Society v. Cortez, 622 F.3d 215 (3d Cir. 2010) the Third Circuit concluded that a 1997 amendment to Pennsylvania's Constitution, requiring life-sentenced prisoners obtain a unanimous recommendation from the Board of Pardons as opposed to a simple majority vote did not violate *ex post facto*. Id. at 246. The court concluded that a life sentence before the change was still a life sentence after the change, and thus did not increase the possibility of increased punishment. Id. at 234. "There is no *ex post facto* violation where a retroactively applied law does not

make one's punishment more burdensome, but merely creates a disadvantage." *Id.*

In conclusion, newly enacted criminal justice legislation will not be declared a violation of *ex post facto* simply because it is retroactively applied. *Ex post facto* jurisprudence demands that the plaintiff also prove by compelling evidence that the new law increases the risk of greater punishment.

## VIII. AMERICANS WITH DISABILITIES ACT

The Americans with Disabilities Act ("ADA") is the federal government's attempt to address discrimination against persons with disabilities. Enacted in 1990, the law is predicated on the belief that "society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem." 42 U.S.C. § 12101(a)(2).

Title II of the ADA states: "Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132.

In Pennsylvania Department of Corrections v. Yeskey, the Supreme Court held that Title II applied to state prisons, noting that "the statute's language unmistakably includes state prisons and prisoners within its coverage." 524 U.S. 206, 209 (1998). State and local prisons that deny qualified inmates -- by reason of disability -- the benefits of programs and activities provided to other inmates, violate the ADA.

Before addressing the elements of Title II litigation, it is important to consider several procedural matters, including what relief may be obtained and who is a proper ADA defendant. In United States v. Georgia, the Supreme Court agreed that inmates could seek nominal and compensatory damages for Title II violations but only "for conduct that actually violates the Fourteenth Amendment." 546 U.S. 151, 159 (2006). In the case before it, a Georgia prisoner (Goodman) claimed he was confined in a cell in which he could not turn his wheelchair around, rendering his toilet inaccessible. *Id.* at 155. Because such mistreatment also constituted a potential Eighth Amendment violation, the Court agreed that Goodman

could pursue money damages against Georgia authorities for Title II Violations. Id. at 157.

Whether or not inmates can pursue money damages for Title II ADA violations (which are not constitutionally required) has not been decided by the Supreme Court. For example, the courts have made clear that there is no constitutional right to rehabilitative programs. Could a wheelchair-bound prisoner pursue an ADA damages claim for denying him access to a high school GED program because he could not ascend stairs to the classroom? That question is unresolved.

As for punitive damages, the Supreme Court has rejected such relief for ADA prisoners. In Barnes v. Gorman, the Court vacated a \$1.2 million dollar punitive damages award to a paraplegic arrestee seriously injured during transportation in a police van. 536 U.S. 181, 190 (2002). The Court concluded that punitive damages may not be awarded in private suits brought under the ADA. Id.

The courts have made clear that prisoners can bring litigation seeking injunctive relief against a public entity for Title II ADA violations. See Board of Trustees of the University of Alabama v. Garfett, 531 U.S. 356, 374 n.9 (2001). Thus, where a prisoner can demonstrate that he or she will continue to suffer ADA violations, they may seek injunctive relief ordering compliance with Title II. See Owlett v. Doud, 378 Fed. Appx. 188, 191 (3d Cir. 2010) ("we have recognized that ADA claims for prospective injunctive relief are authorized" if there exists an "ongoing violation").

As to who exactly is a proper defendant in a Title II ADA suit, it appears that the state itself and the state or local department or agency in question is the only proper defendant. According to the statute itself, individuals cannot be excluded by reason of disability from participation in "the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. ADA

lawsuits brought against state officials in their personal or "individual" capacities have been rejected. See Koslow v. Pennsylvania, 302 F.3d 161, 178 (3d Cir. 2002) ("there appears to be no individual liability for damages under Title I of the ADA"); George v. Pennsylvania Department of Corrections, No. 3:CV-09-1202, 2010 U.S. Dist. Lexis 23116 (M.D.Pa. 2010) ("George's claim against the defendants in their individual capacities are subject to dismissal as not cognizable under the ADA").

Accordingly, prisoners preparing Title II cases should name as defendants the state itself or the state or local prison allegedly violating ADA requirements. Inmates can name state officials as defendants but only if their complaints are crystal clear that such persons are being sued in their "official" capacities only. See Kentucky v. Graham, 473 U.S. 159, 165 (1985) (suing an individual in his official capacity is treated the same as suing the entity itself); Koslow v. Pennsylvania, 302 F.3d 161, 178 (3d Cir. 2002) ("prospective relief against state officials acting in their official capacities may proceed under the statute").

In Gallagher v. Allegheny County, a hearing-impaired arrestee brought a Title II suit alleging that he was denied access to an interpreter and electronic devices to communicate with his family and attorney. NO. 09-103, 2011 U.S. Dist. LEXIS 7047 (W.D. Pa. Jan. 25, 2011). Gallagher's claim against a county official in his "individual capacity" was dismissed because there is no individual liability under Title II. Id. Gallagher's claim against the same official in his "official capacity" was allowed to proceed since "official capacity" claims against governmental employees are treated as suits against the local entity. Id.

Turning now to the merits of a Title II ADA claim against a public entity, a prisoner must prove: (1) that he or she is disabled within the meaning of the ADA; (2) that he or she is qualified for the prison service, program or activity in that he or she meets all

essential eligibility requirements; and (3) despite being qualified, he or she has been excluded from the service, program or activity because of a disability. See 42 U.S.C. § 12132; Lopez v. Beard, 333 Fed. Appx. 685, 688 (3d Cir. 2009); Iseley v. Beard, 200 Fed. Appx. 137, 140 (3d Cir. 2006).

If a prisoner is found to have been excluded from public services, programs or activities by reason of his or her disability, the public entity must make "reasonable accommodations" or "modifications" to allow participation by the disabled prisoner. Accommodation is not reasonable if it either imposes undue financial and administrative burdens on a public entity or requires a fundamental alteration in the nature of the program.

#### **A. Is the Prisoner Disabled Within the Meaning Of the ADA?**

The threshold issue in any ADA action brought against a public entity is whether the plaintiff is a person with a disability. A person is "disabled" within the meaning of the ADA if he or she has: (1) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (2) a record of such an impairment; or (3) is regarded as having such impairment. See 42 U.S.C. § 12102(2); Wellman v. Dupont Elastomers, 414 Fed. Appx. 386 (3d Cir. 2011); Keyes v. Catholic Charities of the Archdiocese of Philadelphia, 415 Fed. Appx. 405 (3d Cir. 2011).

Accordingly, any person who suffers from, or is regarded as having, a "physical or mental impairment" which "substantially limits" his or her "major life activities" will be considered disabled within the meaning of the ADA. These three concepts are decisive in ADA litigation because while all "physical or mental impairments" affect individual lives, not all physically or mentally impaired persons are disabled within the meaning of the ADA. Courts will distinguish between impairments that merely affect a person's life (which are not ADA disabilities) and those

impairments which "substantially limit" one or more "major life activities" (which are ADA disabilities). See 42 U.S.C. § 12102(1).

In determining whether a plaintiff's impairment substantially limits a major life activity and, thus, constitutes an ADA-qualified disability, the Supreme Court devised a three-part test. First, the court must determine whether the plaintiff has a physical or mental impairment. Second, the court must identify the life activity upon which the plaintiff relies and determine whether it constitutes a major life activity under the ADA. Third, tying the two statutory phrases together, the courts ask whether the impairment substantially limits the major life activity. See Bragdon v. Abbott, 524 U.S. 624 (1998).

#### **1. Physical or Mental Impairment**

The first step in every ADA case is determining whether a plaintiff has a "physical or mental impairment." A physical or mental impairment refers to any physiological or psychological disorder affecting one or more of the various body systems. See Bragdon, 524 U.S. at 632. Conditions meeting this definition would include cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, and emotional illness, among others. Id. at 632. In Bragdon, the Supreme Court held that HIV infection satisfies the statutory and regulatory definition of a physical impairment in light of the immediacy with which the Virus begins to damage the infected person's white blood cells. Id. at 637.

#### **2. Major Life Activity**

The second step under Bragdon is to identify the life activity upon which the plaintiff relies and "determine whether it constitutes a major life activity under the ADA." Id. at 631. Unless the physical or mental impairment affects a "major life activity," there are no grounds for an ADA suit. See Hartman v. O'Connor, 415 Fed. Appx. 350 (3d Cir. 2011) (where inmate failed to explain nature of his disability, ADA claim dismissed); Ali v. Howard, 353 Fed.

Appx. 667, 671 (3d Cir. 2009) (where inmate admitted he could walk without a cane, ADA claim dismissed). Among those "major life activities" which may be affected by a physical or mental impairment are hearing, seeing, eating, sleeping, walking, lifting, reading, concentrating, working, etc. See 42 U.S.C. § 12102(2)(A).

### 3. Substantially Limits

The final step ties the first two ADA criteria together, asking whether the physical or mental impairment "substantially limits" the major life activity asserted by the plaintiff. Bragdon, 524 U.S. at 639. "Substantially limits" means generally that the impairment creates an inability to perform a major life activity that the average person can perform. In Bragdon, the Supreme Court held that HIV infection (physical impairment) substantially limited the plaintiff's asserted major life activity (reproduction). *Id.* at 639-640. Failure to prove that impairment substantially limits a major life activity will result in claim dismissal. See Boggi v. Medical Review and Accrediting Council, 415 Fed. Appx. 411 (3d Cir. 2011) (ADA claim dismissed for failure to show Attention Deficit Disorder substantially limited plaintiff's ability to work, read, write, or engage in other activity).

Before proceeding further with our analysis, we must consider significant statutory changes to the ADA. In 2008 Congress enacted into law the ADA Amendments Act of 2008 ("ADAAA") the purpose of which was to broaden the definition of an ADA disability by overturning several Supreme Court decisions.

In 2002 the Supreme Court ruled that a physical or mental impairment had to be "permanent or long-term" to qualify as an ADA disability. See Toyota Motor v. Williams, 534 U.S. 184 (2002). In the ADAAA in 2008, Congress rejected this narrow definition with its provision that an impairment that is merely "episodic" or in "remission" qualifies as a disability "if it would substantially limit a major life activity when active." 42 U.S.C. § 12102(4) (D). See also Britting v. Secretary,

Department of Veteran Affairs, 409 Fed. Appx. 566, 568 (3d Cir. 2011).

Prior to the enactment of the ADAAA, the Supreme Court had also ruled that judges must consider corrective measures in determining whether a physical or mental impairment "substantially limits" a major life activity. See Sutton v. United Airlines, 527 U.S. 471, 482-483 (1999). For example, as was the situation in Sutton, if a diabetic is able to function normally by monitoring his blood sugar level, controlling his diet, and receiving insulin, then he was not considered substantially limited in a major life activity. *Id.* at 483-484. See also Murphy v. U.P.S., 527 U.S. 516, 520 (1999) (where plaintiff's hypertension was controllable through medication, there was no ADA disability).

Congress' enactment of the ADAAA overruled Sutton and Murphy with its provision that, with the exception of eyeglasses and contact lenses, the "determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures." 42 U.S.C. § 12102(4) (E).

In light of these ADAAA amendments, what proof must a plaintiff make in federal court? He or she must still prove that they have a "physical or mental impairment" that "substantially limits" one or more "major life activities." 42 U.S.C. § 12102(1). However, such an impairment does not have to be permanent or long-term (as previously required under Toyota Motor). In addition, an impairment qualifies as an ADA disability even if the effects may be corrected by mitigating devices such as medication (contrary to Sutton).

Naturally, one should research post-ADAAA rulings to determine the exact evidentiary proof necessary for specific impairments. However, there can be no doubt that Congress' mandate that physical or mental impairments "shall be construed in favor of broad coverage of individuals under

this Act" is a positive statutory development. 42 U.S.C. § 12102(4) (A).

#### 4. Record of, or Regarded as, Disabled

Any individual that has a "physical or mental impairment" that "substantially limits" one or more "major life activities" is disabled within the meaning of the ADAAA. See 42 U.S.C. § 12102(1)(A). An individual will also be considered disabled if there is "a record of such an impairment," 42 U.S.C. § 12102(1)(B), or if the person is "being regarded as having such an impairment." 42 U.S.C. § 12102(1)(C). Thus, even if an individual does not have a physical or mental impairment which substantially limits a major life activity, he or she may still bring a viable ADA suit if the state or local government agency engages in discriminatory behavior based on a mistaken belief that the individual has an ADA-qualified impairment.

Among the 2008 amendments, Congress altered the definition of "disability" such that being "regarded as" having an impairment no longer requires a showing that government officials actually perceived the individual to be substantially limited in a major life activity. Under the ADAAA, government officials violate the law "whether or not the impairment limits or is perceived to limit a major life activity." 42 U.S.C. § 12102(3)(A). This provision, however, does not apply to impairments that are transitory and minor. "A transitory impairment is an impairment with an actual or expected duration of 6 months or less." 42 U.S.C. § 12102(3) (B).

#### **B. Is A Prisoner Qualified For Corrections Services, Programs, and Activities?**

Simply proving that a prisoner has a disability within the meaning of the ADA is only the first step in establishing a Title II violation. The prisoner must also demonstrate that he or she was qualified for a particular service, program or activity but was excluded from participation by reason of his or her disability. See 42 U.S.C. § 12132. A prisoner becomes a "qualified individual

with a disability" by proving that he or she "meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity." 42 U.S.C. § 12131(2).

For most prison services, programs or activities, there are little or no eligibility requirements. For example, yard and gym activities, telephone calls, visitation privileges, counseling services, religious programs, library access, and rehabilitative programs are for the most part open to all general population prisoners.

Other prison programs, however, do retain eligibility requirements that must be satisfied by all prisoners, disabled and non-disabled. For example, a state prisoner will not be considered for transfer to a halfway house until he or she has completed one-half of his or her minimum sentence (among other criteria). Likewise, some state prison jobs require a high school diploma or GED equivalent to qualify for consideration. Thus, until a disabled prisoner becomes "qualified" by meeting the eligibility requirements for participation in such programs, there is no ADA violation.

In conclusion, having a disability does not, by itself, give rise to an ADA violation. A disabled person must also prove that he or she was otherwise qualified for some particular service, program, or activity yet was denied participation as a result of the disability.

#### **C. Reasonable Accommodation**

If a prisoner has a disability within the meaning of the ADA and satisfies all the eligibility requirements for a particular prison service, program or activity, ADA prohibits state officials from discriminating against him or her by reason of that disability. This means that prison officials are obligated to make "reasonable" accommodations and modifications to ensure that disabled persons are granted equal access to all prison services, programs, and activities. See 42 U.S.C. § 12131(2). Such modifications may include the removal of architectural barriers for the use of wheelchairs and the provision

of auxiliary aids and services such as interpreters, Braille materials, and telephones compatible with hearing aids. See 42 U.S.C. § 12131(1). However, reasonable accommodations will not be required when providing them causes an undue hardship for the institution, that is, significant difficulty or expense or a direct threat to the health and safety of others.

Having set forth the basic framework of an ADA claim, it may be helpful to highlight a few prison-related ADA cases to see how the courts are applying these standards. In Duffy v. Riveland, a deaf prisoner brought suit claiming an ADA violation when he was excluded from fully participating in his disciplinary hearing due to the prison's failure to provide a qualified interpreter. 98 F.3d 447, 450 (9th Cir. 1996). The Ninth Circuit agreed that Duffy's deafness was a disability within the meaning of the ADA and that he was "qualified" to participate in his own disciplinary hearing. Id. at 455. The Court also agreed that disciplinary proceedings were "services, programs or activities" within the scope of the ADA. Id. The Ninth Circuit remanded the case back to the lower court to determine whether the prison discriminated against Duffy by failing to provide a qualified interpreter. Id. at 456. While the court agreed that Duffy was not entitled to an interpreter certified by the National Registry of Interpreters for the Deaf, he was entitled access to someone who 'could understand his sign language and communicate effectively with him.' Id.

In Love v. Westville Correctional Center, a quadriplegic prisoner confined to a wheelchair filed an ADA suit, claiming that he was denied access to prison programs based on his disability. 103 F.3d 558, 558-559 (7th Cir. 1996). According to the record, Love was housed in the prison infirmary unit and was precluded from using the prison's recreational facilities, and all rehabilitation programs available to the general prison population, including church, work, substance abuse, and the library. Id. at 559. The Seventh Circuit agreed that Love had an

ADA-qualified disability and that he was denied participation in prison programs due to his disability. Id. at 560. The Seventh Circuit rejected prison officials' argument that they could not make reasonable accommodations due to scarce resources. Although security concerns, safety concerns and administrative exigencies should all be considered in determining whether reasonable accommodations can be made to permit a disabled prisoner to participate in institutional programs and services, the Court held that the defendants failed to present any evidence supporting their argument. Id. at 561.

In Armstrong v. Davis, disabled prisoners confined in the California state correctional system brought suit, contending that state officials discriminated against them during parole release and parole revocation hearings. 275 F.3d 899, 854 (9th Cir. 2001). Specifically, prisoners and parolees with vision, hearing and learning disabilities alleged that they were provided no accommodations to help them understand the parole release and parole revocation processes despite obvious disabilities; consequently, many disabled prisoners and parolees simply waived their rights to a hearing or were unable to attend or meaningfully participate in the hearings. Id. at 857. The Ninth Circuit agreed that the Parole Board violated the ADA since they failed "to address the needs of prisoners or parolees who have problems understanding complex information or communicating through the spoken or written word." Id. at 862.

In Pritchett v. Ellers, the Third Circuit dismissed an ADA claim, finding that the plaintiff failed to establish an ADA qualified disability. 324 Fed. Appx. 157, 159 (3d Cir. 2009). The Court agreed that the inmate's larynx condition (physical impairment) affected his speaking (major life activity). However, no proof was provided that this impairment "substantially limited" his speaking ability. The court noted that while Pritchett has a raspy voice, no evidence was presented that he "was unable to articulate

words and to communicate with other individuals." Id. at 160.

To prevail in a Title II ADA claim, prisoners must establish three elements. First, they must be disabled within the meaning of the ADA. This requires proof that the prisoner has a "physical or mental impairment" which "substantially limits a major life activity." Secondly, prisoners must allege and prove that they were "qualified" for participation in the institution's services, programs, or activities in question by satisfying all eligibility requirements. Finally, prisoners must prove that despite being qualified, they were excluded from participation in such services, programs or activities because of their disabilities.

If a qualified prisoner has been excluded from participation in a prison's services, programs or activities due to his or her disability, the state must make "reasonable accommodations" or "modifications" to allow participation by the disabled prisoner unless the requested accommodation would impose an undue financial or administrative burden or pose a legitimate threat to prison security or safety.

## IX. PRISON LITIGATION REFORM ACT

Almost two decades have passed since Congress enacted the Prison Litigation Reform Act ("PLRA"). See 42 U.S.C. § 1997(e). Yet many prisoners remain unaware of its existence or worse, simply choose to ignore its provisions. For inmates with valid constitutional claims, such indifference has devastating consequences. As you will see below, numerous inmate cases have been dismissed for failure to observe PLRA mandates. Enacted with the specific goal of reducing inmate litigation in federal court, See Woodford v. Ngo, 548 U.S. 81, 93-94 (2006) (stating that the PLRA was passed "in the wake of a sharp rise in prisoner litigation" and "contains a variety of provisions designed to bring this litigation under control"), the PLRA is the first line of defense for state attorneys seeking quick dismissal of inmate litigation. A prisoner must comply with the exhaustion, filing, and relief requirements of the PLRA, or face dismissal. It is that simple.

In addition to reducing inmate-filed litigation, the PLRA also restricted the power of federal judges to order prospective relief. Consequently, even if a prisoner proves a constitutional violation, he or she may not receive the relief desired. Accordingly, no prisoner should file a lawsuit challenging prison conditions absent a thorough compliance-check with PLRA requirements.

### A. Exhaustion Of State Remedies

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 are exhausted.

42 U.S.C. § 1997(e)(a).

What does this statute mean? Quite simply if your prison maintains a grievance system, you must submit your claim under

this process, and exhaust all avenues of appeal, before filing a case in federal court. If you fail to do so, you will join a growing list of Pennsylvania prisoners whose Section 1983 cases were procedurally dismissed. See Reyes v. Sobina, 333 Fed. Appx. 661 (3d Cir. 2009); Veasey v. Fisher, 307 Fed. Appx. 614 (3d Cir. 2009); Rozzelle v. Rossi, 307 Fed. Appx. 640 (3d Cir. 2008); Johnson v. Townsend, 314 Fed. Appx. 436 (3d Cir. 2008).

The purpose of the PLRA exhaustion requirement is twofold: first, by requiring inmates to comply with prison grievance procedures, it permits state officials the opportunity to resolve the controversy internally before it becomes a federal case. Porter v. Nussle, 534 U.S. 516, 525 (2002) ("In some instances, corrective action taken in response to an inmate's grievance might improve prison administration and satisfy the inmate, thereby obviating the need for litigation."). Secondly, by requiring exhaustion of administrative remedies, it promotes judicial efficiency by producing a factual record that can assist the lower court in resolving the prisoner's claim. Id. at 525. ("And for cases ultimately brought to court, adjudication could be facilitated by an administrative record that clarifies the contours of the controversy.").

Although some minor questions regarding the PLRA exhaustion requirement remain, the Supreme Court has issued rulings in several cases clarifying scope, meaning and application. For example, must prisoners seeking monetary damages for constitutional violations submit their claims to a prison grievance process even when monetary relief cannot be obtained through that process? The answer is yes. In Booth v. Churmer, 532 U.S. 731 (2001) the Supreme Court held that inmates cannot "skip the administrative process simply by limiting prayers for relief to money damages not offered through administrative grievance mechanisms." Id. at 741; Porter v. Nussle, 534 U.S. at 524 (2002) ("Even when the prisoner seeks relief not available in grievance proceedings, notably money

damages, exhaustion is a prerequisite to suit.").

Another question: Can prisoners file a lawsuit while the grievance process is pending? The answer is no. Inmates must exhaust all available administrative remedies before filing suit. Cooper v. Sniezek, 418 Fed. Appx. 56 (3d Cir. 2011) ("Exhaustion must be completed before a prisoner files suit."); Neal v. Goord, 267 F.3d 116, 122 (2d Cir. 2001) ("Subsequent exhaustion after suit is filed therefore is insufficient"). Inmates cannot file suit prematurely. They must first exhaust all administrative remedies to the very end. See Booth, 532 U.S. at 740-741 (where inmate filed grievance but failed to complete final appeal, exhaustion not satisfied); Quinn v. Dietman, 2011 U.S. App. LEXIS 3018 (3d Cir. 2011) (inmate failed to exhaust state remedies when he failed to make final appeal); Torrence v. Thompson, 335 Fed. Appx. 151, 153 (3d Cir. 2009) (case dismissed where final appeal in grievance process not completed).

The PLRA exhaustion requirement compels a prisoner to use his available prison grievance process. Concepcion v. Morton, 306 F.3d 1347 (3d Cir. 2002) (PLRA exhaustion requirement applies to grievance process described in inmate handbook; formal regulation or statute not required). You must utilize the formal grievance process. Other means of complaint or communication with prison staff—such as "request slips"—will not satisfy PLRA exhaustion requirements. George v. Chronister, 319 Fed. Appx. 134, 137 (3d Cir. 2009) (submission of medical request form failed to qualify as property exhausted grievance); McCoy v. Gilbert, 270 F.3d 503, 507 (7th Cir. 2001) (inmate failed to exhaust formal grievance); Curry v. Scott, 249 F.3d 493, 504 (6th Cir. 2001) (prison investigation will not substitute for exhaustion through prison grievance system).

When exactly must a prisoner file a grievance? In order to satisfy the PLRA exhaustion requirement, prisoners must comply with all grievance procedures. For

example, if prison grievance policy requires prisoner to file grievances within a specified period of time after the complained of incident, he must do so in a timely fashion. In Woodford v. Ngo, the Supreme Court upheld dismissal of a lawsuit where the prisoner submitted a grievance six months after prison officials imposed restrictions upon his religious activities. 548 U.S. at 85 (2006). In this case, California prison policy required inmates to file grievances “within 15 working days” of the incident in question. *Id.* at 86. The Supreme Court concluded that the PLRA exhaustion requirement was not a “toothless scheme” and that “proper exhaustion” means compliance with grievance procedural rules, including timeliness of the grievance. *Id.* at 95.

The Third Circuit has likewise shown little tolerance for prisoners who fail to file timely grievances and then claim that there are not administrative remedies available because their grievances were time-barred. Daniles v. Rosenberger, 286 Fed. Appx. 27, 29 (3d Cir. 2010) (where inmate failed to file grievance within 15 days of event—as required by prison rules—claim dismissed for non-exhaustion); Mack v. Curran, 457 Fed. Appx. 141, 145 (3d Cir. 2012) (inmate’s placement in RHU insufficient excuse for failure to file timely grievance).

How much specificity or information must a grievance contain in order to satisfy exhaustion? For example, can a prisoner sue a state official in a § 1983 lawsuit if he fails to identify the official in the administrative grievance? In Jones v. Bock, the Supreme Court concluded that it is the prisoner grievance procedures, not the PLRA that defines the boundaries of proper exhaustion. 549 U.S. 199, 218 (2007) (“The level of detail necessary in a grievance to comply with the grievance procedures will vary from system to system and claim to claim, but it is the prison’s requirements, and not the PLRA, that define the boundaries of proper exhaustion.”); Hughes v. Knieblher, 341 Fed. Appx. 749, 751 (3d Cir. 2009) (In determining whether a prisoner had met the exhaustion

requirement of the PLRA, we look to the prison’s procedural rules.”).

As a result of Jones the lower courts have concluded that inmates must comply with prison grievance procedures or face case or claim dismissal for lack of exhaustion. For example, if prison rules require you to specify by name each and every staff member involved in the dispute. You must do so or that claim will be deemed unexhausted. See Watts v. Herbig, 364 Fed. Appx. 723, 724 (3d Cir. 2010) (Eighth Amendment claim dismissed against one defendant because grievance never identified him as required by prison rules). If prison rules require you to present your grievance in a specific manner, you must do so or face dismissal. See Rivera v. Pennsylvania Department of Corrections, 388 Fed. Appx. 107, 108-109 (3d Cir. 2010) (where prisoner failed to comply with prison rule limiting grievance to two pages, case dismissed for non-exhaustion); Frazier v. SCI Medical Dispensary Doctor, 391 Fed. Appx. 128, 130 (3d Cir. 2010) (where prisoner’s grievance contained three separate issues—in violation of grievance policy—claim dismissed for failure to exhaust).

The PLRA exhaustion requirement compels a prisoner to precisely follow all grievance procedures. If your grievance policy requires you to file grievances within a specified time period or identify staff or specify whether money damages or other relief is requested, you must do so or face dismissal. Toney v. Bledsoe, 427 Fed. Appx. 74 (3d Cir. 2011) (“Exhaustion of administrative remedies must be proper and in accordance with applicable regulations and policies, and noncompliance cannot be excused by the courts.”).

If you fail to comply with prison grievance procedures, your subsequently-filed lawsuit will be dismissed on non-exhaustion grounds (and you will forfeit a \$350 filing fee)<sup>2</sup>. Of course, there have been

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<sup>2</sup> As of the date of this printing, the fee for filing a civil Complaint in the federal District Courts in the Eastern, Middle, and Western Districts of Pennsylvania is \$350.

a few rare exceptions based upon unusual events. See Robinson v. Johnson, 343 Fed. Appx. 778, (3d Cir. 2009) (failure of grievance to identify DOC officials responsible for RHU exercise policy excused where such information was unavailable); Mitchell v. Horn, 318 F.3d 523, 536 (3d Cir. 2003) (remanding case to lower court to determine whether prison officials refused to supply inmate with grievance form); Gravley v. Tretinik, 414 Fed. Appx. 391 (3d Cir. 2011) (where grievance identified wrong nurse based upon erroneous information provided by prison guard, exhaustion satisfied). These cases were based upon unusual events. The prudent course of action is to precisely follow all grievance procedures to avoid subsequent exhaustion disputes in federal court.

Another matter regarding exhaustion concerns the burden of proof. Must the prisoner prove in court that he has exhausted all his administrative remedies or does that burden lie with prison officials who request suit dismissal based upon non-compliance with § 1997e(a)? In Jones v. Bock, the Supreme Court held that failure to exhaust is an "affirmative defense" and that "inmates are not required to specially plead or demonstrate exhaustion in their complaints." 549 U.S. at 216. In other words, the burden is on prison officials to raise the issue of non-exhaustion; inmate-plaintiffs are not required to plead exhaustion in their complaints. Id. at 217. If prison officials fail to assert non-exhaustion during pretrial proceedings, the defense of non-exhaustion may be considered waived. See Smith v. Mensinger, 293 F.3d 641, 647 n. 3 (3d Cir. 2002) ("[E]xhaustion is an affirmative defense which can be waived if not properly preserved by a defendant.") (quoting Ray v. Kertes, 285 F.3d 287 (3d Cir. 2002)). However, after the affirmative defense of non-exhaustion has been properly preserved by a defendant, a prison official does not have a specific time frame for seeking

dismissal of a claim based on this defense. See Drippe v. Tobelinski, 604 F.3d 778, 782 (3d Cir. 2010). However, if, under the circumstances of a particular case, the prison official is not allowed to file a motion at that time under the Federal Rules of Civil Procedure, local rules or the scheduling order from the judge, this could bar him from raising the defense.

On appeal, if the prison official did not originally make the affirmative defense of non-exhaustion, then they cannot make it on appeal because they did not properly preserve the issue. See Smith v. Mensinger, 293 F.3d 641, 647 n. 3 (3d Cir. 2002); Jerry v. Beard, 419 Fed. Appx. 260 (3d Cir. 2011).

Finally, what happens if a prisoner's federal lawsuit contains both exhausted and non-exhausted claims? Must a district judge throw out the entire case pursuant to 1997e(a)? Does there exist an "all or nothing" total exhaustion rule? In Jones v. Bock, the Supreme Court rejected the "total exhaustion rule," stating that if a complaint contains both good (exhausted) and bad (unexhausted) claims, the court proceeds with the good and leaves the bad. 549 U.S. 199, 224 (2007).

In conclusion, all constitutional claims filed in federal court must initially be submitted to available state grievance systems. Do not deviate from grievance procedures or you risk case or claim dismissal in federal court.

## B. Filing Fee

Any person who files a civil action in federal court must pay a filing fee of \$350. See 28 U.S.C. § 1914(a). Since many prisoners do not have the financial resources to satisfy this fee, they are permitted to seek leave to proceed "in forma pauperis" ("IFP"). 28 U.S.C. § 1915. Contrary to what many inmates believe, obtaining IFP status does not excuse the \$350 filing fee. Porter v. Dept. of Treasury, 564 F.3d 176, 180 (3d Cir. 2009) ("Although a prisoner may obtain IFP status under the PLRA, this does not result in a waiver of the fees; it merely allows the inmate to pay the fees in installments when

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There is also a \$50.00 administrative fee, in addition to the filing fee, but the \$50.00 fee can be waived if a person is proceeding *in forma pauperis*.

there are sufficient funds in his prison account.").

The PLRA amended the federal IFP statute to discourage prisoners from filing suits, or, at least cause them to seriously weigh the merits before filing. See Muhammad v. U.S. Marshals Service, 385 Fed. Appx. 70, 73 (3d Cir. 2010) ("Before initiating a lawsuit or an appeal, the PLRA counsels that Muhammad must weigh the costs of litigation against his desire to frequent the prison commissary."). Any prisoner with \$350 in resources will be denied IFP status and be required to pay the entire filing fee up front. See In Re Mac Truong, 327 Fed. Appx. 326, 327 (3d Cir. 2009) (IFP status denied where he had rental income of \$3,000 per month).

Inmates without resources to pay the \$350 filing fee may seek IFP status. They must file, in addition to the normal affidavit listing assets and a statement of inability to pay court costs, a certified copy of his or her prison trust account for the six month period immediately preceding the filing of the complaint. See 28 U.S.C. § 1915(a) (2). See also Garrett v. Clark, 147 F.3d 745, 7&6 (8th Cir. 1998) (the PLRA "does not say that a prison account statement must be supplied when the complaint is filed. Instead, the prisoner should be allowed to file the complaint, and then supply a prison account statement within a reasonable time.").

Any prisoner who fails to submit a properly detailed affidavit and a certified copy of his prison account will be denied IFP status. See Rohn v. Johnston, 415 Fed. Appx. 353 (3d Cir. 2011) (case dismissed for failure to submit required affidavit of poverty); Bricker v. Turner, 396 Fed. Appx. 804, 805 (3d Cir. 2010) (civil case dismissed where prisoner failed to comply with Court order to submit properly completed IFP affidavit and authorization form to begin deductions); Piskanin v. Court of Common Pleas of Lehigh County, 359 Fed. Appx. 276, 278 (3d Cir. 2009) (civil case dismissed where prisoner failed to submit affidavit of property

and certified account statement as requested by the court to determine his IFP status).

Requiring a prisoner to supply the court with a six-month account statement is necessary because "if a prisoner brings a civil action or files an appeal *in forma pauperis*, the prisoner shall be required to pay the full amount of a filing fee." 28 U.S.C. § 1915(b)(1). Consequently, the old pre-PLRA days of prisoners using their IFP status to file suits scot-free are over. All prisoners must now pay the full filing fee -- either they pay it immediately or proceeding IFP, they will be assessed an initial partial filing fee followed by incremental payments each month thereafter until the balance is paid off. See 28 U.S.C. § 1915(b)(1) and (2).

Upon receipt of the affidavit of poverty and six-month certified copy of his prison account, the district judge "reviews the litigant's financial statement, and, if convinced that he or she is unable to pay the court costs and filing fees, the court will grant leave to proceed in forma pauperis." Shelley v. Patrick, 361 Fed. Appx. 299, 301 (3d Cir. 2010).

As to the amount of the initial payment, the statute states that the court shall assess as an initial partial filing fee, twenty percent of whichever is greater: (a) the average monthly deposits to the prisoner's account; or (b) the average monthly balance in the prisoner's account for the six month period immediately preceding the filing of the complaint or appeal. See 28 U.S.C. § 1915(b)(1)(A) and (B). However, if the prisoner has no assets and no means by which to pay the initial partial filing fee, he or she is still permitted to file the complaint or appeal. See 28 U.S.C. § 1915(b)(4).

After payment of the initial partial filing fee, the prisoner shall be required to make monthly payments of 20 percent of the preceding month's income credited to the prisoners account. The agency having custody of the prisoner shall forward payments from the prisoner's account to the clerk of the court each time the amount in the

account exceeds \$10 until the filing fees are paid. See 28 U.S.C. § 1915(b) (2).

### C. Screening Provisions

In addition to requiring prisoners to pay the full filing fee, the PLRA expanded the ability of a district court to dismiss an inmate lawsuit "*sua sponte*" (meaning "on its own motion"). Now the courts at the docketing stage (prior to service of the complaint upon the defendants), "shall" dismiss a prisoner's suit *sua sponte* if it is: (1) frivolous or malicious; (2) fails to state a claim on which relief may be granted; or (3) seeks monetary relief against a defendant who is immune from such relief. See 28 U.S.C. § 1915(e).

Dismissal on these grounds does not require the court to await the filing of a motion to dismiss by the defendant. The courts now have *sua sponte* authority to immediately dismiss any action or claim which, for example, fails to state a claim upon which relief can be granted. See Holmes v. Dreyer, 431 Fed. Appx. 69 (3d Cir. 2011) (where inmate allegations concerning criminal trial were clearly barred under Heck v. Humphrey, *sua sponte* dismissal as frivolous upheld); Adekoya v. Chertoff, 431 Fed. Appx. 85 (3d Cir. 2011) (where inmate's First Amendment allegations clearly failed to state a claim for relief, *sua sponte* dismissal upheld); Hall v. Minner, 411 Fed. Appx. 443 (3d Cir. 2010) (where inmate suit was clearly barred by statute of limitations, *sua sponte* dismissal upheld).

Prior to a *sua sponte* dismissal, the Third Circuit has agreed that a prisoner should be afforded the opportunity to amend his or her complaint unless the deficiency cannot be cured. The dispositive precedent is Shane v. Fauver, where the court ruled that dismissal of the complaint, without granting leave to file an amended complaint which cured the deficiencies, was error. 213 F.3d 113, 117 (3d Cir. 2000). Although acknowledging that the purpose of the PLRA was "to curb the substantively meritless prisoner claims that have swamped the courts," the Third Circuit noted that it was "not aware of any specific support in the

legislative history for the proposition that Congress also wanted the Courts to dismiss claims that may have substantial merit but were inartfully pled." Id.

For example, in DaSilva v. Sheriff's Department, a district judge dismissed an inmate's complaint *sua sponte* for failure to name "with specificity" the responsible officials involved in a beating. 413 Fed. Appx. 498 (3d Cir. 2011). The Third Circuit reversed because DaSilva was not given an opportunity to amend his complaint. "It is not impossible that DaSilva could have named the proper defendants if he had been granted a period of time to file an amended complaint." Id. at 501. See also Davis v. Gauby, 408 Fed. Appx. 524, 527 (3d Cir. 2010) (while a district judge should not ordinarily dismiss a complaint *sua sponte* without providing the plaintiff an opportunity to amend his complaint, it may do so if the amendment would be futile).

### D. Physical Injury Requirement

The PLRA has also restricted the ability of inmates to collect compensatory damages for constitutional violations. "No federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury." 42 U.S.C. § 1997e(e).

The key precedent in the Third Circuit regarding 42 U.S.C. § 1997e(e) is Allah v. Al-Hafeez. 226 F.3d 247 (3d Cir. 2000). In Allah, a prisoner brought suit seeking injunctive relief and an award of compensatory and punitive damages as the result of a religious-based First Amendment violation. Id. at 248-249. Since he was transferred to another prison, the Third Circuit agreed that Allah's request for injunctive relief was moot. Id. at 249. The question presented on appeal was whether Allah's claim for money damages was barred under 1997e(e).

The Third Circuit agreed that 1997e(e) barred Allah's Claim for compensatory damages since the only injury

alleged in his complaint was mental and emotional injury. *Id.* at 250. "Under section 1997e(e), however, in order to bring a claim for mental or emotional injury suffered while in custody, a prisoner must allege physical injury, an allegation that Allah indisputably does not make. Accordingly, Allah's claims for compensatory damages are barred by Section 1997e(e) and were appropriately dismissed." *Id.* at 250-251.

While an award of compensatory damages was not available under 1997e(e) absent proof of physical injury, the Third Circuit agreed that prisoners may still seek an award of nominal damages and punitive damages for violations of constitutional rights even absent a showing of physical injury. "Neither claims seeking nominal damages to vindicate constitutional rights nor claims seeking punitive damages to deter or punish egregious violations of constitutional rights are claims for mental or emotional injury." *Id.*

As a result of § 1997e(e), the courts will dismiss any claim seeking compensatory damages for mental or emotional injuries without a prior showing of physical injury. See *Scott v. Cherish*, 2011 U.S. Dist. Lexis 88968 (W.D. Pa. 2011) (compensatory damages claim dismissed where plaintiff failed to allege physical injury); *Morales v. Beard*, 2011 U.S. Dist. Lexis 78308 (M.D. Pa. 2011) (hair cut and shave is insufficient to amount to physical harm); *Short v. Williams*, 2011 U.S. Dist. Lexis 4010 (M.D. Pa. 2011) (compensatory damages for mental distress due to asbestos exposure dismissed unless amended complaint is filed specifying physical injury).

As to what constitutes "physical injury," Congress failed to provide a definition in the PLRA, thus leaving the matter for the courts to decide. In *Mitchell v. Horn*, 318 F.3d 523 (3d Cir. 2003), a prisoner alleged that he suffered "physical injury" within the meaning of § 1997e(e) when he was placed in a disciplinary cell where he could not eat, drink, or sleep. *Id.* at 526. The Third Circuit concluded that the loss of food, water and sleep were not by themselves "physical

injuries." *Id.* However, the Third Circuit agreed that physical injuries could result from such deprivations and remanded the case back to the lower court for further proceedings. *Id.* at 534. The Third Circuit further held that a "physical injury" within the meaning of 1997e(e) requires the prisoner to establish "a less than significant but more than *de minimis* physical injury." *Id.* at 536. What type of injury or illness falls within the scope of this definition will be determined in subsequent cases.

For example, in *Michtavi v. United States*, 345 Fed. Appx. 727, 730 n.3 (3d Cir. 2009), the Third Circuit held that the need to take medication for mental anguish was insufficient to satisfy § 1997e(e) requirement of physical injury. In *Wolfe v. Beard*, 2011 U.S. Dist. Lexis 15339 (E.D. Pa. 2011) a prisoner alleged that he spit blood and suffered high blood pressure and migraines due to an assault by a guard. In that case, the district judge agreed that the plaintiff had "alleged a sufficient predicate physical injury to overcome the bar against recovery for emotional injury." And in *Morris v. Levi*, 2011 U.S. Dist. Lexis 55785 (E.D. Pa. 2011) the district judge concluded that a prisoner's allegations of dizziness, chest pains and increased heart rate were sufficient physical injuries to deny the defendant's motion to dismiss the claim for compensatory damages.

It would appear that compensatory damages are not recoverable for constitutional violations absent proof of physical injury. If no physical injury was sustained, the prisoner can still file suit seeking an award of nominal damages and punitive damages as well as injunctive relief. See *Carey v. Piphus*, 435 U.S. at 266 (1978) (a violation of constitutional rights is actionable for nominal damages without proof of actual injury); *Smith v. Wade*, 461 U.S. 30, 56 (1983) (an award of punitive damages may be assessed "when the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others").

### E. Three Strikes Provision

As noted previously, prisoners without financial resources to pay the filing fee may seek leave to proceed "in forma pauperis" (IFP). IFP status does not excuse payment of the filing fee; it merely permits an indigent inmate to file his suit and commence his case while making incremental monthly payments to satisfy the filing fee.

Not all prisoners, however, are entitled to seek IFP status. According to 28 U.S.C. § 1915(g) a prisoner is not allowed to bring a civil action or appeal IFP if he or she has, "on 3 or more prior occasions," brought an action that was dismissed "on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury."

What does § 1915(g) mean? "In plain English, this means that prisoners who have had three actions or appeals dismissed cannot take advantage of any of the benefits of IFP status, such as avoiding the immediate payment of filing fees or having *pro bono* counsel appointed by the court under § 1915(e) (1)." Baker v. Flagg, 439 Fed. Appx. 82 (3d Cir. 2011).

Under this statute, an indigent prisoner accrues a "strike" when he or she files a frivolous or meritless action. Once the prisoner has received "three strikes," he or she is "out" in terms of bringing a future IFP case absent proof of "imminent danger of serious physical injury." 28 U.S.C. § 1915(g). See In Re Faison, 419 Fed. Appx. 171, 172 (3d Cir. 2011) ("because Faison was considered a 'three striker,' he could only proceed with his appeal IFP if he satisfied the imminent danger exception"); In Re Young, 382 Fed. Appx. 148, 149 (3d Cir. 2010) (mandamus action was missed where plaintiff was a three striker and failed to establish imminent danger); Dandar v. Krysevig, 371 Fed. Appx. 251 (3d Cir. 2010) (motion for preliminary injunction dismissed because plaintiff was a three-striker and failed to establish imminent danger).

This PLRA provision was specifically aimed at abusive indigent inmates who continuously filed frivolous or meritless litigation in federal court. Of course, the courthouse door still remains open to even prisoners with three strikes. Such inmates, however, must either pay the entire filing fee up front to commence a civil action (see Abdul-Akbar v. McKelvie, 239 F.3d 307, 317 (3d Cir. 2001) (a three strikes inmate "is simply unable to enjoy the benefits of proceeding IFP and must pay the fees at the time of filing instead of under the installment plan")) or gain IFP status by proving that he or she is "under imminent danger of serious physical injury." See Demos v. Bush, 365 Fed. Appx. 341, n.1 (3d Cir. 2010) (three strikes inmate must either "pay the filing fee for a civil action in full" or "demonstrate imminent danger of serious physical injury" within meaning of statute).

According to § 1915(g) any prisoner-initiated action or appeal dismissed on grounds that "it is frivolous, malicious, or fails to state a claim upon which relief may be granted" counts as a strike. When a prisoner has accumulated three strikes, § 1915(g) is triggered. In light of today's computerized court records, any attempt to conceal prior dismissals seems ill-advised. In Jones v. Folino, the Third Circuit dismissed an appeal where the prisoner failed to divulge in the lower court that he had three strikes against him. 419 Fed. Appx. 264, 265 n.1 (3d Cir. 2011). "Jones' lack of candor is unacceptable. If, while a prisoner, he files a civil action or appeal in a federal court, he must inform the court that he has had three cases dismissed as frivolous and that he is required to demonstrate imminent danger of serious physical injury in order to proceed IFP." Id.

All cases dismissed as frivolous, malicious or failing to state a claim count as strikes. The Third Circuit has decided, however, that prior dismissals cannot be counted as strikes under 1915(g) where appeals were still pending in those cases. See Jordan v. Ciechi, 428 Fed. Appx. 195, 198 n.2 (3d Cir. 2011) ("A dismissal does not

qualify as a strike for 1915(g) purposes until a litigant has exhausted or waived his or her appeals.").

Prisoners who have three strikes under § 1915(g) are not permitted IFP status to file a new action; instead they must pay the complete filing fee up front. Abdul-Akbar v. McKelvie, 239 F.3d at 317. The only exception is when the prisoner can prove that he or she is "under imminent danger of serious physical injury." § 1915(g).

District judges will assess imminent danger contentions at the time the complaint is actually filed with the court. Abdul-Akbar, 239 F.3d at 313. Danger that has passed due to a prison transfer or some other change in prison conditions does not qualify as "imminent" danger. Id. In addition, a district judge may discredit factual claims of imminent danger that are "fantastic" or "delusional" or "wholly incredible." See Brown v. City of Philadelphia, 331 Fed. Appx. 898, 900 (3d Cir. 2009) (allegations that prison guards threatened his life, contaminated his food, denied him medical treatment, placed feces and urine in his cell, denied him heat and water, and urged other inmates to attack him were not credible in light of plaintiff's abuse of judicial system as he had three strikes and used imminent danger previously to gain IFP status).

Allegations of imminent danger must be credible. See Ashley v. Dilworth, 147 F.3d 715, 717 (8th Cir. 1998) (imminent danger exception satisfied where inmate was subjected to documented physical attacks); McAlphin v. Toney, 281 F.3d 709, 711 (8th Cir. 2002) (imminent danger satisfied based upon pain and spreading mouth infection); Prall v. Bocchini, 421 Fed. Appx. 143, 145 (3d Cir. 2011) (remanding imminent danger question back to lower court to evaluate credibility of assertion that inmate was subject to beatings once a week).

Finally, are prisoners precluded from seeking appointment of counsel if they have accumulated three strikes under § 1915(g)? The answer is yes. In Brightwell v. Lehman, the Third Circuit agreed that a three strikes

plaintiff is statutorily precluded from obtaining court-appointed counsel. 637 F.3d 187, 192 (3d Cir. 2010). "Allowing a litigant who was denied IFP status pursuant to § 1915(g) to obtain counsel under 1915(e)(1) would thus contradict both the text of § 1915 and the principal purpose of the PLRA." Id. at 192.

#### F. PLRA Restrictions On Remedial Relief

In addition to reducing inmate lawsuits filed in federal court, the PLRA also contained statutory changes designed to end, or at least significantly curtail, what some PLRA advocates see as "judicial micromanagement" of the prison system. As a result, court orders requiring improvements in prison conditions while not unobtainable, now require specific findings.

The PLRA amends 18 U.S.C. § 3626 in three significant respects: (1) it places new requirements for prospective relief in all civil actions concerning prison conditions; (2) it places limitations on the issuance of "prisoner release orders" or so-called "population caps" to reduce prison overcrowding; and (3) it provides for the automatic stay and termination of previously granted prospective relief.

The PLRA places limitations on when district judges can award "remedial" or "prospective" relief which is defined as "all relief other than compensatory monetary damages." 18 U.S.C. § 3626(g)(7). According to the statute, a court "shall not grant or approve any prospective relief unless the court finds that such relief is narrowly drawn, extends no further than necessary to correct the violation of a federal right, and is the least intrusive means necessary to correct the violation of the federal right." 18 U.S.C. § 3626(a)(1)(A).

Basically, what § 3626(a) does is require that prison conditions remedies extend no further than absolutely necessary to remedy federal constitutional violations. Consequently, if a federal judge concludes that prison over-crowding has resulted in unsanitary conditions and increased prisoner violence, that judge can only order state

authorities to implement those measures necessary to correct the Eighth Amendment violations. See Tyler v. Murphy, 135 F.3d 594, 596 (8th Cir. 1998) (vacating injunction imposing 20-person cap on technical parole violators held at prisons where district judge did not make requisite § 3626(a) findings).

With respect to prisoner release orders, the PLRA provisions mandate that no such order may be entered unless a "less intrusive" order has failed to remedy the federal right violation and the defendant was afforded a "reasonable amount of time to comply with the previous court orders." 18 U.S.C. § 3626(a)(3)(A). Additionally, only a three-judge court can issue a prisoner release order, see 18 U.S.C. § 3626(a)(3)(B), and this court must find, by clear and convincing evidence, that crowding is the "primary cause" of the illegal conditions of confinement and that no other remedy can alleviate those conditions. See 18 U.S.C. § 3626(a)(3)(E).

In Brown v. Plata, 131 S.Ct. 1910 (2011) the Supreme Court upheld a three judge court's § 3626 order requiring California to reduce its state prison population. Id. at 1944. According to the order, California was required to reduce its population to 130% percent of design capacity within two years. Id. Evidence in this extraordinary case indicated that severe overcrowding resulted in a suicide rate exceeding national standards, increased prison violence, denial of essential medical care, and outbreaks of infectious diseases. Id. at 1924. "As many as 54 prisoners may share a single toilet." Id. at 1924. The Supreme Court agreed that the three-judge-court's prisoner release order was "narrowly drawn," extended "no further than necessary" and was the "least intrusive means necessary" to remedy the Eighth Amendment violations at hand. See 18 U.S.C. § 3636(2)(3).

If prospective relief has already been granted by a district court, the PLRA contains provisions permitting termination of all prospective relief unless the court makes

written findings that the relief is needed to rectify a "current and ongoing violation of the federal right, extends no further than necessary to correct the violation of the federal right, and that the prospective relief is narrowly drawn and the least intrusive means to correct the violation." See 18 U.S.C. § 3626(b) (3); Imprisoned Citizens Union v. Ridge, 169 F.3d 178, 190 (3d Cir. 1999) (Congress chose to allow the courts to maintain jurisdiction only where defendants are guilty of "current and ongoing" violations of a federal right). Even if a court made these findings at the time the remedial order was entered, the order is subject to termination, upon motion, two years after the order's entry unless the court, once again, makes the prescribed findings. See 18 U.S.C. § 3626(b)(1).

That long-standing consent decrees regulating prison conditions are in peril was amply demonstrated in Para-professional Law Clinic v. Beard, 334 F.3d 301 (3d Cir. 2003). At issue in the case was a § 3626 motion, brought by the Pennsylvania DOC, to terminate a 14-year-old injunction enjoining state officials from closing SCI-Graterford's inmate law clinic. Id. at 303. Although acknowledging that the law clinic "provides a valuable service" to both inmates and the judiciary, and that prison officials would have to completely overhaul their own system of access to the courts if the clinic was closed, the Third Circuit nevertheless agreed with the Commonwealth and dissolved the injunction. Id. at 306. Consent decrees and other remedial relief can only be sustained upon proof of a "current and ongoing" constitutional violation. Id. at 304. Ironically, it was the law clinic's effectiveness in providing legal assistance to prisoners that convinced the court that there did not exist a "current and ongoing" violation of access to the courts at the prison. Id. at 306. See also Bey v. Keen, 2012 U.S. Dist. Lexis 150072 (M.D. Pa. 2012) (where plaintiff failed to show "current and ongoing" violation of access to courts, consent decree governing legal assistance terminated); Vazquez v. Carver, 18 F.Supp.2d 503, 513 (E.D. Pa. 1998)

(since record contained no evidence of current violation, consent decree terminated despite argument that prison officials may rescind policies that prevented federal violations).

Finally, all prospective relief ordered by a court is stayed thirty days after a motion

is filed to modify or terminate remedial relief and lasting until the district court enters a final order ruling on the motion. See 18 U.S.C. § 3626(e)(3). A crowded or congested court docket, however, does not qualify as "good cause" for postponement of the stay. §18 U.S.C. § 3626(e)(3).