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Before the National Prison Rape Elimination Commission

New Orleans, December 6, 2007

The Role of Courts and Litigation in Regulating Prison and Jail Prevention of Sexual Violence and Misconduct

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I have been asked to focus my testimony on litigation and how it contributes to oversight of jails and prisons, in particular to incentivizing appropriate prison and jail supervisory practices and policies that minimize sexual misconduct and sexual violence behind bars. Litigation is an accountability mechanism operative in many spheres, of course, but whereas in most other areas of governmental activity, other such mechanisms have pride of place, we have as a polity largely failed to implement any other effective regulatory system to govern our burgeoning incarcerative apparatus. At least in many states prison and jail systems, litigation is one of the only reform or oversight tools available. It has, over the years, been very beneficial in that role, serving as an ameliorative force for improvement if not radical reinvention of detention and corrections policy. Its positive impact has, however, been partially undermined by the Prison Litigation Reform Act, passed a decade ago.

Generally speaking, civil rights litigation operates along three general regulatory paths: It promotes institution-specific regulation (court orders); encourages transparency and public accountability; and deters unconstitutional behavior, or, alternatively put, incentivizes prevention of unconstitutional misconduct. All three are relevant to litigation's evaluation in this as in other areas. Below, I present background on the operation of litigation relating to sexual violence and misconduct in jails and prisons.

It may be useful to preface my remarks by acknowledging the limits of prisoners' civil rights. Jails and prisons are only lightly regulated by the U.S. Constitution. The Eighth Amendment's ban on "cruel and unusual punishments" sets a low bar for the areas of prison life it reaches at all. Medical care, for example, need not be good, or even non-negligent; the Constitution forbids only care so deficient as to constitute "deliberate indifference" to the health of those incarcerated in jails and prisons.[1] The obligation to protect prisoners from sexual assault by other prisoners is similarly limited.[2]

Nonetheless, litigation proceeds. Among its leading topics in federal court are physical assaults by staff or by other prisoners, including sexual assaults; medical and mental health care; alleged due process violations relating to disciplinary sanctions; and more general living-conditions claims relating, for example, to nutrition or sanitation. Less frequent but still often seen are complaints about freedom of speech, free exercise of religion, and access to courts or mail. All these topics are the subjects of lawsuits of two very different types. A small but very important docket consists of cases involving larger groups of plaintiffs—all the prisoners in a

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[1] *Estelle v. Gamble*, 429 U.S. 97, 104 (1976).

[2] *Farmer v. Brennan*, 511 U.S. 825 (1994).

given facility, for example, or even in a given state. Most such group cases seek injunctive remedies, which obligate a facility or system to undertake various reforms going forward. (This is not to say that group damages actions are unheard of—most notably in a recent large crop of jail strip-search cases.) The vastly larger docket consists of suits brought by individuals, usually seeking damages but sometimes seeking an individualized kind of accommodation or change. A plaintiff in a jail case might, for example, allege that he was sexually victimized by another prisoner or a correctional officer, and seek damages for harm suffered or appropriate medical and mental health care going forward. Nearly all of the many thousands of cases federal and state prisoners file each year are of this individual type.

I. Group lawsuits.

Group lawsuits involving jails and prisons are prototypically injunctive lawsuits, seeking some kind of prospective reform of conditions. They always involve lawyers—often full-time prisoners' advocates, other times pro bono or even appointed counsel. They are extremely expensive to litigate, for both sides, and have grown a great deal more so in recent years. For example, a large case in California involving the Pelican Bay prison cost plaintiffs' counsel over $1 million in actual expenses and took them many thousands of hours of time. The prisoners do not pay, so it is the plaintiffs' lawyers who bear that expense, though if they win or settle, their fees—but not their expenses—are typically paid by the defendants. After plaintiffs won the Pelican Bay lawsuit, the California Department of Corrections was assessed several million in fees.[3] In total, the jail and prison group litigation docket looks a great deal like other types of civil rights injunctive practice.

For a large number of prison and jail systems, group litigation has had its effect in the most direct way possible—by a court order or settlement agreement, reached by litigation or negotiation and sometimes enforceable by contempt or other judicial action if need be. Such orders act as institution-specific regulation. At last published count, in 2000 (for prisons) and 1999 (for jails), Bureau of Justice Statistics data show that court orders governed 23% of the nation's state prisons, housing 39% of state prisoners, and 13% of the nation's local jails, housing 31% of the jail population.[4] These orders and agreements have varying profiles. They can apply to a wing of a facility, to an entire facility,[5] to a specified group of facilities or group of prisoners within a jurisdiction, or to all the jurisdiction's facilities.[6] A single order can govern

[3] Amy Stevens, *The 'Pro Bono' Payoff*, S.F. EXAMINER, Dec. 3, 1995, at A-12. The firm told a reporter that it planned to give $2.4 million to charity and keep the rest for costs. *Id.*

[4] These figures are derived from BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, ICPSR STUDY NO. 4021, CENSUS OF STATE AND FEDERAL ADULT CORRECTIONAL FACILITIES, 2000 (2005); BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, ICPSR STUDY NO. 3318, NATIONAL JAIL CENSUS, 1999 (2003). Both are available by study number at http://www.icpsr.umich.

[5] *See, e.g.*, *Balla v. Board of Corrections*, 595 F.Supp. 1558 (D. Id. 1984) (Idaho State Correctional Institution case, still open, involving, inter alia, crowding, medical care, and physical and sexual assault of prisoners by other prisoners).

[6] *See, e.g.*, *Lucas v. White*, Case No. C 96-02905, Private Settlement Agreement, Feb. 1998 (available as document PC-CA-9-1, at http://clearinghouse.wustl.edu) (setting out requirements for training and policy at BOP facilities).

many areas of prison life and policy,[7] one very crucial area of prison policy,[8] or something more minor in its importance. Over the years, there have been numerous court order cases seeking to reduce prisoner-on-prisoner sexual violence, and staff-on-prisoner sexual violence and misconduct. Many such cases and orders are collected and posted by the Civil Rights Litigation Clearinghouse.[9] I am attaching documents from two such disputes to my testimony: a settlement agreement in *Lucas v. White*, under which the federal Bureau of Prisons reformed its policies relating to sexual abuse of prisoners; and an injunctive order entered in *Little v. Shelby County* (in Nashville, Tennessee).[10]

It is clear that prisoners have gained much from these kinds of orders. For example, a case study of *Guthrie v. Evans*,[11] the Georgia State Prison case that ended in 1985, summarized its positive effects:

> "The inhuman practices and conditions at [Georgia State Prison] that the special monitor described in 1979 no longer exist. The reign of terror against inmates has ended. Today, guards do not routinely beat, mace, and shoot inmates. Inmates and guards no longer die from a lack of safety and protection. Guards can walk the cells without having to carry illegal knives and pickax handles to protect themselves. The medical, mental, nutritional, educational, and recreational needs of inmates are now provided for. . . . Those changes were the result, in large part if not solely, of the *Guthrie* litigation."[12]

Prison memoirs and writings confirm the point. For example, a 1979 article by Wilbert Rideau, then the (prisoner) editor of the Louisiana State Penitentiary's *Angolite*, gave credit to court order litigation for reducing sexual violence:

> "While [rapes] used to be a regular feature of life here at the Louisiana State Penitentiary, they are now a rare occurrence. Homosexuality still thrives, but the

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[7] *See, e.g.*, *Cason v. Seckinger*, 231 F.3d 777 (11th Cir. 2000) (describing longstanding case and court orders dealing with "(1) pervasive sexual abuse of female inmates by staff; (2) pervasive sexual harassment of female inmates by staff; (3) an inadequate classification system; (4) use of excessive force, physical violence, and verbal abuse; (5) the illegal use of stripping and restraints on mentally ill inmates; (6) violations of basic privacy rights and illegal stripping; (7) enforcement of existing orders; (8) inadequate staffing; (9) life-threatening structural and physical plant conditions; (10) deliberately indifferent medical, dental, and mental health care; (11) deficient food and food services; (12) inadequate access to the courts; (13) unlawful visitation, mail, and telephone practices; (14) inadequate fire safety; (15) inadequate occupational health and safety; (16) insufficient vocational and educational programs; (17) lack of exercise and recreation, and unjustified idleness; (18) lack of meaningful regulations on personal property; (19) abusive protective custody procedures; (20) unlawful racial and religious discrimination; (21) inadequate disciplinary and grievance procedures policies; (22) overcrowding; (23) the adverse psychological effects of detention; and (24) inadequate mental health therapy and counseling").

[8] *See, e.g.*, *Lucas v. White*, *supra* note 6.

[9] *See* Civil Rights Litigation Clearinghouse, http://clearinghouse.wustl.edu; on the "search" page. In the case categories "prison conditions" and "jail conditions," issue searches for "sex with staff; sexual harassment by staff" and "sexual abuse by residents/inmates" are available.

[10] These documents are available at http://clearinghouse.wustl.edu. The *Lucas* agreement is document PC-CA-0009-0001; the Shelby County document is JC-TN-0004-0003.

[11] 93 F.R.D. 390 (S.D. Ga. 1981).

[12] BRADLEY STEWART CHILTON, PRISONS UNDER THE GAVEL: THE FEDERAL COURT TAKEOVER OF GEORGIA PRISONS 108–09 (1991).

> violence and forced slavery that used to accompany it have been removed. In 1976, Federal District Court Judge E. Gordon West ordered a massive crackdown on overall violence at the prison, which paved the way for the allocation of money, manpower, and sophisticated electronic equipment to do the job. Since then, *any* kind of violence at all between inmates elicits swift administrative reprisal and certain prosecution. This, more than anything else, has made Angola safe for the average youngster coming into the prison today."[13]

And many—though by no means all—other sources concur. A prison official in Kentucky, describing a major court-order case[14] about conditions at the Kentucky State Reformatory, explained that the consent decree in the case:

> "changed the whole system. It made the system unified. We had a cabinetwide policy and then institution policies clarified those. . . . That's the guideline by which you operate and function. . . . We have all this training. The training uses all the policies and procedures, explains the importance of the policies and procedures."[15]

The decrees have professionalized and bureaucratized by the terms they imposed, but also by their impact on who was interested in becoming or qualified to become an administrator. As a prisoner involved in the same Kentucky litigation observed:

> "But you know what? Guys like those old-time wardens can never be warden at LaGrange any more. That's the beautiful thing about that consent decree. It made that system so damn sophisticated that you just can't walk out of the head of a holler in Hazard, out of the logging woods, an' walk right in and be the warden."[16]

Moreover, the effects of court orders and settlement agreements are by no means limited to the systems in which they are entered. Whether they are litigated or negotiated, orders and agreements cast a marked general deterrent shadow on systems hoping to avoid them. And their impact is magnified, as well, when other systems imitate them not out of fear but rather out of a more positive interest.

In short, court orders have had a major impact on the nation's jails and prisons, both by the regulating they have accomplished directly and by their indirect effects. This is true with respect to sexual violence and misconduct as it is in other areas.

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[13] Wilbert Rideau, *The Sexual Jungle* (1979), *in* WILBERT RIDEAU & RON WIKBERG, *LIFE SENTENCES: RAGE AND SURVIVAL BEHIND BARS* 73, 94 (1992). The case mentioned was *Williams v. Edwards*, No. 71-98 (M.D. La.); the order in question was affirmed by the Court of Appeals, 547 F.2d 1206, 1213–14 (5th Cir. 1977).

[14] *Thompson v. Bland*, No. Civ. 79-0092 (W.D. Ky.), *consolidated with Kendrick v. Bland*, No. Civ. 76-0079 (W.D. Ky.). For the first decree in the case, see *Kendrick v. Bland*, 586 F. Supp. 1536 (W.D. Ky. 1984). Information about this litigation is available at the Civil Rights Litigation Clearinghouse, http://clearinghouse.wustl.edu; see case PC-KY-0007.

[15] Lloyd Anderson, *Voices from a Southern Prison* 202 (2000) (quoting lawyer Barbara Jones).

[16] *Id.* at 207.

II. Individual lawsuits

Individual lawsuits, usually for money damages, are less directly regulatory than court orders or settlements. But in two different ways, suits for money serve accountability and regulatory functions. The first way is by promoting transparency and public accountability. Both under the discovery rules and during trial, lawsuits open a window into the closed world of jails and prisons, allowing judges and the public to find out what occurs behind the prison fences; they can bring about sustained publicity, which in turn attracts lawmaker and public attention. Second, damage actions have a deterrent impact; they give administrators an incentive to comply with constitutional norms in order to avoid liability. Both methods operate importantly in the realm of sexual misconduct and violence.

For an example of the first, transparency/accountability, point, consider the trial in *Johnson v. Johnson*, a case brought by the ACLU charging Texas authorities with deliberate indifference to the rape and abuse of plaintiff Roderick Johnson.[17] The jury found for the defendants in the case—but nonetheless it was the subject of dozens of newspaper articles and brought rare sustained attention to the topic of prison sexual violence. This kind of attention facilitates and encourages public oversight, and is necessary, if not sufficient, for reform.

The second point, deterrence, is important in this arena as well. For example, some observers attribute a decline in rape in one prison system to this effect:

> "One [reason for the decline] is the willingness of courts to hear inmates' lawsuits against states. This trend, which began in the early 1970s, is said to have forced states to make the protection of vulnerable prisoners a high priority. Protective custody (PC) is now a big deal. Inmates who ask for protection but fail to get it can make expensive claims."[18]

Clearly, this assessment does not hold true for all prisons. But at least sometimes, the prospect of damages pushes prison systems towards useful protective regulation.

At the same time, it is important to understand the limits of damage actions. One would expect prisoner plaintiffs to have extremely low success rates, as they do, given the limited legal rights those held in jail and prison can enforce and the obstacles to their effective litigation or settlement of their cases. Particularly important among the obstacles are the unavailability of counsel—nearly 96% of their federal civil cases, prisoners have no lawyer. The counseled sliver of the docket is far more successful for its plaintiffs. Among cases terminated in 2000, counseled cases were three times as likely as pro se cases to have recorded settlements, two-thirds more likely to go to trial, and two-and-a-half times as likely to end in a plaintiff's victory at trial. One-quarter of prisoner civil rights settlements and one-third of plaintiffs' trial victories occurred in the four percent of cases with counsel.[19] The point is that with a lawyer, prisoners cases succeed at a more ordinary rate, but without a lawyer, it is very difficult for prisoners to either assess or pursue their cases.

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[17] For information, see the Civil Rights Litigation Clearinghouse, http://clearinghouse.wustl.edu, case PC-CA-8.

[18] TED CONOVER, NEWJACK: GUARDING SING SING 263 (2000).

[19] *See* Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1609-1611 (2003).

Similarly, it makes sense that even those few prisoner plaintiffs who do manage to win their cases would receive very low damages. After all, the ordinary rules of tort damages limit compensation. Unlike unincarcerated plaintiffs, injured prisoners who remain behind bars after the injury have no (or very low) lost wages and no medical expenses. It is a commonplace that juries tend to give noneconomic damages that are correlated with the economic damages they find.[20] This approach can net most prisoner plaintiffs virtually nothing[21] in even extremely serious cases. In addition, in many cases one would expect juries to lowball prisoners' nonwage damages as an expression of disregard for them—even when liability is clear or even egregious. And the absence of counsel is key, as well. For pro se cases, a prisoner who is together enough to succeed in persuading a judge or jury on liability faces all the more skepticism about the magnitude of the harm he experienced. Lawyers who handle these prisoner civil rights cases report that these obstacles to large recovery are not completely insurmountable. For example, in cases in which the plaintiffs are the bereaved relatives of dead or comatose prisoners, a big verdict is possible if the lawyer is able to focus the jury's attention entirely on the outrageousness of the alleged misconduct, rather than on the small economic losses. But these kinds of cases are not typical, and it takes a good deal of expertise to try them in a way that neutralizes the ordinary reactions of jurors.

In line with these expectations, the vast majority of prisoners' lawsuits do fail, and even those that do succeed tend to have very low damages. To use one year's outcomes as an example, in 1995, over 80% of prisoners' civil cases in federal district court were dismissed rather than settled or tried (the corresponding figure for the non-prisoner federal docket was 32%). The settlement rate was, likewise, extremely low (6% of cases, compared to 37% in other case types), as was the plaintiffs' trial victory rate (10% of trials, compared to 45% for other case types' plaintiffs).[22] And the evidence is that prisoner plaintiffs have been faring even worse in more recent years, at least in the cases that do not go to trial.[23] When prisoners do win or settle their cases, the damages tend to be very low. In 1993, for example, prisoner plaintiffs won 100 federal trials. The median award among them was only $1,000. One of these actions resulted in a very large award; $6.5 million. The average among the others was $18,800—obviously much higher than the median, indicating that most awards were very small, but some few were substantially higher. And the low level of liability and damages inevitably dampens the deterrent impact of damage action litigation.

In total, damage actions likely have a limited but important effect encouraging appropriate protection of prisoners from sexual violence.

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[20] *See* Herbert M. Kritzer, *Contingent-Fee Lawyers and Their Clients: Settlement Expectations, Settlement Realities, and Issues of Control in the Lawyer-Client Relationship*, 23 L. & SOC. INQUIRY 795, 817 (1998).

[21] One of the few lawyers who actually takes prisoner cases on contingency fee credits the large verdicts lawyers in her firm have won to their efforts to get juries to step outside traditional damages: "You can't take a traditional approach to presenting damages in these cases, because there just aren't any. The plaintiffs have low if any earnings potential; they weren't supporting anyone. So we look instead to show the jury how outrageous the defendants' conduct was." Telephone interview of Elizabeth Koob, plaintiffs' attorney specializing in prisoner damage actions (May 22, 2002).

[22] *See* Schlanger, *Inmate Litigation*, *supra* note 19, at 1598, tbl. II.B.

[23] *See id.* at 1658-1664.

III. The Prison Litigation Reform Act

But while both group and individual cases have been and remain useful spurs to prison and jail reform, the Prison Litigation Reform Act,[24] enacted in 1996, has undermined those effects.

A. The PLRA and Court Orders

First, the PLRA has made it harder for plaintiffs to obtain new injunctive relief. Under the PLRA not only must consent decrees be narrowly tailored to address the alleged constitutional violations, but the violation must itself be the subject of a court "finding."[25] Thus either a trial or some sort of stipulation relating to liability is necessary to settle a jail or prison case with a court-enforceable decree. Unsurprisingly, defendant prison officials are not happy to agree to such stipulations, which may even subject them to damages in suits by other claimants. There are two possible results, both problematic. The first is wasteful litigation when a settlement would otherwise be readily at hand; the second is settlements that are unenforceable and therefore less effective.

Simultaneously, the PLRA has made it easier for defendants to end old decrees, even when they have not complied with them. Before the PLRA's enactment, the law on prospective relief in civil rights cases left such relief in effect until defendants fully complied with the judgment and satisfied the court (or the plaintiffs, who could choose not to oppose the relevant motion) that they were unlikely to relapse, even if oversight ceased.[26] The PLRA opened prison and jail orders to far more ready challenge. The statute entitles defendants to "immediate termination" of any prospective relief two years after that relief is granted, unless the court finds "current and ongoing violation" of federal rights. And defendants can renew their request for termination yearly.[27] Because nearly all correctional court orders are more than two years old, the PLRA allows most counties, cities, or states unhappy with an order to simply move to terminate it. Sure enough, between 1996 and 2000, a large number of jurisdictions filed termination motions. Plaintiffs' counsel were successful in defending some of the old orders, for a time by attacking the PLRA's constitutionality (until the Supreme Court effectively decided the issue[28]), and also by litigating the ongoing need for conditions remedies. Inevitably, however, plaintiffs lost some of those contests, and the victories they achieved came at the cost of new projects. Thus, by forcing inmates' advocates into rear-guard actions that were only partly successful and that took the place of assaults on additional targets, the PLRA's immediate termination provision both shrank the stock of old orders and slowed the flow of new ones.

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[24] Pub. L. No. 104-134, §§ 801–10, 110 Stat. 1321, 1321-66 to 1321-77 (1996) (codified at 11 U.S.C. § 523 (2000); 18 U.S.C. §§ 3624, 3626 (2000); 28 U.S.C. §§ 1346, 1915, 1915A, 1932 (2000); 42 U.S.C. §§ 1997a–1997h (2000)). The PLRA was part of the Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321.

[25] 18 U.S.C. §§ 3626(a)(1)(A); (c)(1).

[26] *See Louisiana v. United States*, 380 U.S. 145, 154 (1965) (remarking that courts have "not merely the power but the duty to render a decree which will so far as possible eliminate the [unlawful] effects of the past as well as bar like [illegality] in the future").

[27] 18 U.S.C. § 3626(b)(1) (2000).

[28] *Miller v. French*, 530 U.S. 327 (2000).

To be sure, notwithstanding the PLRA, the *threat* of litigated intervention remains very salient, because important and highly public new orders continue to be entered. In California's prison system, for example, the entire medical care operation came under receivership in 2005[29]—the most intrusive court order regulation possible, in which the state's authority has been given to a private party appointed by the court. Nonetheless, there is currently substantially less court-order regulation than prior to the PLRA. In 1995, only in about a fifth of states did correctional authorities report that between 0 and 10% of state prison population was housed in entities subject to court-order regulation. By 2000, a *majority* of state prison systems indicated this light degree of coverage.[30]

B. The PLRA and Damage Actions

In an even sharper way, the PLRA has further limited the already circumscribed ability of prison and jail damage actions to improve conditions of confinement. The key components of the statute in this respect are its administrative exhaustion provision and its physical injury provision.

Administrative Exhaustion.

Prior to the PLRA, inmates seeking to file civil rights lawsuits (like other civil rights plaintiffs) generally were not required to first run their complaints through whatever grievance system their incarcerating authority had implemented.[31] The PLRA changed that rule. The PLRA's exhaustion provision states: "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."[32] The provision appears harmless enough. Who could object, after all, to a regime in which corrections officials are given the first opportunity to respond to and perhaps resolve prisoners' claims?

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[29] *See Plata v. Schwarzenegger*, No. C-01-1351 (N.D. Cal. Oct. 3, 2005) (findings of fact and conclusions of law re appointment of receiver) (available as document PC-CA-0018-007 at http://clearinghouse.wustl.edu). Other information about and filings from this case are available at http://clearinghouse.wustl.edu, under case no. PC-CA-0018.

[30] *See* Margo Schlanger, *Civil Rights Injunctions Over Time: A Case Study of Jail and Prison Court Orders*, 81 N.Y. U. L. REV. 550, 581-582 (2006).

[31] *See McCarthy v. Madigan*, 503 U.S. 140, 149–50 (1992) (exhaustion of federal Bureau of Prisons grievance processes not required for filing civil rights action); *Patsy v. Bd. of Regents*, 457 U.S. 496, 502 (1982) (exhaustion of state administrative processes not required prior to initiation of action under section 1983). Under the Civil Rights of Institutionalized Persons Act (CRIPA), if district courts deemed exhaustion "appropriate and in the interests of justice," incarcerating authorities who had obtained federal certification of their grievance system as "plain, speedy, and effective" could insist that civil rights actions brought by inmates be stayed pending exhaustion. 42 U.S.C. § 1997e(a)(1) (1988) (superseded by PLRA, Pub. L. No. 104-134, § 803(d), 110 Stat. 1321, 1321–71); *see also* Donald P. Lay, *Exhaustion of Grievance Procedures for State Prisoners Under § 1997e of the Civil Rights Act*, 71 IOWA L. REV. 935, 937–42 (1986) (discussing CRIPA exhaustion rules). With so small a prize (and because they objected to the statutory certification requirements), few correctional jurisdictions bothered to seek certification. *See* JUDICIAL CONFERENCE OF THE U. S., REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 49 (1990) (explaining that "few states have sought and obtained certification under this statute"); Note, *Resolving Prisoners' Grievances Out of Court: 42 U.S.C. § 1997e*, 104 HARV. L. REV. 1309, 1310–11 (1991) (discussing certification procedure and Federal Courts Study Committee's recommendations for revision).

[32] 42 U.S.C. § 1997e(a).

The problem is that in many jails and prisons, administrative remedies are, unfortunately, very difficult to access. Deadlines may be very short, for example, or the number of administrative appeals required very large.[33] The requisite form may be repeatedly unavailable,[34] or the prisoner may fear retaliation for use of the grievance system (which often require that prisoners get grievance forms from, or hand them to the very officer whose conduct is the subject of their complaint).[35] Sometimes, the grievance system seems not to cover the complaint the prisoner seeks to make.[36] Or a prisoner may be unable to fill out a grievance because he is in the hospital.[37]

Nonetheless, beginning six years after the PLRA's enactment, first some of the Courts of Appeals,[38] and finally the Supreme Court,[39] held that the PLRA forever bars even meritorious claims from court if an inmate has failed to comply with all of the many technical requirements of the prison or jail grievance system. This means that if prisoners miss deadlines that are often less than fifteen days and in some jurisdictions as short as two to five days,[40] a judge cannot consider valid claims of sexual assault. Moreover, the PLRA's exhaustion requirement has been held to grant constitutional immunity to prison officials based on understandable mistakes by lay people operating under rules that are often far from clear. Wardens and sheriffs routinely refuse to engage prisoners' grievances because those prisoners commit minor technical errors, such as using the incorrect form,[41] sending the right documentation to the wrong official,[42] failing to name a relevant official in the complaint (even if prison administrators have actual knowledge of that official's role in the incident),[43] or failing to file separate forms for each issue, even if the

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[33] S*ee* Brief for Jerome N. Frank Legal Services Organization of the Yale Law School as Amicus Curiae Supporting Respondent, *Woodford v. Ngo*, 126 S. Ct. 2378 (2006) (No. 05-416) at 6-13, 2006 WL 304573 at *6-*13 and A1-A7 for a survey of prison and jail grievance policy deadlines.

[34] *See, e.g., Latham v. Pate*, 2007 WL 171792 (W.D. Mich. 2007) (dismissing suit due to tardy exhaustion in case in which inmate alleged beating; inmate maintained that he had been placed in segregation and administrative segregation immediately following assault and that "officers did not provide him with the grievance forms").

[35] *See, e.g., Umstead v. McKee*, 2005 WL 1189605 (W.D. Mich. 2005) ("it is highly questionable whether threats of retaliation could in any circumstances excuse the failure to exhaust administrative remedies"); *Garcia v. Glover*, 197 Fed. Appx. 866, 867 (11th Cir. 2006) (refusing to excuse non-exhaustion in case in which inmate alleged that he had been beaten by five guards, despite the fact that prisoner alleged that he feared he would be "killed or shipped out" if he filed an administrative grievance).

[36] *See, e.g., Marshall v. Knight*, 2006 WL 3714713 (N.D. Ind. 2006) (dismissing, for failure to exhaust, plaintiff's claim that prison officials retaliated against him in classification and disciplinary decisions, even though prison policy dictated that no grievance would be allowed to challenge classification and disciplinary decisions); *Benfield v. Rushton*, 2007 WL 30287 (D.S.C. 2007) (dismissing suit by prisoner who alleged that he was repeatedly raped by other inmates, due to untimely filing of grievance; prisoner had explained that he "didn't think rape was a grievable issue").

[37] *See, e.g., Washington v. Texas Department of Criminal Justice*, 2006 WL 3245741 (S.D. Tex. 2006) (dismissing plaintiff's claim for failure to file a grievance even though he was hospitalized and medically unable to file during the time allowed by state policy).

[38] *See Pozo v. McCaughtry*, 286 F.3d 1022 (7th Cir. 2002).

[39] *Woodford v. Ngo*, 126 S. Ct. 2378 (2006).

[40] *Woodford*, 126 S. Ct. at 2402 (Stevens, J., dissenting).

[41] *See, e.g., Richardson v. Spurlock*, 260 F.3d 495, 499 (5th Cir. 2001).

[42] S*ee, e.g., Keys v. Craig*, 160 Fed.Appx. 125 (3d Cir. 2005).

[43] S*ee, e.g., Williams v. Hollibaugh*, 2006 WL 59334, at *5-*6 (M.D. Pa. 2006).

interpretation of a single complaint as raising two separate issues is the prison administration's.[44] Each such misstep by a prisoner bars consideration of even an otherwise meritorious civil rights action.[45]

Far from encouraging correctional officials to handle the sometimes frivolous but sometimes extremely serious complaints of inmates, the PLRA's exhaustion rule actually provides an incentive to administrators in the state and federal prison systems and the over 3000 county and city jail systems to fashion ever higher procedural hurdles in their grievance processes. After all, the more onerous the grievance rules, the less likely a prison or jail, or staff members, will have to pay damages or be subjected to an injunction in a subsequent lawsuit.[46] Can anyone reasonably expect a governmental agency to resist this kind of incentive to avoid merits consideration of grievances? The officials in question are a varied group—elected jailers and sheriffs, appointed jail superintendents, professional wardens, politically appointed commissioners. What they all have in common is an understandable interest in avoiding adverse judgments against themselves or their colleagues. Because even when prison and jail administrators *want* to resolve a complaint on its merits, the PLRA discourages them from doing so, it actually undermines the very interest in self-governance Congress intended to serve.[47]

Moreover, courts have been extremely rigorous in their application of the exhaustion requirement, refusing the kinds of exceptions that are typically available under the exhaustion doctrine in administrative law. For example, one court recently held that "The PLRA does not excuse exhaustion for prisoners who are under imminent danger of serious physical injury, much less for those who are afraid to confront their oppressors."[48] A rule requiring administrative exhaustion, and punishing failure to cross every *t* and dot every *i* by conferring constitutional immunity for civil rights violations, is simply unsuited for the circumstances of prisons and jails, where physical harm looms so large and prisoners are so ill equipped to comply with legalistic rules.

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[44] *Harper v. Laufenberg*, 2005 WL 79009, at *3 (W.D. Wis. 2005).

[45] *See* Giovanna E. Shay & Johanna Kalb, *More Stories of Jurisdiction-Stripping and Executive Power: The Supreme Court's Recent Prison Litigation Reform Act (PLRA) Cases*, 29 CARDOZO L. REV. 291 (2007), *available at* www.cardozolawreview.com/PastIssues/29.1_shay_kalb.pdf (reporting data on how many cases have been dismissed on exhaustion grounds post-*Woodford*: "In a survey of reported cases citing *Woodford*, in the cases in which the exhaustion issue was decided, the majority were dismissed entirely for failure to exhaust. All claims raised in the complaint survived the exhaustion analysis in fewer than 15% of reported cases.").

[46] There is evidence that prisons and jails have headed in this direction. For example, in July 2002, in *Strong v. David*, 297 F.3d 646 (7th Cir. 2002), the Seventh Circuit reversed the district court's dismissal of a case for failure to exhaust; in rejecting the defendants' argument that the plaintiff's grievances were insufficiently specific, the court noted that the Illinois prison grievance rules were silent as to the requisite level of specificity. Less than six months later, the Illinois Department of Corrections proposed new regulations that provided:

> The grievance shall contain factual details regarding each aspect of the offender's complaint including what happened, when, where, and the name of each person who is the subject of or who is otherwise involved in the complaint.

ILL. ADMIN. CODE tit. 20, § 504.810(b); *see* 26 Ill. Reg. 18065, at § 504.810(b) (Dec. 27, 2002) (proposing amendment).

[47] In fact, if an agency chooses to entertain an untimely grievance that merits examination, the agency is barred from asserting a failure-to-exhaust defense at later time. *Riccardo v. Rausch*, 375 F.3d 521, 524 (7th Cir. 2004), cert. denied, 125 S. Ct. 1589 (2005).

[48] *Broom v. Rubitschun*, 2006 WL 3344997 (W.D. Mich. 2006).

In short, by cutting off judicial review based on an inmate's failure to comply with his prison's own internal, administrative rules—regardless of the merits of the claim—the PLRA exhaustion requirement undermines external accountability. Still more perversely, it actually undermines internal accountability, as well, by encouraging prisons to come up with high procedural hurdles, and to refuse to consider the merits of serious grievances, in order to best preserve a defense of non-exhaustion. Ideally, grievance systems actually improve agency responsiveness and performance, by helping corrections officials to identify and track complaints and to resolve problems.[49] But the PLRA's grievance provision instead encourages prison and jail officials to use their grievance systems in another way—not to solve problems, but to immunize themselves from future liability. Judicial oversight of prisoners' civil rights is essential to minimize violations of those rights, but the PLRA's exhaustion provision arbitrarily places constitutional violations beyond the purview of the courts.

It would be relatively simple to achieve the legitimate goal of allowing prison and jail authorities the first chance to solve their own problems, without creating the kinds of problems the PLRA has introduced. The exhaustion provision should not be eliminated, but rather amended to require that prisoners' claims be presented in some reasonable form to corrections officials prior to adjudication, even if that presentment occurs after the prisons' grievance deadline. Filed cases could be stayed for a limited period of time to allow for administrative resolution.

Physical injury.

The PLRA provides that inmate plaintiffs may not recover damages for "mental or emotional injury suffered while in custody without a prior showing of physical injury."[50] Many courts have held that the provision covers all personal injury, including violations of non-physical constitutional rights.[51] Moreover, although the case law is far from uniform, some courts have deemed sexual assault not to constitute a "physical injury" within the meaning of the PLRA. In *Hancock v. Payne*,[52] a number of male prisoners alleged that over several hours, a corrections officer sexually assaulted them. "Plaintiffs claim that they shared contraband with [the officer] and that he made sexual suggestions; fondled their genitalia; sexually battered them by sodomy, and committed other related assaults." The plaintiffs further complained that the officer "threatened Plaintiffs with lockdown or physical harm should the incident be reported." The district court granted summary judgment in part to the defendants. One of the grounds for this defense victory was the physical injury requirement. The federal district court said, "the

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[49] *See* LYNN S. BRANHAM, ET AL., LIMITING THE BURDENS OF PRO SE INMATE LITIGATION: A TECHNICAL-ASSISTANCE MANUAL FOR COURTS, CORRECTIONAL OFFICIALS, AND ATTORNEYS GENERAL (American Bar Association Criminal Justice Section 1997).

[50] 42 U.S.C. § 1997e(e).

[51] *See, e.g.*, *Thompson v. Carter*, 284 F.3d 411, 416-17 (2d Cir. 2002) (no compensation available for violation of due process rights); *Allah v. Al-Hafeez*, 226 F.3d 247, 250 (3d Cir. 2000) (no compensation available for violation of religious rights); *Royal v. Kautzky*, 375 F.3d 720, 722-23 (8th Cir. 2004) (no compensation available for retaliation for exercise of free speech rights); *Searles v. Van Bebber*, 251 F.3d 869, 876 (10th Cir. 2001) (no compensation available for violation of religious rights); *Davis v. District of Columbia*, 158 F.3d 1342, 1348 (D.C. Cir. 1998) (no compensation available for violation of constitutional privacy rights). *But see Cannell v. Lightner*, 143 F.3d 1210, 1214-15 (9th Cir. 1997) (stating that PLRA "does not preclude actions for violations of First Amendment rights.").

[52] 2006 WL 21751 (S.D. Miss.).

plaintiffs do not make any claim of physical injury *beyond the bare allegation of sexual assault*." In other words, in the view of this district court, not even coerced sodomy (which was alleged) constituted physical injury. Though some other courts have decided the question differently, the *Hancock* court is not alone in reaching this conclusion.[53] This outcome exists in sharp tension with Congress's efforts to eliminate sexual violence and coercion behind bars by passing the Prison Rape Elimination Act.[54]

The point is that the PLRA's ban on awards of compensatory damages for "mental or emotional injury suffered while in custody without a prior showing of physical injury" has made it far more difficult for prisoners to enforce any non-physical rights and to seek compensation for any mental rather than physical harm, no matter how intentionally, even torturously, inflicted. The PLRA has left the availability of compensatory damages for the constitutional violation of coerced sex an open question. It has thereby undermined the important norm that such infringements of prisoners' rights are unacceptable.

IV. Conclusion.

Lawsuits brought by individual prisoners and by groups of prisoners have been an important, if limited, source of accountability, oversight, and regulation relating to sexual violence and misconduct in prisons and jails. They continue to be important, though their effectiveness has been undermined in recent years by the Prison Litigation Reform Act.

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[53] *See Smith v. Shady*, 2006 WL 314514 at *2 (M.D. Pa. 2006) ("Plaintiff's allegations in the complaint concerning Officer Shady grabbing his penis and holding it in her hand do not constitute a physical injury or mental symptoms."). *See generally* DEBORAH M. GOLDEN, THE PRISON LITIGATION REFORM ACT – A PROPOSAL FOR CLOSING THE LOOPHOLE FOR RAPISTS (June 2006) *available at* www.acslaw.org/files/Golden%20-%20Rape%20and%20PLRA%20white%20paper.pdf. *But see Liner v. Goord*, 196 F.3d 132, 135 (2d Cir. 1999) (sexual assault constitutes physical injury within the meaning of the PLRA).

[54] 42 U.S.C. §§ 15602 et seq.

Lucas v. White
PC-CA-009-001

IN THE UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

ROBIN LUCAS, ET AL., Plaintiffs, vs. O. IVAN WHITE, ET AL., Defendants.	Case No. C 96-02905 THE PRIVATE SETTLEMENT AGREEMENT

INTRODUCTION

Former and current Bureau of Prisons inmates Robin Lucas, Register Number 87132-011, Valerie Mercadel, Register Number 08463-085, and Raquel Douthit, Register Number 15004-057, filed this action on August 13, 1996 seeking damages and injunctive relief from present and former Bureau of Prisons officials. On or about August 13, 1996, each plaintiff also filed an administrative claim for damages against the United States under the Federal Torts Claim Act, 28 U.S.C. §§ 1346(b) and 2671 et seq., which was denied on July 25, 1997. On October 1, 1997, plaintiffs amended their complaint to add a claim for damages against the United States under the Federal Tort Claims Act and to add the following defendants in their official capacities only: Kathleen M. Hawk, Director, BOP; Constance Reese, Warden, FCI Dublin, substituting for Warden Hayes in his official capacity, only; Margaret Harding, Warden, FCI-Danbury; L.R. Greer, Warden, FCI Tallahassee; and Dr. Peter M. Carlson, Director, Western Region, substituting for O. Ivan White in his official capacity.

Plaintiffs allege, inter alia, that while they were in the custody of the Bureau of Prisons and incarcerated at the Federal Detention Center, Dublin, California and Federal Correctional Institution, Dublin, California, they were subjected to a "pattern and practice of sexual assaults, intimidation, physical, sexual, and verbal abuse, threats of violence, sexual harassment, invasions of privacy, and other violations of law," including retaliation for their complaints of unlawful conduct. The parties have participated in mediation since December 16, 1996;

it is pursuant to that process that this agreement arises. By stipulation of the parties and order of the Court, defendants have not answered the Complaint or the Amended Complaint pending the final outcome of the mediation process.

I. CONDITIONS

A. The parties recognize that 18 U.S.C. § 3626 limits prospective relief via consent decree to that necessary to redress particular inmates' rights. The parties agree that this settlement agreement is not a consent decree qualifying under the Prison Litigation Reform Act of 1995 for judicial enforcement.

B. The parties agree that this settlement does not constitute an admission by either the United States or the individual defendants of the truth of the allegations contained in the complaint.

C. The Bureau of Prisons' agreement to the terms in this settlement is undertaken in good faith to redress plaintiffs' concerns arising from certain actions alleged to have occurred at FCI Dublin. This document embodies the following agreement: The Bureau of Prisons promises to adopt and implement certain policies and procedures designed to reduce the risk to female prisoners of sexual assaults and harassment by correctional staff and male prisoners and to provide appropriate programming, counseling and services to female prisoners who are victims of sexual assault. The United States agrees to pay damages to Plaintiffs in settlement of each of their FTCA claims, as described in Section IV of this agreement. In return, Plaintiffs agree to dismiss the FTCA claims with prejudice, to release all claims against the individual capacity defendants for damages

alleged to arise out of the incidents described in the complaint, and to dismiss their injunctive relief claims subject to 18 U.S.C. § 3626(c)(2)(a), pending BOP's performance of its obligations in this Agreement which are to be completed by or before June 30, 1999, at which time the injunctive claims shall be dismissed with prejudice.

D. The parties understand and agree that to the extent that this Agreement requires changes in BOP policy affecting bargaining unit employees, such changes are subject to negotiation with the labor union representing the affected employees.

II. CHANGES IN BOP POLICIES AND PROCEDURES

A. Introduction And Procedures

1. This agreement is not a consent decree qualifying under the Prison Litigation Reform Act of 1995 for judicial enforcement but is instead a private settlement agreement, as described in 18 U.S.C. § 3626(c), and defined in 18 U.S.C. § 3626(g)(6). As such, the parties agree that the "terms of [the] agreement are not subject to court enforcement other than the reinstatement of the civil proceeding that [this] agreement settled." 18 U.S.C. § 3626(c)(2)(A). In conformance with the PLRA, the parties agree jointly to inform the Court that they have entered into a "PLRA private settlement agreement" and to request that the Court issue an order dismissing this action.

2. This agreement is undertaken in good faith to resolve the concerns of Plaintiffs in respect of the effects that operations at FCI Dublin will have upon other inmates at that facility, and the BOP Official Capacity Defendants (hereinafter

"BOP") undertake in good faith to ameliorate those concerns. This agreement also seeks to address the concerns of the two Plaintiffs who remain in the custody of the Bureau of Prisons in respect of their requests for injunctive relief.

B. The J-2 Special Housing Unit At FCI Dublin

1. Female inmates will not be housed in the J-2 Special Housing Unit of the Federal Detention Center in Dublin absent circumstances which would require the Warden temporarily to make such housing assignments during a correctional or law enforcement emergency, natural disaster, or any other emergency situation in which such assignments are approved by the Regional Director.

2. In each report provided pursuant to paragraph IX of this Agreement, BOP will indicate whether or not female inmates were housed in the J-2 Special Housing Unit at FCI Dublin during the period since the previous report and will indicate whether male inmates were simultaneously housed in the J-2 SHU at the time.

C. Confidential Mechanism to Report Sexual Assaults

FCI Dublin inmates, and plaintiffs Mercadel and Douthit, will have the telephone number of the Office of Inspector General of the Department of Justice added to their Inmate Telephone monitored calling lists, without affecting their currently approved lists.

D. Independent Consultant for Training Purposes

1. In order to assist with the review and development of training programs, the BOP may consult with Andie Moss, Correctional Programs Specialist, National Institute of

Corrections. If the BOP elects not to consult with Ms. Moss, the BOP will retain an independent consultant with substantial expertise regarding: (1) sexual assault and harassment against female inmates; and (2) privacy concerns of female inmates. The BOP will consult with plaintiffs' Counsel with regard to the selection of that consultant.

E. Training Programs

1. National Training

A Bureau Training Program will be developed for annual Refresher Training for 1998, which will address Bureau policies and procedures concerning sexual assaults, sexual contacts, sexual misconduct, confidential reporting, sexual harassment and other issues arising out of the special needs of female prisoners. BOP agrees to provide such training and information, including a review of Bureau policy, to new employees as part of the Introduction to Correctional Techniques training at the Federal Law Enforcement Training Center at Glynco, Georgia. Specialized training will also be available for staff most likely to be involved in treatment or management of sexually assaulted inmates.

With the assistance of the Consultant, BOP shall review and revise its training program to assure that appropriate training and information is provided to all employees who work with female prisoners concerning the following topics:

a. BOP policies and procedures concerning sexual assaults of prisoners by prisoners or BOP staff, sexual contact between prisoners, sexual contact between prisoners and BOP staff, sexual misconduct, confidential reporting and

investigation of allegations of sexual misconduct and protection of inmate complainants, duty of staff to report and testify concerning sexual misconduct;

b. Program Statement 5324.02 (and any successor statements), including, but not limited to, the Staff Training in Part 7.b, staff sensitivity training in Part 8, and successor training provisions;

c. Sexual harassment, including inappropriate speech, hostile environment, and verbal or non-verbal propositions;

d. Privacy rights of female prisoners, including, but not limited to, cross-gender supervision, cross-gender searches, prurient viewing of females changing clothes or using showers and toilet facilities; and

e. Special needs of female prisoners, including, but not limited to, sexual and spousal abuse, menstruation, pregnancy, child-rearing, medical and psychological needs.

2. FCI Dublin Training

FCI Dublin shall be responsible for devising and providing specialized training to assure that all staff receive training in local procedures and implementation of national BOP policy on the local level. For example, staff should be trained in the local Institution Supplement to Program Statement 5324.02, including the identity of the Sexual Assault Coordinator and local procedures.

3. Specialized Training

The BOP shall develop specialized training programs for employees with particular responsibilities under Program

Statement 5324.02, or successor provisions of BOP policy, including, but not limited to, the Sexual Assault Coordinator, Medical and Psychological staff, SIS staff and employees with the rank of Lieutenant or higher.

4. Frequency of Training at Dublin

a. All existing FCI Dublin employees shall complete the revised training program no later than the end of the second quarter of 1998. Employees who qualify for specialized training shall, as applicable, complete the specialized training programs no later than six months after this agreement becomes final.

b. New employees will be provided with and instructed to read applicable policies during Institution Familiarization, and will, subject to the physical limitations of individual employees, attend Introduction to Correctional Techniques training at the Federal Law Enforcement Training Center, Glynco, Georgia, and will receive the local training program described above within six months of beginning work at FCI Dublin.

5. Refresher Training:

Bureau of Prisons' staff shall provide refresher training at appropriate intervals to staff, including annual local and specialized refresher training.

F. Inmate Orientation

1. Bureau of Prisons' inmates will be provided with literature on topics concerning sexual assault and harassment, including recognition and reporting, during the admission and orientation period following arrival at the institution. Posters with similar information will be placed in the institution.

2. As required by Program Statement 5324.02, part 7c, BOP

shall develop technical assistance, training materials and information for distribution to all BOP inmates concerning preventing and avoiding sexual assault. These materials should include information for victims of sexual assaults concerning their rights under BOP policies, how to make a confidential report to prison staff or the OIG Hotline and seek protection in the unlikely event of a sexual assault or if they receive threats, etc. BOP shall also prepare a candid and complete presentation that covers the written materials, which presentation shall be given as part of the HIV-AIDS discussion in the Institution Admission and Orientation Program.

3. BOP shall also develop specialized training materials and information for distribution in the Institution Admission and Orientation Program to female inmates, including their rights to privacy in prison.

G. Psychological and Medical Services for Victims

1. The Bureau of Prisons will assure that any inmate who claims to be the victim of a sexual assault is promptly provided with appropriate medical and psychological care in an environment that meets both the inmate's safety and therapeutic needs.

2. With regard to the provision of mental health services, the following is a guideline for a suggested protocol:

a. Psychology Services or other mental health staff should be notified immediately after the initial report by an inmate of an allegation of sexual abuse/assault of an inmate.

b. Any alleged victim(s) will be seen, as soon as possible, and preferably no later than 24 hours following such

notification, by a mental health clinician to provide crisis intervention and to assess any immediate and subsequent treatment needs.

c. The findings of the initial crisis/evaluation session and the additional follow-up evaluation, assessment and file review should be reduced to writing within one week of the initial session and, once drafted, placed in the appropriate treatment record, with a copy provided to the Clinical Director and institution staff responsible for oversight of sexual assault prevention and intervention procedures.

d. Additional psychological or psychiatric treatment, as well as continued assessment of mental health status and treatment needs, should be provided as needed and only with the patient's full consent and collaboration except when there is a need for immediate emergency psychiatric care of the type addressed by the BOP Health Services Manual, the BOP Psychology Services Manual, and by 28 C.F.R §§ 549.90 et seq., concerning psychiatric treatment and medication. Decisions regarding the need for continued treatment and/or assessment will be made by qualified clinicians according to established professional standards, and should be made in full recognition of the potential impact, in terms of immediate and delayed psychiatric or emotional symptoms, commonly experienced by victims of sexual abuse/assault. If the patient chooses to decline further treatment services, he or she will be asked to sign a statement to that effect. If the patient chooses to continue to pursue treatment, the clinician will facilitate referral of the patient to the appropriate treatment options.

This may include individual therapy, group therapy, further psychological assessment, assignment to a mental health case load, referral to a psychiatrist and/or other treatment options. Pending referral, mental health services will continue unabated.

e. All additional treatment and evaluation sessions will be properly documented and placed in the appropriate treatment record to ensure continuity of care within, between, or outside BOP facilities.

f. Should the patient be released from custody during the course of treatment, the patient will be advised of community mental health resources in his/her area.

H. Program Statement Revisions (National)

1. Subject to the APA requirements of notice and comment, the Bureau of Prisons will make the following revisions to Program Statement 5324.02 and its successor Program Statements.

2. The "Purpose and Scope" section will be revised to reference BOP employees as possible assailants.

a. The definition of "sexual assault" has been revised to read as follows:

<u>Definition</u>: Inmate-on-Inmate Sexual Abuse/Assault: One or more inmates engaging in, or attempting to engage in a sexual act with another inmate or the use of threats, intimidation, inappropriate touching, or other actions and/or communications by one or more inmates aimed at coercing and/or pressuring another inmate to engage in a sexual act. Sexual acts or contacts between inmates, even when no objections are raised, are prohibited acts.

Staff-on-Inmate Sexual Abuse/Assault:
Engaging in, or attempting to engage in a sexual act with any inmate or the intentional touching of an inmate's genitalia, anus, groin, breast, inner thigh, or buttocks with the intent to abuse, humiliate, harass, degrade, arouse, or gratify the sexual desire of any person. Sexual acts or contacts between an inmate and a staff member, even when no objections are raised, are always illegal.

3. The BOP will continue to refer allegations of staff misconduct to the Department of Justice, Office of Inspector General for further referral, when appropriate, to the FBI. The notification procedures require that all complaints of possible criminal sexual misconduct by prisoners or BOP staff be reported to the Office of Internal Affairs, and that the Office of Internal Affairs report in turn to the Office of Inspector General, which refers such complaints, when appropriate, to the FBI.

4. The Bureau Of Prisons will ensure that the all Institution Supplements concerning Inmate Sexual Assault Prevention/Intervention Programs reference Program Statement 1330.13 §8(d) and its successor provisions, which allows the submission of Requests for Administrative Remedy concerning sensitive issues directly to the appropriate Regional Director.

5. A new section 4(e) to all Institution Supplements to Program Statement 5324.02 and its successor provisions shall include the following provision:

<u>Confidentiality:</u> Information concerning the identity of an inmate-victim reporting a sexual assault, and the

fact of the report itself, shall be limited to those who have a "need to know" in order to make decisions concerning the inmate-victim's welfare and for law enforcement/investigative purposes.

III. MONITORING AND ENFORCEMENT

A. Progress Reports

Counsel for the government will provide at least three reports to plaintiffs' counsel detailing BOP's progress in fulfilling all obligations promised as part of this settlement agreement. The first progress report will cover the period between the date this agreement is signed by all parties and June 30, 1998. Subsequent reports will cover six month intervals. Each report will be provided to plaintiffs' counsel within 45 days following the end of the period, with the final report covering the period ending June 30, 1999. The progress reports will address each issue addressed in ¶¶ II.B through II.H, above, and counsel will attach copies of policies, procedures, training materials or other applicable documents referenced in those sections. The progress reports will be made, under penalty of perjury, by counsel for the United States.

B. Policies, Procedures And Training Materials

To the extent that BOP has not already implemented certain policies, procedures and training materials consistent with this Agreement prior to the execution of this Agreement, BOP will provide Plaintiffs' Counsel with drafts of policies, procedures and training materials prepared in connection with this settlement agreement before these documents are finalized, for comments and suggestions. Plaintiffs' Counsel will provide

written comments no later than 30 calendar days after receipt of any draft. With respect to policies, procedures and training materials already in place at the time this Agreement is signed, BOP will provide such materials to plaintiffs' counsel. BOP agrees to consider plaintiffs' counsel's comments and suggestions concerning such materials.

C. Dispute Resolution And Reinstatement

Pursuant to the PLRA, the only remedy available to plaintiffs in the event of a breach of this agreement is to reinstate the underlying action. 18 U.S.C. §3626(g)(6). The parties agree that before plaintiffs request reinstatement of the underlying action, they will negotiate in good faith concerning the issue in dispute and may participate in a face-to-face mediation session supervised by a mediator appointed by the Court or otherwise agreed to by the parties. In the event that the dispute is not resolved through mediation, the parties agree to submit the issue to the mediator for an evaluation of the merits of the parties' stance on the issue. If the United States agrees that the dispute warrants face-to-face mediation, it will pay the mediator's fees incurred.

D. Termination

The Bureau of Prisons agrees to perform all the obligations contained in this agreement on or before June 30, 1999. When all agreed obligations are fulfilled, counsel for the BOP will send a final advisory to that effect along with the last of the three progress reports it has agreed to provide to Plaintiffs' counsel, under penalty of perjury. At that time, the United States will seek an order dismissing the injunctive relief claims with

prejudice.

IV. DAMAGES AND DISMISSAL

Pursuant to 28 U.S.C. § 2677, in settlement of the Plaintiffs' Federal Tort Claims Act claim and all other claims of Plaintiffs against the United States and any current or former employee of the Bureau of Prisons arising out of the incidents alleged in the complaint, the United States agrees to pay a total of $500,000.00. The check, or Electronic Funds Transfer, shall be made payable to "Rosen, Bien & Asaro Trust Account." In return solely for the payment of this financial settlement Plaintiffs agree to dismiss the Federal Tort Claims Act cause of action with prejudice and to release all claims arising out of the incidents alleged in the complaint against the defendants in their individual capacities. The Request for Dismissal shall be filed with the Court within two Court days of receipt of the payments from the United States. Without admitting liability, the United States agrees that the monetary payment made to each Plaintiff is to compensate her for physical injuries and resulting emotional injuries alleged in the complaint. This monetary settlement is undertaken pursuant to the provisions contained in 28 U.S.C. § 2672, the acceptance of which "shall constitute a complete release of any claim against the United States and against the employee of the government whose act or omission gave rise to the claim, by reason of the same subject matter." The monetary settlement shall be complete and final and binding upon the receipt of the payment and the execution of the dismissal with prejudice.

V. ATTORNEYS' FEES, COSTS AND LITIGATION EXPENSES

Counsel for the parties agree that plaintiffs' counsel are entitled to apply for an award of reasonable attorneys' fees and costs in an amount to be determined. Pursuant to Local Rule 54-5 counsel will meet and confer in good faith in an attempt to resolve the amount of the award prior to filing a motion with the court.

VI. COOPERATION

The parties and their attorneys agree to use their best efforts and to act in good faith to effectuate and carry out the terms of this Agreement.

VII. COUNTERPARTS

This Agreement may be executed in any number of counterparts, all of which taken together shall constitute one and the same instrument, and any of the parties may execute this Agreement by signing any such counterpart.

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PLAINTIFFS:

Dated: 2/11/98 — Robin Lucas

Dated: 2/2/98 — Valerie Mercadel

Dated: 2/4/98 — Raquel Douthit

DEFENDANT UNITED STATES:

Dated: 2/24/98

U.S. DEPARTMENT OF JUSTICE

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APPROVED AS TO FORM:

Dated: 2/13/98

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By: Michael W. Bien

Dated: 2/11/98

LAW OFFICES OF GERI L. GREEN

By: Geri L. Green

Attorneys for Plaintiffs

FILED BY MMD.C.
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W.D. OF TN, MEMPHIS

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

DARIUS D. LITTLE, Plaintiff, v. SHELBY COUNTY, TENNESSEE; A.C. GILLESS, individually and in his official capacity as Sheriff of Shelby County, Tennessee; DENNIS DOWD, individually and in his official capacity as Chief Jailer of Shelby County; and JIM ROUT, individually and in his official capacity as Mayor of Shelby County, Defendants.	)	NO. 96-2520-TUA

ORDER GRANTING INJUNCTIVE RELIEF TO REMEDY
UNCONSTITUTIONAL CONDITIONS IN SHELBY COUNTY JAIL

IT APPEARING TO THE COURT that on September 12, 1996, the parties entered into a Consent Order Stipulating Liability for Injunctive Relief Purposes Only; and Establishing Procedure for Remedy, which was entered by the court (hereinafter "Consent Order").

IT FURTHER APPEARING TO THE COURT that pursuant to said Consent Order, the court found for purposes of injunctive relief that Darius Little's Eighth Amendment right was violated due to the risk of physical and sexual assault by other inmates in the Shelby County Jail. Liability was stipulated pursuant to 42 U.S.C. § 1983.

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IT FURTHER APPEARING TO THE COURT that, pursuant to said Consent Order, the parties were to submit a prospective remedy which was narrowly drawn, extending no further than necessary to correct the violation of the federal right as stipulated, and which is the least intrusive means necessary to correct the violation of the federal right.

IT FURTHER APPEARING TO THE COURT that the parties consulted with Charles Glover Fisher, Ray Nelson, and Bill Garnos, all experts in jail conditions, who have been certified by this court as experts pursuant to this court's order dated April 1, 1997.

IT FURTHER APPEARING TO THE COURT that the experts agree that the factors which will impact reducing the risk of violence and sexual assault in the Shelby County Jail include:

A. Continual supervision of the inmates;

B. Properly classifying inmates, and separating inmates who are likely to assault other inmates;

C. Separating likely victims of assault from likely predators.

IT FURTHER APPEARING TO THE COURT that upon the testimony of the court's certified experts, the court finds that the relief ordered herein is narrowly drawn, extends no further than necessary to correct the violation of the federal right, and is the least intrusive means necessary to correct the violation of the federal right. In construing this remedial order, the court has given substantial weight to any adverse impact on public safety, or the operation of the criminal justice system caused by the entry of

this order. The court has further kept in mind the desires of Congress, as contemplated by the Prison Litigation Reform Act, Pub. L. No. 104-134 § 800, et seq. (currently codified at 18 U.S.C. § 3626).

IT FURTHER APPEARING TO THE COURT that the following terms need to be defined as they are used in this order.

"Cell" -- an individual living area for one or two inmates, that contains at least one bunk, a toilet, and a wash basin.

"Cell Block" -- a group of cells connected by a common day room (or corridor on the lower level of the jail) that are accessible by a single set of security doors that open into a main access corridor for the jail.

"Cell Block Officer" -- a jailer employed by the Sheriff's Department whose primary responsibility while on duty is to supervise inmates housed in a cell block.

With the aforestated considered,

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. Classification. Within 90 days of the entry of this order, each inmate admitted to the Shelby County Jail will be confidentially interviewed by classification staff prior to such inmate's cell assignment to determine if such inmate has known enemies from whom he should be separated; protective custody needs; or gang involvement. Information will be collected during the initial classification interview to determine if such inmate has assaulted other inmates during prior incarcerations, or has been a victim of an assault by another inmate during prior incarcerations,

or fears he may be victimized by another inmate, or has gang affiliations or previous convictions for violent crimes. This information shall become part of an automated inmate information system, which shall be developed and implemented as soon as practicable, using good faith efforts but no later than nine months from the entry of this order to insure that potential victims are separated from known predators (i.e., inmates who have assaulted other inmates). All housing unit assignments will be made by classification staff only. Within six months after the entry of this order, all staff assigned to classification will complete a course of classification interviewing training designed to insure compliance with this order.

2. Housing. Any inmate who is classified as violent (a level V, VI, or VII on the current classification scale) shall never be housed in a cell with more than one other inmate. Whenever it becomes necessary to assign two inmates to the same cell, classification officers will not house potential victims with known predators. Furthermore, inmates classified as violent (i.e., those indicated by a red dot on the wrist band under the current classification system, and inmates with a known history of violence, will not be housed with inmates classified as nonviolent (indicated by a blue, green, or yellow dot on the wristband, under the current classifications). When a compatible housing assignment cannot be made, the inmate shall be housed in a single cell. As soon as reasonably possible, but no later than nine months after the entry of this order, the facility shall implement a policy

requiring single-celling for those inmates who have not yet been fully classified.

3. Inmates Supervision. A separate cell block officer shall be continuously assigned to each of the cell blocks in which inmates are incarcerated, on the lower level of the current jail facility whenever any of the cells in such cell block house two or more inmates. Each cell block officer shall monitor the cell block to which he/she is assigned continuously to assure the inmates housed together in the same cell are housed compatibly. Only under documented emergencies involving risk of safety to cell block officers or inmates will cell block officers supervise more than two adjacent cell blocks at a time, and shall only do so for the time period necessary to resolve such emergency. The continuous monitoring required by this order shall be implemented as soon as reasonably possible, but no later than nine months from the date of entry of this order.

4. Cell block officers assigned to housing duties on floors 2, 3 and 4 of the current jail facility will also continuously supervise individual cell blocks in which inmates are incarcerated to assure compatibility. Cell block officers may only be removed from their assigned cell blocks for documented emergencies involving risk of safety to cell block officers or inmates, and then only for the time period necessary to resolve such emergency. Under no circumstances shall a cell block officer supervise more than two adjacent cell blocks at a time. It is the intent of this order that there shall be a separate cell block officer assigned at

all times to supervise each cell block in the current facility on floors 2, 3 and 4, when such cell block houses inmates and are not totally locked down for the entire shift. Every cell block shall have its own cell block officer continuously supervising such cell block except as otherwise allowed in this order. The continuous monitoring required by this order shall be implemented as soon as reasonably possible, but no later than nine months from the date of entry of this order.

5. Each cell block officer will insure that inmates are housed compatibly by frequent observation of behavior of inmates in the cell block such cell block officer is supervising, and by confidentially interviewing inmates in the cell block to determine if the inmate's cell assignment is safe. In addition, cell block officers will interview any inmate in the cell block who the cell block officer believes may be having compatibility problems with other inmates. Inmates identified as having potentially violent cell mate compatibility problems will be promptly separated and referred to classification for review.

6. In general population cells on the second, third and fourth floors, inmates will be permitted to move between their cell and the day room of the cell block during a five minute period each hour, unless such movement is otherwise restricted by jail operational procedures. During the remaining 55 minutes of the hour, the cell doors will remain locked. Inmates may remain in their cells, or the day room during those 55 minute periods. Cell block officers will continuously monitor the cells during these

five minute periods when the cell doors are open to insure that no inmate enters a cell within the cell block to which such inmate is not assigned.

7. Continuous direct observation of inmates by cell block officers is required during all out-of-cell activity in lock down and protective custody housing units.

8. A court-appointed Special Master shall be appointed by the court to make regular inspections to verify compliance with the terms of this order. Counsel for plaintiff and defendants are hereby ordered to submit the names of five potential compliance monitors within 60 days of the entry of this order, in accordance with the Prison Litigation Reform Act. The court hereby determines that an appointment of a Special Master is necessary because the remedial phase of this order is sufficiently complex to warrant such employment. The Special Master will prepare a periodic monitoring schedule, which will be used to record observations of each element of the order. The Special Master will also investigate each alleged inmate on inmate altercation, whether rape or other assault, to determine if any provision of this order had not been followed in such cases, and to identify any policy or procedure that if in place could possibly have prevented such altercation. The Special Master shall be responsible for recommending agency regulations and procedures that facilitate compliance with this order.

9. A monthly report will be prepared by the Special Master within ten days of the close of the calendar month to report the

progress on the defendants' compliance with this order and the results of the inmate-on-inmate altercation investigations. The Special Master will attempt to subjectively categorize these altercations which represent predatory and gang-related behavior as opposed to the normal kind of altercations that result from people living in close proximity with one another.

10. The Special Master, along with plaintiff's and defendants' counsel, shall conduct a conference no later than eighteen months after the entry of this order to determine whether this order has been successful in reducing the risk of physical and/or sexual assault in the Shelby County Jail. If this order has not made an impact on reducing sexual and physical assaults in the jail to a constitutionally acceptable level, the Special Master shall propose to the court what other remedial relief might be appropriate to correct the unconstitutional condition.

IT IS SO ORDERED this 12th day of November, 1997.

JEROME TURNER
UNITED STATES DISTRICT JUDGE