Number 26, February 2003

SUMMARY JUDGMENT VICTORIES

Almost all prisoner litigants will have to prevail against a Motion for Summary Judgment if their cases are to proceed. Too often, the necessary discovery is kept from them. We here recount some successes and hope to inspire more!

CA DISTRICT COURT GRANTS *SUA SPONTE* SUMMARY JUDGMENT TO PLAINTIFF ON FIRST AMENDMENT RIGHT TO RECEIVE INFORMATION FROM THE INTERNET

[¶26.1] Plaintiff Frank Clement, a prisoner at California's supermax facility, Pelican Bay, filed a civil rights lawsuit against prison personnel for Eighth Amendment violations for delaying a colonoscopy, failing to provide medically necessary footwear, and for violation of his First Amendment rights for denying him access to materials printed from the internet. He sought immediate injunctive relief as well as damages.

The California Department of Corrections (CDC) argued in their motion for summary judgment that there was no dispute of material evidence between themselves and the plaintiff. Clement opposed the motion. U.S.D.J. Claudia Wilken, in a surprising turn, decided on the court's own motion to grant a summary judgment to plaintiff. The court also granted Clement permanent injunctive relief on the First Amendment violations. Defendants' motion for summary judgment was granted for the medical care claims - in part because Clement failed to show that the corrections officials had been responsible for the delay and in part because he had raised the footwear issue on a habeas in state court and lost. The court's action on the First Amendment issue was significant, prompting Arizona and other states to amend regulations that had prohibited receipt of material from the internet. This decision should bolster the efforts of prisoners who are engaged in trying to change arbitrary and capricious prison regulations. [Clement v. California Department of Corrections, et. al., 220 F.Supp. 2d 1098 (N.D.Ca. 2002)]

Facts. The case began when plaintiff argued that the defendants' delay, denial, and interference with diagnostic tests and medical treatment for his colon cancer violated his Eighth Amendment rights. Plaintiff made another Eighth Amendment claim that he was

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forced to buy shoes from the authorized vendor that were substantially different from the type of tennis shoes necessary to alleviate pain from a chronic foot problem. Plaintiff, who was a member of an internet-based Pen Pals site, also claimed that defendants' refusal to allow correspondence printed from the internet violated his First Amendment freedoms.

Plaintiff's claims assessed. On the issue of the colonoscopy exam that was not given to the plaintiff in a timely manner, the court ruled against plaintiff, stating that the delay in this medical procedure did not cause sufficient harm to plaintiff and furthermore, the delay was not deliberate. Also, the undisputed evidence in the record proved that the delay in plaintiff having the procedure came as a result of a delay at the hospital where the procedure was to take place. Although the CDC's Chief Medical Officer disagreed with the diets prescribed by the specialist, the court ruled that Clement could not show that he had been harmed by the delay and changes in his diet. As to the inadequate footwear issue, plaintiff was precluded by res judicata from raising this matter.

Moving on to the First Amendment claim, the court first had to determine whether plaintiff had a legitimate claim and then whether he could show that defendants had failed to satisfy all four factors of the *Turner* test. If Clement had a right to read communications and information from the internet, the CDC would have had to show that regulation of internet materials constituted a legitimate penological interest. If this first factor was missing from defendants' case, then the court would not have to consider the other factors. The *Turner* test factors include: first, a valid, rational connection between the prison regulation and the legitimate governmental interest to justify it; second, an existence of an alternative means of exercising the right that is open to prisoners; third, the impact that the proposed accommodation will have on guards, other prisoners, and the allocation of prison resources; and finally, the absence of easy alternatives is evidence of the reasonableness of a regulation. [Turner v. Safely, 107 S.Ct.2254 (1987)]

Rational basis. The court began by stating that a prisoner's right to receive information through the mail is undeniable, and pointed to the recent Ninth Circuit decision striking down the CDC prohibitions on bulk mail that had been used to keep *Prison Legal News* out of the hands of its subscribers. [Prison Legal News v. Cook, 238 F3d 1145 (9th Cir. 2001)] The burden of proof facing the CDC would be to show a "commonsense connection" between the policy or regulation and a legitimate penological purpose, and then to present empirical evidence that the policy will achieve its purpose.

Internet materials a security threat. Defendants' justification for the policy proscribing all communications printed or downloaded from the internet rested on the inability of the prison mailroom to handle the large volume of mail that would come in as a result of allowing internet materials, and an argument that internet materials are a unique security risk, susceptible to criminal misuse. Before the court even looked to defendants' ability to satisfy the *Turner* factors, the justices concluded on its own merit that the defendants did not have evidentiary proof that prisoners receiving internet materials would negatively impact prison security. In fact, the court relied not only on the professional opinion of plaintiff's experts, but on the published opinions of corrections professionals to conclude that prisoners' communication with the outside world, specifically in this case, the internet, can lead to successful rehabilitation. The court relied upon judgment in Morrison v. Hall, [261 F.3d 896 (9th Cir. 2001)], which held that "prohibiting inmates from receiving mail based on the postage rate at which the mail was sent is an arbitrary means of achieving the goal of volume control." Similarly, the court in this case argued that prohibiting mail downloaded from the internet in order to achieve volume control was just as arbitrary. Still, if the Pelican Bay officials felt that an increased volume of mail may impact prison security, the court suggested that the prison has more rational ways at its disposal for dealing with the volume rather than just arbitrarily prohibiting internet mail from coming into the prison. Alternative ways for dealing with volume include limiting the number of pages or pieces of correspondence a prisoner can receive.

Susceptible to misuse? As to defendants' claim that internet materials were susceptible to misuse by prisoners and their confederates, the court that no supporting evidence had shown this to be the case. Defendants had failed to prove that normal, non-internet, handwritten correspondence would consti

tute any less harm than internet correspondence. Also, there is no dispute that the same information on the internet could be transcribed into other communication forms, word-processed, photocopied, and/or transcribed by hand into forms that are already acceptable to prison officials. Finally, defendants failed to prove whether internet communications are any harder to trace than other permitted communications. Thus, for the first factor of the *Turner* test, defendants' ability to connect their regulation with a rational penological interest, defendants failed. Although the failure of the first factor means the court does not have to consider the remaining three factors of the Turner Test to determine if the prison regulations in this case are rational, the court examined these factors anyway.

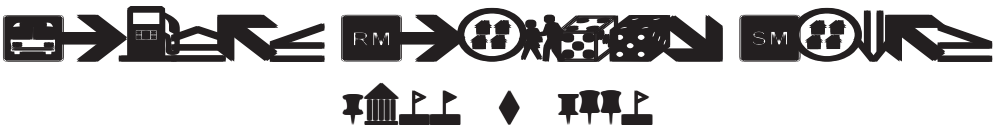
Alternative means of exercising First Amendment right. Because the plaintiff presented undisputed evidence that the information he wanted was only available on the internet, the rationality of the defendants in denying plaintiff this freedom was further compromised. The court exemplified the unreasonableness of such alternatives that might force an inmate to transcribe by hand lengthy articles off the internet or rely upon summaries of internet materials that itself might prove to be inaccurate. Thus, inmates' direct receipt of these internet materials is the most logical way to combat illogical alternatives.

Impact on prison resources. Defendants argued that the increased number of pages coming from internet mail would overload the mailroom, negatively impacting prison resources. For this third factor, the court reiterated its earlier argument that whatever increase in the volume of mail that results from internet materials cannot justify an arbitrary ban on these materials.

Available alternatives to the challenged policy. While the defendants have presented the position that limiting the quantity of mail sent to the prison is a penological interest, they have presented no evidence that other alternatives might work just as well as decreasing overall mail volume. The defendants did not present evidence that limiting the number of pages or pieces of mail would achieve the same penological interest. Consequently, the court argues that the unavailability of a viable alternative in this matter suggests the very unreasonableness of banning internet material.

Conclusion. Defendants' inability to satisfy the first of the four *Turner* factors and the court's opinion that none of the remaining factors could be proven left the CDC with no basis for their efforts to limit plaintiff's First Amendment freedoms – and no material facts to be tried. Thus, the court, *sua sponte*, issued a summary judgment in favor of plaintiff Frank Clement and granted him a permanent injunction voiding the policy of prohibiting internet materials in the California Department of Corrections. The court observed that the injunction would serve to alert the CDC of the unconstitutionality of its regulation, and serve judicial economy by relieving the court of having to supervise the running of the prisons. Clement was represented by lawyers from the ACLU of Northern California and the Prison Law Office.

The Prisoners Self Help Legal Clinic dedicates this issue of The Bridge to the memory of



Walter Sykes helped found the PSHLC and saw us through ten years. A vigilant defender of the rights of expression, he used his sharp mind and sharper wit to ridicule any effort by the state to limit First Amendment freedoms. A long-time paralegal, Walter was always ready to challenge those in power. In these days, especially, we will miss his voice!

3d Circuit Holds Failure to Exhaust Administrative Remedies is an Affirmative Defense, to be Pleaded by Defendant Prison Officials

[¶26.2] Frederick Ray, a former prisoner at the Pennsylvania State Correctional Institution at Huntington, appealed from a District Court order dismissing sua sponte his Sec. 1983 complaint against prison officials, because he had not "demonstrated" that he had exhausted his administrative remedies. [Ray v. Kertes, 285 F.3d 287 (3d Cir. 2002)]

PLRA. Sec. 1997e(a) of the Prison Litigation Reform Act (PLRA) provides that "no action shall be brought with respect to prison conditions… until such administrative remedies as are available are exhausted." 42 U.S.C. Sec 1997e(a) (2001). Ray argued that the District Court erred in dismissing his complaint for 2 reasons: (1) the PLRA's exhaustion requirement is an affirmative defense that must be alleged and proved by the defendants, not the prisoner plaintiff, and (2) the court imposed an improperly heightened pleading standard, requiring the prisoner to prove exhaustion in the complaint. Ray did not dispute that the PLRA language requiring administrative exhaustion applies to claims of excessive force by prison guards; that issue has been settled by the Supreme Court's recent decision in Porter v. Nussle, 122 S.Ct 983 (2002), where the court explicitly so held.

Facts and procedural history. Ray's complaint alleged that he was twice assaulted by prison guards, who retaliated by filing groundless misconduct charges against him when he told them he would sue. All but one of the disciplinary charges against him were eventually dismissed by the prison hearing officer. Thereafter, while he was still a prisoner and using a printed form complaint provided to prisoners, Ray filed a 1983 complaint pro se in the District Court for the Middle District of Pennsylvania against the officers he alleged assaulted him and other prison officials. On the first page of the form complaint, under the heading "Exhaustion of Administrative Remedies," Ray responded "Yes" to each of the following questions: "Is there a grievance procedure available at your institution?" ; "Have you filed a grievance concerning the facts relating to the complaint?"; and "Is the grievance process completed?"

The district court referred the complaint to a magistrate judge, who recommended dismissal for failure to exhaust administrative remedies. In his objections to the magistrate's report, Ray alleged that he had asserted the assault claims as defenses to the misconduct charges made against him (which arose from the same altercation). He stated that he had complied with the exhaustion requirement by exhausting the appeal process for all his misconduct charges. He further asserted that under the Pennsylvania grievance procedure, grievances can not be filed for claims related to disciplinary proceedings.

Before defendants were served, the district court dismissed Ray's complaint, finding that he had not demonstrated exhaustion of administrative remedies. The court pointed to the fact that Ray had not detailed the specific steps he had taken to exhaust and had not attached copies of his grievances to the objections he filed to the Magistrate's recommendation. In an obvious attempt to discourage any appeal, the district court warned Ray that "[A]ny appeal from this order will be deemed frivolous… and not taken in good faith." No doubt similar warnings were given to other prisoners in the past and that, heeding those warnings, others had abandoned their litigation.

Ray, however, filed a Notice of Appeal pro se. The Third Circuit, realizing the importance of the questions involved, obtained representation for the pro se prisoner from Jon Romberg, Associate Director of Seton Hall University School of Law's Center for Social Justice. Although his complaint had been dismissed without prejudice, Ray could no longer pursue his administrative remedies because of the passage of time and his release from prison. The principal question raised in the appeal was not the substantive one of whether exhaustion is required, but the procedural one of which party has the burden of pleading exhaustion or its absence.

Third Circuit opinion. Although this was the first time the Third Circuit faced the question of how the PLRA's exhaustion requirement should be pled, six other circuit courts had already tackled the issue. The Second, Seventh, Ninth and D.C. Circuits had all held that the requirement is an affirmative defense. *See, e.g.,* Wyatt v. Terhune, 2002 U.S. App. LEXIS 2217 at 18 (9th Cir. Feb. *12, 2002*), Jackson v. District of

Columbia, 254 F.3d 262, 267 (D.C. Cir. 2001), Massey v. Wheeler, 221 F.3d 1030, 1034 (7th Cir. 2000), Snider v. Melindez 199 F.3d 108, 111-12 (2d Cir. 1999) . Some dicta in the Fifth Circuit supports this view. Wendell v. Asher, 162 F.3d 887, 890 (5th Cir. 1998). The Sixth Circuit, on the other hand, held that the PLRA requires prisoners to both allege and show exhaustion of all available state administrative remedies. Brown v. Toombs, 139 F.3d 1102 (6th Cir. 1998). District courts in the Third Circuit were divided on the issue.

Congressional intent. Congress had two primary concerns in enacting Sec. 1997e(a): (1) to lessen the burden "frivolous" prison litigation placed on the federal courts, and (2) to reinforce the power of prison administrators to control prison problems, minimizing the "interference" of federal courts in matters of prison administration. The Third Circuit concluded that these policies are not inconsistent with construing the exhaustion requirement as an affirmative defense. Under Sec. 1997e(c)(1) and (2) of the PLRA, federal courts have the power to dismiss frivolous prisoner lawsuits sua sponte (on their own, *i.e.,* without a motion by one of the parties), fulfilling Congress' first concern, and making it unnecessary to view Sec. 1997e(a) as authorizing the same action. Congress' concern to give prison administrators the opportunity to control prison problems is addressed by the exhaustion requirement itself. The question of who bears the burden of proof does not affect that issue.

The Third Circuit relied on its prior decision in Williams v. Runyon, 130 F.3d, 573 (3d Cir. 1997), a Title VII case, where the Court stated that "failure to exhaust administrative remedies is an affirmative defense in the nature of statutes of limitations." The court found that "fairness" requires placing the burden of proof on defendant prison administrators, as it is much easier for them to show a failure to exhaust than it is for a prisoner to demonstrate exhaustion. Not only do prison officials have greater access to prison records, but they and their attorneys can provide the court with clear, typed explanations, including photocopies of relevant administrative regulations.

No Heightened Pleading Standard. The Third Circuit went on to hold that the district court further erred in dismissing Ray's complaint for failure to meet the heightened pleading requirement it imposed, and in doing so *sua sponte*. The dismissal was inconsistent with the rest of the PLRA. Subsection (c) of Sec. 1997e of the PLRA, entitled "Dismissal," explicitly provides for sua sponte dismissal by a district court in four specific instances: if the court is satisfied that the action is (1) frivolous, (2) malicious, (3) fails to state a claim upon which relief can be granted, or (4) seeks monetary relief from a defendant who is immune from such relief. Notably absent from this list is any reference to failure to exhaust. The court of appeals relied on the well-established principle that when a statute specifically enumerates some categories, it impliedly excludes others. The last sentence in Sec. 1997e(2) that "the court may dismiss the underlying claim [for the 4 specified reasons] without first requiring the exhaustion of administrative remedies" further proves that Congress did not intend to include the failure to exhaust among the grounds for which the court could dismiss *sua sponte*.

The Opinion cautions district courts that "[a]s a general proposition, sua sponte dismissal is inappropriate unless the basis is apparent from the face of the complaint." In this case, Ray's failure to exhaust was not apparent from the complaint or other documents before the district court. In fact, Ray alleged in his complaint that the grievance process had been completed. Without further inquiry, the District Court was not in a position to conclude that Ray failed to exhaust his administrative remedies. Moreover, the district court was not in a position to conclude that Ray failed to exhaust his administrative remedies. Moreover, the district court's requirement that a prisoner must demonstrate compliance with the exhaustion requirement was inconsistent with the United States Supreme Court's teachings in Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, [507 U.S. 163, 168 (1993)], that courts should narrowly interpret statutory language to avoid heightened pleadings standards. The same rationale was applied by the Supreme Court in the PLRA context in Crawford-El v. Britton, 523 U.S. 574, 596 (1998), which criticized "the creation of new rules by federal judges." District courts may not require greater particularity in pleading than the Federal Rules require and no provision of the PLRA requires pleading exhaustion with particularity.

<<<<Prisoners should note that this Opinion leaves open the question whether a prisoner may satisfy his/her exhaustion obligation in the course of disciplinary proceedings.>>>>

3d Circuit Reverses Hochberg on Religious Rights of Muslim Prisoners

[¶26.3] On appeal from a United States District Court order by U.S.D.J. Faith Hochberg granting summary judgment and dissolving a preliminary injunction which required defendant prison officials provide non-vegetarian Halal meals to plaintiff Muslim prisoners, the United States Court of Appeals for the Third Circuit concluded that the District Court's analysis was erroneous and lacked a factual basis, and remanded the matter for further proceedings. [Dawud Muhammad, et. al. v. Terhune, et. al. Civil No. 00-2110, (decided August 23, 2002)]

Facts. In June of 1999, ten prisoners at East Jersey State Prison who are practicing Muslims filed a civil rights complaint. According to the complaint, corrections officials announced in 1998 that they would no longer allow prisoners to receive food packages from outside the prison. In response, Muslim prisoners requested the prison Administrator, Steven Pinchak, to provide them with non-vegetarian Halal meals instead of the generic prison meals containing either Haram food or vegetarian Halal food. Their request, however, was ignored.

After the package policy was implemented, the prisoners repeated their request, which was again ignored. In their complaint, the prisoners contended that the failure to provide non-vegetarian Halal meals violated their First Amendment right to free exercise of religion and Fourteenth Amendment right to equal protection. In an accompanying motion, the prisoners sought a preliminary injunction which would require prison officials to provide non-vegetarian Halal meals. The district court initially granted the prisoners' uncontested motion for the preliminary injunction. However, the prison officials subsequently moved before the District Court for reconsideration of the preliminary injunction and for summary judgment.

Practice of religion. Employing the four-prong test prescribed in Turner v. Safley, [482 U.S. 78 (1987)], the district court found that: 1) the regulation banning the receipt of food packages from outside the prison was rationally related to legitimate prison interests; 2) because a vegetarian Halal diet was provided, no prisoner was being forced to "defile" himself by eating forbidden food; 3) requiring the prison to import non-vegetarian Halal meals would be a burden on prison resources and pose a security concern; and 4) that Halal meals provided by the prison would not accommodate the prisoners' religious beliefs any more than non-vegetarian Halal meals would, only that they might be more palatable. Judge Hochberg, concluding that the prisoners' First and Fourteenth Amendment rights had not been violated, dissolved the preliminary injunction and granted the DOC's motion for summary judgment.

Rationale. As there was no evident dispute between the parties about whether the prisoner's belief that they are entitled to a non-vegetarian Halal diet is both sincere and religious, the Court of Appeals observed:

> [W]e must inquire whether there is a rational connection between the prison's refusal to give [appellants their] requested diet and a legitimate penological interest. If so, we must then determine whether the refusal is reasonable in light of the nature of the prison's penological interest, [appellants'] interest in practicing [their] religion, the overall effect on the prison community of granting [their] request, and the availability of ways to accommodate [their] request at de minimis cost to valid penological interests." *[DeHart v. Horn, 227 F.3d 47, 52 (3d Cir. 2000)(en banc)]*

The Court of Appeals also observed that "the *Turner* standard also takes into account the extent of the burden imposed by the regulation on an inmate's religious expression." [DeHart, at 53] In fact, regulations that leave other avenues available for the exercise of religious beliefs receive greater deference from the courts in the balancing process than regulations that provide no alternative means. Thus, it is important to inquire whether the prisoners have alternative means of exercising their religious beliefs generally, aside from the question of diet.

In *DeHart*, the Third Circuit reversed and remanded because, in addressing this factor, the district court discounted plaintiff DeHart's interest in practicing vegetarianism noting that adherents of the "three major traditions of Buddhist practice" did not share DeHart's view that a vegetarian diet was mandatory. Based on an analysis of extensive United States Supreme Court precedent, the circuit judges concluded that "to discount DeHart's sincerely held religious beliefs because it was not in that mainstream … is simply unacceptable." [Id, at 55.] In the course of

doing so, the Court of Appeals overruled a previous decision, Johnson v. Horn [150 F.3d 276 (3d Cir. 1998)], on which the district court, in part, based its decision.

As with *Dehart*, the district court in the instant case not only relied on *Johnson* but its analysis of the prisoners' claim similarly turned in part on its conclusion that the provision of exclusively vegetarian Halal meals does not violate their religious beliefs. "While Halal is a religious commandment, the prison is not requiring inmates to seek out an alternative means of following a mandated religious practice because the prison provides a vegetarian Halal diet. Thus, no prisoner is being forced to 'defile himself.'" [Slip Op. at 8.] Having reached that conclusion, an impermissible judgment about the religious beliefs of the plaintiffs, the district court did not make any further inquiry into whether the plaintiffs have alternative means of expressing their rights.

The Court of Appeals concluded that the district court's analysis was erroneous; opining that, while it may be the case that the prison's denial of the plaintiffs' request for non-vegetarian Halal meals passes the first *Turner* prong, for essentially the same reasons as explained in *Dehart*, the district court in the instant case did not correctly apply the second *Turner* prong. Thus, the district court could not have performed a proper balancing test pursuant to *Turner* and also did not lay the requisite factual foundation for the Court of Appeals to perform its own balancing test on appeal. The grant of summary judgment was vacated and the case returned to district court. At time of writing, there have been no further decisions by the district court.

3d Cir: Favorable Termination Rule Does Not Apply to Conditions Claims

[¶26.4] After his release, Antonio Torres sued several New Jersey Department of Corrections officials and various medical care staff for violating his due process rights by sanctioning him for a rule violation when his verbal expression was a clear result of his mental illness. The district court granted summary judgment to all defendants, relying primarily on the "favorable termination rule," announced in Heck v. Humphrey [114 S.Ct.2364 (1994)]. Torres appealed to the Third Circuit Court of Appeals, arguing that his action was concerned solely with the conditions of his confinement, rather than its "fact or length." In this case of first impression, the Third Circuit agreed with Torres and ruled that a plaintiff who is no longer a prisoner (and thus has no access to a habeas action) may use a §1983 action to challenge the conditions of his confinement. [Torres v. Fauver, 292 F3d 141 (3d Cir 2002)]

Facts. In 1993, Antonio Torres appeared before the Classification Committee at Bayside State Prison and was told that he had been granted "Full Minimum Status" and would be placed on a work detail and would be placed in a minimum-security facility outside the wall of the prison. Torres, a paranoid schizophrenic, became delusional and convinced that being in the new facility would harm him. He pleaded for reassignment and, after being refused, said that he would try to escape if placed in the unit. He was charged with planning to escape, found guilty and sanctioned. He was given 15 days detention and 120 days in isolation. He unsuccessfully appealed to the prison administrator, but did not proceed to state court.

§ 1983 case history. Torres was released at the end of 1993 and filed a pro se complaint alleging violations of his Eighth and Fourteenth Amendment rights a year and a half later. He was represented by counsel and the pre-trial proceedings stretched through June 1999.

After discovery, the district court dismissed his Eighth Amendment complaints and applied the "Favorable Termination Rule" to dismiss his due process claim. Under this rule, as announced in *Heck* and applied to prison disciplinary proceedings in Edwards v. Balisok [117 S.Ct.1584 (1997)], a prisoner cannot seek damages for actions that, if found to be unconstitutional, would challenge the "fact or length" of his confinement, unless he successfully challenges the resulting conviction or sanction.

Sanctions and conditions. The Supreme Court justices declared in *Heck* that civil actions cannot be used to invalidate criminal judgments, but they have also consistently considered conditions cases distinct from those that challenge the fact or length of confinement. In *Heck*, the justices wrote: "If the district court determines that the plaintiff's action, even if successful, will not demonstrate the invalidity of any outstanding criminal judgment against the plaintiff, the action should be allowed to proceed, in the absence

of some other bar to the suit." It is important to understand that a plaintiff whose complaint alleges a rights violation (such as evidence tampering by a guard) that, if proved, would imply the invalidity of the sanction is just as vulnerable to this rule as is a plaintiff who directly attacks the validity of the charges (i.e., by saying that they were fabricated). The question of whether a § 1983 action is available to a prisoner who does not have access to a federal habeas action is unsettled.

Courts of Appeal agree. With the exception of the Sixth Circuit, all Courts of Appeal have held that prisoners who present constitutional challenges that apply only to the conditions that resulted from a disciplinary sanction may use a federal civil rights claim under 42 U.S.C. §1983. The Third Circuit panel read Torres' complaint about the procedures through which the escape charge was handled to be a challenge to the conditions of his imprisonment. To succeed with this claim, he would have had to show a violation of a liberty interest. After the 1995 ruling in Sandin v. Conner [115 S.Ct. 2293], that accepts segregation as a normal part of prison life, and the recent decision in Fraise v. Terhune [283 F.3d 506 (3d Cir 2002)] (*see* this issue, p. 9), that held the extremely restrictive conditions in the Security Threat Group Management Unit ("STGMU") to be constitutional, the 120 days of administrative segregation given to Torres were not a constitutional violation.

Although the circuit court panel found that Judge Cooper erred in ruling that the "Favorable Termination Rule" applied to Torres' case, the circuit panel affirmed the grant of summary judgment. They concluded that Torres had not suffered "the type of atypical, significant deprivation in which a State might conceivably create a liberty interest" [*Sandin* at 486] in a state [NJ] that has ruled that prisoners can be held indefinitely in the STGMU [Fraise at 522-523].

The circuit court, nonetheless, did not overturn the grant of summary judgment, finding that the conditions in segregation that Torres was subjected to were unconstitutional under *Sandin*.

Massachuseetts Prisoners Win on Due Process Claim in State Court on Gang Unit & Segregation Policies

[¶26.5] In a split decision, the Supreme Judicial Court of Massachusetts recently upheld the Superior Court's grant of summary judgment to the plaintiff class on the due process claims of prisoners in segregated confinement. The class action was filed by prisoners held in non-disciplinary segregation in a high security prison and any other similar unit in a Massachusetts prison against the Commissioner of Corrections and superintendent of M.C.I. Cedar Junction alleging violation of state and constitutional standards for confinement. Although this opinion only affects Massachusetts prisoners, it is one of the first to disallow the widely used policy of classifying prisoners to segregated status without benefit of any procedure that can be challenged. [Haverty, et. al. v. Commissioner of Correction, 437 Mass. 737 (2002)]

Facts. Cedar Junction is the only maximum security prison in Massachusetts. Following a 1995 disturbance, the prison was locked down and divided into two wings, East and West. The East Wing became an isolation unit, where prisoners ate alone in their cells, had few activities, and were let out of their cells for no more than one hour each day – during which time they were required to shower and make telephone calls. Four (one half) of the units in the East Wing housed prisoners who had been identified as gang members. Assignment to the East Wing was considered a classification decision, and specifically not a disciplinary sanction. The East Wing at Cedar Junction was acknowledged to be much more restrictive part of the prison. The West Wing had fewer restrictions and greater privileges and operated through incentives and rewards for positive behavior. All Massachusetts prisoners are entitled to a regular six-month classification review, but the decision to place a prisoner in one of the East Wing units was, in the words of the court, "the entirely subjective and discretionary function of prison authorities." Cedar Junction had previously had a non disciplinary segregation unit, the Departmental Segregation Unit (DSU), subject to regulations guaranteeing due process, but it was closed after the lockdown. The due process regulations were enacted after a successful suit by

prisoners, Hoffer v. Fair, [No. SJ-85-0071 (Mar. 3, 1985)]. The regulations and procedures mandated for the protection of prisoners in the DSU were not applied to prisoners sent to non disciplinary segregated-confinement housing units such as the East Wing. Both East and West Wings also have disciplinary units subject to procedural regulations.

State court action. The Cedar Junction prisoners filed suit in state court arguing that the conditions in the East Wing were substantially similar to the conditions in the former DSU and that the failure to apply the regulations was a violation of their due process rights. They also argued that the application of the gang policy unfairly targeted Hispanic prisoners and was a violation of their right to equal protection. The case was heard in Massachusetts Superior Court and the plaintiff class was represented by Philip Kassel, Esq.from Massachusetts Coorectional Legal Services, Inc. The Commissioner of Corrections, who had been rebuffed in his earlier effort to repeal the regulations governing the assignment to non disciplinary segregation, argued that the DSU had been abolished and that the DSU regulations therefore has no force. Defendants argued that the six-month review was adequate protection for the liberty interests of prisoners.

Plaintiff's expert William H. Dallman (a former warden of an Ohio maximum security prison) reviewed the records of the decision process for assignment to the East Wing. He found that 200 of the 486 cases he examined did not have a classification score at all, and in half of those scored, the scores were ignored. His affidavit was not challenged by the defendants. He concluded that a significant majority of the prisoners whose cases and records he reviewed were inappropriately placed in segregation, according to the defendants' own procedures. In eighty-five percent of the files he reviewed, there was no basis for segregation, and in one half of these, there was no basis for maximum security placement.

Both parties filed for summary judgment. The motion judge considered the equal protection claim and found that the racial disparity and the "pervasive atmosphere of racism" at Cedar Junction presented a prima facie case of intentional discrimination. The defendants' denial, however, resulted in a factual dispute, and the matter was allowed to proceed for trial. On the due process issue, however, the motion judge found that both federal constitutional rights and state-created liberty interests triggered due process protections. As there were no material issues of fact at issue, the motion judge granted the plaintiff prisoners' motion for summary judgment and for entry of separate and final judgment under Massachusetts Rules of Civil Procedure, but stayed the requirement of compliance with the regulation until after the appeal.

Summary Judgment upheld. In the Massachusetts appeals court, the Supreme Judicial Court, the justices upheld the grant of summary judgment, although they disagreed with some of the reasoning employed by the lower court judge. The defendants argued that the regulations at issue were based on "outdated notions of liberty and due process rights of prisoners," that were not germane in the contemporary prison setting, with its overcrowding and substantial levels of violence. Plaintiffs were able to rely on the defendants' documentation about the East Wing units to show that they were substantially similar to the old DSU. Introducing the affidavit of Stuart Grassian, M.D., who wrote that "prolonged solitary confinement is highly toxic to psychological functioning," plaintiffs claimed that the conditions in the East Wing constitute an "atypical and significant hardship" as required by Sandin v. Conner [115 S.Ct.. 2293 (1995)].

The appellate justices considered the arguments of defendants, but found that instead of detailed documentation of their claims, they could only show general changes in the prison population overall. In their review of the holdings in relevant Massachusetts case law, the justices found that not only did regulations have the force of law, but that the court had warned the Commissioner of Corrections in a 1989 decision that "the department and the commissioner may not sidestep statutory and regulatory provisions stating the rights of an inmate as to his placement in a DSU by assigning as a pretext another name to such a unit." [Longval v. Commissioner of Corrections, 404 Mass.Ap.Ct. 60 (1989).] In that and following cases, the due process protections afforded prisoners faced with segregation had been upheld. While recognizing the need for security in the prison setting, the justices said such security could not be bought by ignoring a regulatory scheme with the force of law. Since the Massachusetts regulation had the force of law, it was not necessary to consider whether the conditions in the East Wing violated the United States Constitution. The grant of summary judgment was up-

held, the stay vacated and the case remanded so that the motion judge could set a schedule for the implementation of the review for the East Wing prisoners. *(Related Article on p. 16)*

U.S. Supreme Court Declares: Any Sentence That Can Send a Defendant to Prison Requires Appointment of Counsel

[¶26.6] The U.S. Supreme Court affirmed a Alabama Supreme Court decision that an uncounseled conviction in a misdemeanor case that leads to a suspended sentence cannot later result in imprisonment. An individual's suspended sentence cannot be activated if that individual was not made aware that he/she could have counsel appointed in the original case, unless he/she knowingly waived the right. It is settled law that counsel must be appointed in any criminal proceeding that can lead to imprisonment, but is not necessary if the maximum potential sentence is a fine. The Supreme Court accepted the current case to resolve a conflict among the circuit courts about the question of how to apply the law to suspended sentences. [Alabama v. Shelton, 535 U.S. 654 (2002)]

Facts. Defendant-respondent, LeReed Shelton was convicted of a third degree assault in the District Court of Etowah County, Alabama. The case, classified as a class A misdemeanor, carried a maximum punishment of one-year confinement and a $2,000 fine. In the original trial, Mr. Shelton represented himself. He invoked his right to a new trial in the Alabama Circuit Court, where he also represented himself. Although the court warned him of the undesirability of self-representation, the court made no effort to provide him with counsel. He was sentenced to 30 days imprisonment, two years unsupervised probation, court costs, $500 fine, $25 reparation fee, and $516.69 restitution. The 30 days jail time was suspended.

Shelton appealed his conviction on Sixth Amendment grounds in the Alabama Criminal Appeals Court. The Court ruled that a defendant who receives a suspended sentence has a constitutional right to state-appointed counsel and remanded for determination whether Shelton knowingly waived this right. After remand, the Court appeared to reverse its original course and rule that a suspended sentence did not hamper the Sixth Amendment, because the defendant had not "actually been deprived of liberty." In other words, because Shelton remained on probation, there was no violation of his Sixth Amendment right.

The Alabama Supreme Court reversed the appeals court on the basis of U.S. Supreme Court reasoning in the Argersinger and Scott cases. In Argersinger vs. Hamlin (407 U.S. 25), the Court declared a right to counsel in petty, misdemeanor, and felony convictions that lead to imprisonment. In Scott vs. Illinois (440 U.S. 367, 373-374), the Court ruled there is no right to counsel if conviction does not result in jail time. The Alabama Supreme Court said a defendant cannot be sentenced to imprisonment if counsel was not present. In this way, the Alabama Supreme Court held that a suspended sentence is a term of imprisonment even if the sentence is suspended and does not lead to immediate imprisonment. In the end, the Alabama Supreme Court affirmed Shelton's conviction and fines, but invalidated "that aspect of his sentence imposing 30 days of suspended jail time."

Reasoning. The U.S. Supreme Court examined the merit of the three positions: the Alabama Supreme Court supports Mr. Shelton, saying that he should not have received the suspended sentence because he was pro se. The State of Alabama argues that, although they cannot activate a suspended sentence, they can impose one. A third party *amicus curiae* was invited by the Court to argue the position that Alabama had abandoned – that failure to appoint counsel does not bar the imposition of a suspected or probationary sentence that could lead to incarceration.

Practicality cannot outweighs 6th Amendment right in each and every case. Amicus contends that appointing counsel to every defendant in Shelton's position is not practical for financial reasons, and that few of those who receive conditional sentences end up in prison. The argument continues that appointing counsel in these cases will hamper the ability of states to use the sentence of probation in an effective way. By implication, this argument suggests that probation without the threat of prison is ineffective. Amicus goes on to say that it is not within most state budgets to have counsel appear at every proceeding that involves a defendant in Shelton's position. The proposed solution is that counsel would be appointed to appear

at probation revocation hearings, because at this point, imprisonment is a real risk.

The Court disagrees, saying that probation revocation hearings in Alabama are informal proceedings without adherence to the customary rules of evidence. The only issue is whether the defendant has violated the terms of probation – not whether the underlying conviction is valid. So, the Court finds that this proposed solution does not satisfy the Sixth Amendment requirement – that the conviction leading to a term of imprisonment be one that is imposed on a defendant who has the right to counsel.

The Court observed that most jurisdictions give state-appointed counsel to individuals in positions similar to Shelton's. Also, if a state chooses to not give counsel to these types of defendants, the state can issue pre-trial probation, which includes a set of conditions very similar to the regular probation process. Even the dissent of the Court admits that if counsel were allowed at the suspended sentence imposition, this step would prove unnecessary, because such a step "does not deprive a defendant of his personal liberty."

Conclusion: State desires probation to be independent from suspended sentence Insofar as the Alabama Supreme Court upheld the right to state-appointed counsel in suspended sentence cases, the State desires this position reversed, because it vacated the defendant's probationary sentence. This arises the question whether probation is independently effective from the suspended sentence. Alabama would like the Court to concede that the probation requirement does not trigger an immediate need for counsel like the suspended sentence requirement does. Because the Alabama Supreme Court did not make it clear in its decision whether probation should be judged separately, the Court declined to pass issue on this matter. The U.S. Supreme Court chooses to act as a review court rather than as a first view one. Also, the Court acknowledges the Alabama Attorney General's assertion that he did not know of any state that imposes post-conviction of a crime a term of probation unattached to the original sentence. The theory that probation is independent from the uncounseled suspended sentence was left to the jurisprudence of the Alabama Supreme Court.

2d Circuit Applies *Apprendi* to Drug Quantity

[¶26.7] Taking account of the full force and the full prosecutorial burden of Apprendi v. New Jersey [120 S.Ct. 2348 (2000)], the United States Court of Appeals for the Second Circuit vacated a sentence that exceeded the statutory maximum for offenses involving indeterminate drug quantities under 21 U.S.C. 960(b)(3) . In its conclusion, the justices restated their opposition to allowing an element of an offense to be charged by statutory citation alone, emphasizing that the failure to specify a drug quantity in an indictment that exposed Doe to more than the statutory maximum was plain error. The case was remanded to district court for re-sentencing. [USA v. Doe, 297 F.3d 70 (2d Cir. 2002)]

Facts. John Doe was indicted under a two-count indictment and Count One provided:

> On or about and between July 16, 1996 and July 22, 1996, both dates being approximate and inclusive, within the Eastern District of New York and elsewhere, the defendants . . . together and with others, did knowingly and intentionally conspire to import into the United States from a place outside thereof cocaine, a Schedule II narcotic drug controlled substance, in violation of 21 U.S.C., Section 952(a). (Title 21, United States Code, Sections 963, 960(a)(1) and 960(b)(1)(b)(ii); Title 18, United States Code, Sections 3551 et seq.)

While the indictment did not specify a drug quantity in the text of the first count, one of the code sections listed parenthetically following the text [21 U.S.C. 960(b)(1)(B)(ii)] specified the quantity-specific punishment for importation of five or more kilograms of cocaine.

Doe and the government subsequently reached an agreement under which Doe agreed to plead guilty to Count One and to provide truthful information to the government in exchange for the government's promise to drop the indictment's remaining count, not to oppose a downward adjustment for acceptance of responsibility, and to file a U.S.S.G. 5K1.1 motion if Doe complied fully with the agreement. Doe also acknowledged that the Count, as charged, carried certain statutory penalties including: 1) Maximum term of imprisonment - life (21 U.S.C. 960(b)(1)(B)(ii); 2)

minimum term of imprisonment - 10 years (21 U.S.C. 960(b)(1)(B)(ii); 3) minimum supervised release term - 5 years, maximum supervised release term - life ; and 4) maximum fine - $4,000,000 (b)(1).

Sentencing. Doe testified and his co-conspirator was convicted – but the government reneged on the promise of a 5K1.1 motion. Doe appeared before a Magistrate Judge for formal plea proceedings. At no time was the quantity of drugs involved discussed by either party. The Probation Department prepared a pre-sentence report (PSR) and recommended that the court find Doe accountable for the importation of 65 kilograms of cocaine (generating a total offense level of 36 and a Guideline range of 188 to 235 months). The government submitted a letter and requested, inter alia, that the quantity of drugs considered for sentencing purposes be increased to over 150 kilograms of cocaine and 2 kilograms of heroin (creating a base offense level of 38). The Probation Department subsequently submitted an addendum to the PSR; incorporating the higher drug quantities and revised the base level recommendation to 38 (creating a total offense level of 39 and a sentencing range of 262-325 months). Judge Sterling Johnson, apparently adhering to the recommendation of the amended PSR, sentenced Doe to 262 months imprisonment, five years supervised release, and a $100 special assessment. No mention of, or challenge to, the drug quantities supporting the sentence was made during the sentencing hearing, not too surprising since Doe was sentenced the same day as the *Apprendi* decision was announced His claim was not preserved, so the standard of review is one of plain error. [United States v. Thomas, 274 F3d 655 (2d Cir 2001)]

Appellate review. Doe appealed his conviction and sentence, alleging 1) that the government acted in bad faith; 2) that Judge Johnson erred in not granting the downward departure, and 3) that the district court erroneously determined the sentence based on drug quantities not specified in the indictment or found by a jury beyond a reasonable doubt. In their review of Doe's conviction, the circuit panel dismissed his first two points. They then found that the failure to specify drug quantity in the indictment, thus "relying on the statute" was plain error, but one that did not impact Doe's substantive rights. The court concluded that, even if the failure to specify the amount in the indictment had impacted Doe's substantive rights, the justices would decline any action, because the record of the proceedings shows Doe's full awareness of the consequences of his plea.

The court then turned to the sentence. Relying on its decision in United States v. Yu [285 F3d 192 (2d Cir. 2002}], the court examined the plea allocution to see if it "settled the issue of drug quantity." No mention of drug quantity was made in the plea colloquy, and the issue had not been presented to a jury. The panel of judges found not only was the error "plain error," but that the error had affected Doe substantial constitutional rights, and required correction. Fail-

ure to correct the error "would seriously affect the fairness and public reputation of judicial proceedings." Despite the United States Supreme Court's decision in United States v. Cotton [122 S.Ct. 1781 (2002)] allowing sentencing for unspecified amounts when the evidence of drug quantity was "overwhelming" and uncontroverted," the Second Circuit returned Doe's case to the district court for resentencing.

NEW JERSEY DECISIONS

Parole Board Given 15 Days to Set Release Conditions

[¶26.8] Kevin Price, while at Garden State Youth Correctional Facility, was denied parole by a panel, and then by the full New Jersey Parole Board, on grounds that he was said to have a "serious substance abuse problem that has not been addressed." Price appealed the Parole Board's decision to the New Jersey Superior Court Appellate Division, arguing that his active participation in substance abuse programs, his extensive public education work, and his infraction-free record demonstrated his rehabilitation. The App. Div. agreed with Price, reversed the denial of parole, and remanded the case to the Parole Board so that conditions of parole could be established within fifteen days. [Price v. New Jersey State Parole Board, Civil No. A-1470-01T5, decided Apr. 26, 2002]

Facts. Kevin Price was incarcerated for five counts of reckless manslaughter committed on July 3, 1995, when he was 24. While intoxicated, Price drove his car the wrong way on the Garden State Parkway and was involved in a collision that resulted in the death of five persons. He pled guilty to five counts of reckless manslaughter, and was sentences to five seven-year terms, three of which were consecutive. At his initial eligibility in July 2001, a two-member panel denied parole indicating that their sole reason was "insufficient program participation." An appeal to the full Parole Board resulted in a *de novo* hearing before a new panel that vacated of the first decision and imposed a new denial, calling attention to a "serious substance problem that has not been addressed."

Kevin Price's record of four years' incarceration, as presented to the two Panels, included: 1) the opinions of four experts on drug and alcohol abuse, all of which concluded that Price did not pose a threat upon release; 2) the evaluation of the DOC psychologist that supported the expert opinions; 3) active participation in public awareness anti-alcohol programs that included 35 public talks, presentation to college students and several sobriety videos; 4) work in the prison as a peer tutor in the GED program and in the CRYUP program; 5) AA and other program participation and six months of one-on-one counseling with a priest; and 6) Price was described as a "model prisoner," who was infraction-free. He had the support of his family, an apartment, a job and plans to continue to go to AA meetings and counseling. In disregarding the presented information, the Parole Board based its final denial on "…Mr. Price's serious alcohol problem that has not been sufficiently addressed," and that he "…needs additional understanding of his character defects, as well as his defense mechanism with respect to minimization of the facts and circumstances."

App. Div. reversal. The Appellate Division pointed out that in *N.J.S.A*. 30:4-123.53, "The [Parole] Act thus posits the likelihood of future criminal conduct as the determinative test for parole eligibility and effectively establishes a presumption in favor of parole." The App.Div. reminds the Parole Board that the question of "substantial likelihood" is a factual question, and that they must consider all evidence presented to them. The App.Div. found that the Parole Board did not consider the mitigating factors presented and could not substantiate the accusation of a future likelihood of criminal behavior. The court, citing *Cestari* [New Jersey State Parole Board v. Cestari, 224 N.J. Super 534 (App.Div. 1988)], concluded that the Board's decision should be reversed because it was arbitrary and capricious. In this case, the court found even less of a factual foundation than in the *Cestari* and *Trantino* cases, and included with its remand instructions to establish the conditions for Price's parole within 15 days. *It is difficult to imagine what* ***more*** *Kevin Price could have done in prison to address his crime and the personal issues that were its context.*

PCR: Counsel's Failure to Interview Alibi Witness Calls for New Trial

[¶26.9] Will Alexander successfully persuaded his trial judge that the attorney representing him in his trial for robbery had been ineffective. The judge then remanded for a new trial on the grounds that the defendant's trial attorney, a public defender, did not inadequately investigate an alibi witness. The Attorney General then appealed the order granting Alexander's Post-Conviction Relief (PCR) petition, but the New Jersey Superior Court, Appellate Division affirmed the trial judge's order. [State v. Alexander, Civil No. A-4291-00T3 (decided 12-19-01)]

Facts. The defendant, Will Alexander, was identified by two out of the four occupants in a New Jersey apartment as being one of several intruders in a robbery, and as the shooter in a homicide. (One of the apartment's occupants was mortally wounded.) Alexander was later convicted in a jury trial, in which he was found guilty of a number of first, second, and third-degree felony charges.

After his conviction was upheld on direct appeal, Alexander filed a PCR petition on several grounds, including that his public defender did not investigate and call an alibi witness who could have put the defendant at a different place when the crime was committed. An evidentiary hearing was held, where both the testimony of the defense counsel at trial and the purported alibi witness was heard. Defense counsel admitted there was an interview request form to interview the alibi witness, but at the bottom of the form, it was marked cancelled. Since only an attorney can cancel an interview request, she said she must have made the cancellation. The reason she gave for canceling was she did not believe the witness could accurately recall where Alexander was during the time of the crime, because so much time had passed between the crime and the date Alexander was arrested. The witness recalled being interviewed by an investigator and telling him that Alexander was in her apartment babysitting her grandchildren when the crime was committed, but was later surprised when she was not called to testify in court. Based on the evidentiary hearing and the original trial record, Alexander's case was remanded for a new trial. The court's decision was based on the failure of counsel to interview an alibi witness before making the decision to not call her on the defendant's behalf.

Ineffective assistance standard. The appellate court affirmed the trial judge's decision citing the recent re-statement by the New Jersey Supreme Court of the standard for appellate review of a trial court decision.

> The aim of the review at the outset is rather to determine whether the findings made could reasonably have been reached on sufficient credible evidence in the record …When the reviewing court is satisfied that the findings and result meet this criterion, its task is complete and it should not disturb the result… [State v. Locurto, 157 N.J. 463 (1999), quoting State v. Johnson, 42 N.J. 146 (1964)]

The App.Div. agreed with the trial court's use of a "two-prong" approach for evaluating the ineffectiveness of counsel, that counsel did show an "objective standard of reasonableness" and that if it were not for counsel's errors, the proceedings would have had a different result. The court disagreed with the State's claim that defense counsel's choice to not interview the alibi witness was a "tactical decision." In fact, according to the appellate panel, there was no evidence that there was any communication between the investigator and defense counsel concerning the witness's interview. Additionally, the App.Div. recounted the contradictory testimony about the defendant's physical appearance, noting that all questions from the jurors focused on the identification issue.

Based on all of this, the appellate justices reasoned that the "two-prong" approach proved the ineffective assistance of defense counsel during the trial. First, defense counsel had the contact information for the alibi witness, yet stated in trial that no alibi witness would be used, because the testimony could not be trusted considering the passage of time. According to the appellate justices, this was clearly unreasonable because during the trial defense counsel said that two of the four witnesses in the apartment were mistaken in their identification of the defendant. Second, the court concluded that if it were not for counsel's mishandling of the alibi matter, the jurors could have had reasonable doubt about the identification of Alexander.

No Factual Basis for Plea

[¶26.10] In **State of New Jersey v. Felix Lebron,** the defendant appealed to the New Jersey Superior Court, Appellate Division, to challenge the propriety of his NERA sentence for sexual assaults on his former wife, and the denial of his earlier motion to withdraw his guilty plea. Lebron argued that the trial judge unduly influenced him in persuading him to plead guilty, and that he had been misled by the prosecutor and given misinformation: thus, he did not **knowingly** enter the guilty plea. He made the motion to withdraw his plea before he was sentenced, but was rebuffed by the trial judge. The App.Div., however, agreed with Lebron, vacated his convictions, and remanded the case to the trial court. [State v. Lebron, Docket No. A-6466-99T4, (decidedd March 28, 2002)]

Facts. Felix Lebron pled guilty to one count of second-degree sexual assault and one count of first-degree aggravated sexual assault for two incidents involving his former wife, from whom he was not yet divorced. Sexual assault in defined as the act of sexual penetration without the "affirmative and freely-given permission" of the victim, and aggravated sexual assault occurs when this act is committed during commission of another felony, in this case, burglary. One incident took place in Lebron's residence, after his wife came to pick up her mail, and the second took place in his wife's residence, to which he had a key, but no permission to enter. The incidents were separated by six weeks and followed a period during which Lebron and his wife had been regularly intimate. In both cases Lebron asked his wife for sex, she refused, they argued, struggled and then had sexual relations. Lebron suffers from epilepsy and depression and reported in his plea colloquy that he is "slow." The trial judge had told Lebron that "nobody's going to talk to you for forty-seven and one half years," and that he "may not see any sunlight" for this amount of time if convicted by a jury. Lebron argued in his appeal that there was no factual basis for his plea, that his plea was coerced, and his motion to withdraw should have been granted.

Adequate factual basis for the offense. The first issue considered by the court was whether Lebron had provided a sufficient factual basis in his plea colloquy to support his criminal guilt. It is well-established that a defendant must supply "a sufficient factual basis for the plea." [State v. Butler, 89 NJ 220 (1982)] Lebron's statement in response to the prosecutor's questions about the charge of sexual assault for the incident in his residence included his admission that his wife had said no more than once, but also his report that her final words were "that we can have sex but that this will be the last time while we're separated so I better enjoy it." The charge for the second incident rested on the state's contention that an inference could be made that Lebron entered his wife's residence without her permission with the intention of committing assault. The plea colloquy, however, showed that Lebron had gone to the house to discuss visitation after his former wife had failed to bring their child for a pre-arranged visit. The App.Div. found that in both incidents the colloquy did not provide sufficient facts for the guilty plea.

Necessary mental state. Furthermore, the court said the trial judge did not "adequately establish that defendant had the necessary mental state to enter a guilty plea." The failure of Lebron's lawyer to raise the question of his competence doesn't absolve the court of the need to make inquiry. Although the appellate justices reached the independent decision that Lebron did mentally comprehend the plea process, the court concedes nonetheless that a complete inquiry should have been made into his mental faculties. Coming to the question of coercion, the App.Div. agreed with Lebron that the trial judge did exert improper influence in persuading the defendant to plead guilty. The court found fault with the trial judge's gross exaggerations of the amount of prison time the defendant would face if he chose not to plead guilty. Some of the statements in the plea transcript could have understandably frightened the defendant into accepting the plea offer. The justices went one step further to note that whether the trial judge's addition was correct at the time was moot, since they had determined that the NERA charges were not supported by fact. The court also commented that, in situations like Lebron's, where the defendant does not initially want to plead guilty, the trial court must be sensitive to what it says in the defendant's presence so as not to exert undue influence in guilty pleas.

The appellate court concluded that the defendant's motion to withdraw his guilty plea should have been granted, especially since he moved to withdraw his plea before sentencing. The court vacated the convictions and the proceedings were remanded to the pre-plea phase.

GANG UNITS: 3D CIR. OKS NJ'S STGMU

[¶26.11] The New Jersey Department of Corrections (DOC) established the Security Threat Group Management Unit ("STGMU") for the same reasons set out in Massachussets: to limit security threat group activities and minimize assaults on staff and prisoners. Prisoners who are identified as members of a designated "threat group" and transferred to the unit are subjected to very restrictive conditions, including restrictions on freedom of expression about the religious beliefs of their group. In order to progress to less restrictive units, they are forced to participate in a behavior modification program, but the STGMU assignment may be indefinite. Members of the Five Percent Nation sued the DOC alleging violation of their due process and free exercise rights. The district court granted summary judgment to defendants and the Third Circuit Court of Appeals affirmed. [Fraise v. Terhune, 283 F. 3d 506 (3d Cir. 2002)]

The Third Circuit panel found that the unit did not violate the free exercise rights of prisoners, did not violate Equal Protections Clause, and did not violate due process. The court applied the *Turner* test and concluded that the prison regulation was reasonably related to penological interests. STGMU policy required that core members of the Five Percent Nation renounce their affiliation, but (somehow) concluded that they were free to hold on to their beliefs.

The court held that there was no violation of the Equal Protection Clause. When analyzing a violation of the Equal Protection Clause, the court applied the reasonable relationship standard to determine whether policy or prison regulation was reasonably related to the penological interests. The court held that there was a reasonable relationship between the policy and the concern with prison security that could justify the disparate treatment of the Five Percent Nation and the Sunni Muslims.

Finally, the circuit court held that the policy did not violate due process because no liberty interest created by the due process clause was impinged. Transfer to more restrictive conditions is within the terms of confinement contemplated by a prison sentence, according to the United States Supreme Court in *Sandin*. That decision held that transfer does not impose an atypical hardship in relation to "ordinary incidents of prison life." Therefore, the prisoners lacked a protected liberty interest and the STGMU policy is constitutional.

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