AELE Seminars:

Public Safety Discipline and Internal Investigations
Sept. 28-Oct. 1, 2020– Virtual

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MONTHLY CASE DIGEST

- Some of the case digests do not have a link to the full opinion.
- Most Federal District Court opinions can be accessed via PACER. Registration required. Opinions are usually free; other documents are 10¢ per page.
- Access to cases linked to www.findlaw.com may require registration, which is free.

First Amendment

A prisoner submitted a grievance after no action was allegedly taken when an officer investigated his report that a cellmate beat him. He answered "maybe" when another officer asked if he was going to submit another grievance concerning the lack of response to prior grievances. Minutes later, the officer who had investigated the alleged beating searched his cell and confiscated a note concerning trading and trafficking, forged letters describing the cellmate incident, letters addressed to a court, and a contraband cassette tape. The prison committee found him guilty of forging documents and possessing contraband. A federal appeals court upheld the rejection of his First Amendment retaliation claims. The fact that the search happened shortly after the conversation concerning the possibility of him filing another grievance was insufficient, standing alone, to show that the search was motivated by retaliation for protected activity. The court stated that the plaintiff needed to provide evidence that would allow a reasonable jury to find that his protected speech was at least a motivating factor for the officer's response. *Manuel v. Nalley*, #18-3380,

2020 U.S. App. Lexis 22550 (7th Cir.).

Federal prison officials seized a prisoner's painting and a number of mail-order photos, stating that they violated prison rules against possession of sexually explicit materials. When his grievances were denied, the prisoner sued for money damages, arguing that his First Amendment rights to free speech had been violated. His painting depicted a reclining, bikini-clad woman with exaggerated breasts. The mail-order photos were of "pretty women posing." A federal appeals court upheld the rejection of this claim, noting that the U.S. Supreme Court has not recognized a new Bivens implied right of action in 40 years and has repeatedly declined to do so. The Court has rejected the *Bivens* inclination that a private right of action exists when Congress is silent and has adopted the opposite approach in statutory and constitutional cases. The Court has even cut back on the three constitutional claims once covered and has never recognized a *Bivens* action for any First Amendment right. The court noted that the plaintiff is in prison based on serious child pornography convictions. His lawsuit challenged the prison's determination that his painting project and pictures were sexually explicit enough to increase the risks of harassment of female personnel and disorder among prisoners. *Callahan v. Federal Bureau of Prisons*, #19-5210, 965 F.3d 520 (6th Cir. 2020).

Gang Activity

****Editor's Case Alert****

A New York state prisoner sued correctional officials, arguing that a rule banning gang insignia or materials is unconstitutionally vague as applied to his photographs depicting family and friends wearing blue and making hand signs, as well as that his placement in a special housing unit for six months following a prison disciplinary hearing determination that he had violated the rule by possessing those photographs violated his due process rights. A federal appeals court upheld the grant of summary judgment to the defendants. The court held that the rule provided adequate standards for prison guards to determine whether pictures of people wearing blue and intentionally making "C" hand signs are prohibited. In

this case, no reasonable prison guard could have doubted that the prisoner's possession of photographs of people wearing blue and making "C" hand signs violated the rule. Therefore, there was no danger that the rule's enforcement would be arbitrary with regard to the photos. The court also ruled that the plaintiff received a hearing that provided the minimal requirements of procedural due process. He received adequate notice of the charge against him, and at the hearing, he was allowed to call witnesses, raise objections, and testify. *Williams v. Korines*, #18-3050, 2020 U.S. App. Lexis 22474 (2nd Cir.).

Inmate Funds

A Texas inmate claimed that various prison employees violated federal law when they deducted a $100 medical co-payment from his inmate trust account. He received regular payments from the VA as veterans' benefits, and claimed that this deduction violated 38 U.S.C. 5301(a) and 31 C.F.R. 212, which protect such benefits against garnishment. A federal appeals court upheld summary judgment for the defendants. The Fifth Circuit affirmed the district court's grant of summary judgment to defendants, noting that the prisoner's VA benefits were commingled with transfers from his credit union account and with sizeable deposits by a private individual. Accordingly, it was impossible to know whether the medical co-payment was charged against funds that originated from the Department of the Treasury and the plaintiff could not state a claim under Section 5301(a), which protects only payments of federal benefits. Because Texas afforded the inmate an adequate post-deprivation remedy for the confiscation of the $100 in his inmate trust account, no violation of his Fourteenth Amendment due process rights took place. *Hawes v. Stephens*, #19-40341, 964 F.3d 412 (5th Cir. 2020).

Prison Litigation Reform Act: Exhaustion of Remedies

When an Illinois prisoner sued, claiming that a corrections officer used excessive force against him, the trial court dismissed the action, ruling that he had not exhausted administrative remedies, as required by the Prison Litigation Reform Act, 42 U.S.C. 1997e(a). A federal appeals court vacated that ruling. The prison's communications were "so obscure" that they made further steps of its administrative process "unknowable" and therefore unavailable to the plaintiff. He had filed both a "standard grievance" and an emergency grievance, followed by an appeal to the Review Board, which was returned to him. He filed a second emergency grievance, which was again denied. The Board returned his subsequent appeal. The prison's responses indicated that there was no conceivable next step for him to pursue. The grievance officer's memorandum gave him conflicting messages. The Board told him that his appeal was missing specific documents but did not check the box specifying that those documents needed to be provided or that some explanation needed to be given for their absence. When the warden and the Board rejected the second grievance, neither mentioned a pending standard grievance or an ongoing Internal Affairs investigation. As far as the prisoner could tell, his standard grievance had been either lost in the shuffle or resolved against him. *Reid v. Balota*, #19-1396, 962 F.3d 325 (7th Cir. 2020).

Prison Litigation Reform Act: "Three Strikes" Rule

Under the Prison Litigation Reform Act's (PLRA) three-strikes rule, indigent prisoners who have had three or more actions dismissed as frivolous, malicious, or for failure to state a claim may not bring a civil action or appeal a judgment as paupers. In two related cases under the PLRA, two plaintiff prisoners, who were both incarcerated "three-strikers," attempted to bring appeals of the dismissals of their lawsuits as paupers on the ground that they faced imminent danger of serious physical injury, an exception to the "three strikes" rule. The first prisoner argued, in the alternative, that the three-strikes rule was unconstitutional. A federal appeals court rejected their requests and explained that, to proceed under the exception, three-strike prisoners must show an imminent danger at the time of their appeal and a connection between that danger and their

underlying claims. The court held that the second prisoner had failed to demonstrate a connection between the physical danger he allegedly faced from various conditions of confinement and the claims he brought concerning restriction of his right of access to the courts, and the first had failed to show that she faced imminent danger at the time she filed her appeal from the alleged threats to her because her previous cooperation with law enforcement had become publically known. But all her allegations of threats occurred either months before or after when she filed her appeal. In regard to the first prisoner's alternative argument, the court ruled that even assuming that some prisoners could make out viable as-applied constitutional challenges to the three-strikes rule, she has failed to do so here, as she had not shown that the rule, as applied to her, denied her all access to the courts. *Pinson v. Dept. of Justice*, #18-5331, 964 F.3d 65 (D.C. Cir. 2020).

Prisoner Assault: By Inmates

A prisoner was assaulted by another inmate with a wooden board, suffering head injuries that require life-long medical treatment. He also developed a seizure disorder as a result. He sued seven correctional facility officials, alleging that each violated his Eighth Amendment right to be free from cruel and unusual punishment by failing to protect him from a substantial risk of serious harm. A federal appeals court upheld the dismissal of the lawsuit based on failure to state a claim, holding that the plaintiff failed to plausibly allege an Eighth Amendment violation. The complaint failed to allege that the prisoner had previously been threatened by the assailant or by another inmate, that the assailant was known to be a violent, volatile inmate, that the plaintiff and the assailant had previously argued or fought, been cellmates at any time, or even knew each other, or that either the plaintiff or the assailant had recently been in protective custody or in a restrictive status such as administrative segregation. The plaintiff was simply the unfortunate victim of a surprise attack and thus his failure-to-protect claim failed, since there was nothing to put the defendants on notice that he needed protection against the risk of an assault. *Vandevender v. Sass*, #19-1230, 2020 U.S. App. Lexis 24245 (8th Cir.).

Prisoner Discipline

A disciplinary board at an Indiana prison found that a prisoner had engaged in a prohibited financial transaction by telling another inmate to send $400 to his mother. The inmate sent a check for that amount, which the prisoner's mother cashed. The inmate told prison officials that the money was for drugs he had been supplied by the accused prisoner. The rule prohibiting unauthorized financial transactions includes the sending of money from one offender to another or the sending of monies from the family/friends of one offender to another. The accused prisoner claimed that the payment was for a car that the other inmate's aunt and daughter were buying. The prison penalized the accused prisoner by the loss of 30 days good-time credit. A federal appeals court overturned a trial court order restoring the 30 days of good time credit. The trial judge did not explain why he read the definition of unauthorized financial transactions in the policy to cover only the examples given, as opposed to the full spectrum of financial transactions that the prison had not authorized. The phrase "financial transactions" was broad, but broad differed from "inscrutable," and the rule was "sweeping, not vague." *Crawford v. Littlejohn*, #19-1949, 963 F.3d 681 (7th Cir. 2020).

Prisoner Suicide

****Editor's Case Alert****

A man was arrested on charges of bail jumping and taken to a pre-trial detention facility. Approximately 18 hours later, he tried to hang himself in his cell. Correctional officers quickly cut him down and summoned an ambulance, which saved his life. He had never told any correctional employee that he was contemplating suicide. He did submit three requests for his prescription medications--clonazepam, prescribed for anxiety, and tramadol, an opioid pain-reliever for his chronic pain from a back injury. He reported physical symptoms relating to not having those drugs and was seen by a nurse, who recorded that he had normal vital signs. He was not given the pills because several of his pills were missing and the doctor inferred that he could have already taken them. He sued, claiming that had

previously been on suicide watch at the facility and that his brother and his mother had recently committed suicide. A federal appeals court upheld summary judgment for the defendants. Given his express statement to an intake officer that he was not considering suicide and the absence of more significant indirect signs, no rational jury could find that he was unreasonably placed in the general population. A jury could not infer that depriving him of his medications might be deadly from the mere fact that a physician had prescribed them. *Pulera v. Sarzant*, #19-2291, 2020 U.S. App. Lexis 21964 (7th Cir.).

Religion

An Ohio prisoner, a practicing Rastafarian, made several religious-practice accommodation requests, including requests to grow his dreadlocks, keep a religious diet, observe fasts, and "commune" with other Rastafarians. He sued, claiming that correctional authority's responses to these requests violated his rights. His lawsuit was brought under the Religious Land Use and Institutionalized Persons Act (RLUIPA) and 42 U.S.C. 1983. A federal appeals court found that he had not shown that the prison's grooming policy, which provides for an individualized determination of whether an inmate's hair is "searchable," prevents him from growing his locks naturally and, therefore, cannot "demonstrate that the prison policy substantially burdens" his religious practice." It was also not clear that he was denied the ability to commune with fellow Rastafarians. But prison officials did not present any government interest to justify the denial of his religious diet requests, and he stated a valid equal protection claim in asserting that while inmates of other religions were allowed to participate in fasts, Rastafarians were not. *Koger v. Mohr*, #19-4020, 964 F.3d 532 (6th Cir. 2020).

Resources

Federal Prison Policies: Provision of Feminine Hygiene Products, Program Statement #003-2020 (July 29, 2020).

Statistics: Probation and Parole in the United States, 2017-2018, by Danielle Kaeble and Mariel Alper, Bureau of Justice Statistics (August 4, 2020 NCJ 252072).

Reference:

• Abbreviations of Law Reports, laws and agencies used in our publications.

• AELE's list of recently-noted jail and prisoner law resources.

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Cross References

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Mail – See also, First Amendment (2nd case)
Personal Appearance – See also, Religion
Prisoner Discipline – See also, Gang Activity
Retaliation – See also, First Amendment (1st case)

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