SB 83

Measure Title:
RELATING TO CORRECTIONS

Report Title:
Private Prison Performance Audit

Description:
Authorizes the auditor to conduct performance audits of private prisons housing Hawaii inmates, namely Red Rock Correctional Center, Saguaro Correctional Center, and Otter Creek Correctional Center.

LINDA LINGLE
GOVERNOR

STATE OF HAWAII
DEPARTMENT OF PUBLIC SAFETY
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No. _

TESTIMONY ON SENATE BILL 83 RELATING TO CORRECTIONS

by
Clayton A. Frank, Director
Department of Public Safety

Senate Committee on Public Safety and Military Affairs
Senator Will Espero, Chair
Senator Robert Bunda, Vice Chair

Tuesday, February 3, 2009; 1:15PM
State Capitol, Conference Room 229

Senator Espero, Senator Bunda, and Members of the Committee:

The Department of Public Safety (PSD) opposes Senate Bill 83. The measure requires performance audits of private prisons on the mainland housing Hawaii prisoners with regard to the issues of delivery of services, visitation, the Department of Public Safety's monitoring of these contracts and other areas that are already part of our quarterly auditing processes. All CCA facilities nationwide are accredited and audited under the American Correctional Association (ACA). ACA has a comprehensive audit of all facility operations, its policies and procedures on mandatory standards. The Department's contractual terms and conditions require all private prisons to meet ACA standards and be accredited within eighteen (18) months of activation. At present, all of CCA's facilities meet ACA's stringent requirement for certification.

This measure is unnecessary and repetitive as the Department already conducts quarterly contractual audits of its private prison facilities using its subject matter experts from various divisions and branches (i.e. Heath Care Division, Substance Abuse, Education, Security, etc.). Further, a detailed deficiency notice on all non-compliant contractual items is

issued to the respective facility and a plan of corrective action are provided to the Department within thirty (30) days of the deficiency notice. The contract also allows the Department to access liquidated damages for staffing requirements and substance abuse programs. To date, no liquidated damages have been accessed as all deficiencies have been corrected within the required thirty (30) day response period. Also, the Department's contracts and monitoring reports are public record and are posted on PSD's website for all to review and download. Upon request, PSD also routinely provides hard copies of these documents.

Further, statements in the language of this measure are incorrect and misleading. The allegation that CCA "began keeping two sets of books" was not substantiated, nor does PSD rely solely on CCA to provide reports and documents regarding any incident. The fact of the matter is, the allegation is a misrepresentation of the methodology of incident reporting and CCA's internal quality assurance program, which are clearly two separate functions. PSD routinely have staff from out mainland branch on the ground in AZ and KY for days and weeks at a time to ensure contract compliance and to address inmate, family, and legislative issues of concern.

During August 2008 staff attorneys from the federal court visited both, the Saguaro and Red Rock facilities and were impressed with the way the facilities were being operated, their cleanliness, the food service operations, medical services provided, and the array of programs available for our inmates. It should also be noted that staff members from the Office of the Ombudsman visited the Otter Creek facility during October 2008 and found no deficiencies. The staff from the Ombudsman office also met with our female inmates during their visit and did not note any issues of concern to raise with either CCA or PSD. I personally visited all three facilities during the first week of November 2008 along with the Institutions Division Administrator, Mr. Michael Hoffman. During our visit, we thoroughly toured all areas of each facility, spoke with staff, reviewed staff training records, ate meals with our inmates, and held several group meetings with them to discuss a variety of issues.

In addition, it should be noted that it was the Department of Public Safety that hired the Criminal Justice Institute, Inc., to conduct a review of our inmate classification system and to assist us in developing a system that is not "time driven," but one that assists in determining inmate's classification level by their "actions" and "demonstrated behavior" with respect to program completion, adjustment to incarceration, and other key factors.

This measure asserts that "problems" at CCA prisons continue, but fails to provide any basis in fact for this statement. This measure also asserts that there is a lack of programs and poor medical care, but again provide no further information or proof of the statement. The fact is, numerous programs are available at all CCA facilities that house inmates from HI (see attached list of programs provided at each facility).

Lastly, this measure is based on the premise that performance audits should be applied to a very specific type of contractor (private prisons) under contract with the Department. If it is the intent to implement the process of performance audits to provide accountability and transparency to the public regarding the services provided by any vendor for any contract made with the State as a legal requirement, then it should apply to all State contracts and not be limited to just the Department of Public Safety and the Corrections Corporation of America.

Therefore, for the reasons listed above and on the preceding page, the PSD does not support Senate Bill 83. Thank you for the opportunity to provide testimony on this matter.

UNIVERSITY OF HAWAI'I AT MĀNOA
College of Social Sciences
Women's Studies Program

February 2, 2009

COMMITTEE ON PUBLIC SAFETY AND MILITARY AFFAIRS
Sen. Will Espero, Chair
Sen. Robert Bunda, Vice Chair
Tuesday, February 3, 2009
1:15 PM
Room 229
STRONG SUPPORT
SB 83 – Audit of Private Prisons
Sent to: PSMTestimony@capitol.hawaii.gov

Thank you Senators Espero and Bunda for convening this extremely important hearing.

My name is Meda Chesney-Lind. I am currently a Professor of Women's Studies at the University of Hawaii at Manoa. I am also a past Vice-President of the American Society of Criminology. Today, however, I am speaking as an individual.

As you know, Senator Espero, since you've written eloquently on the topic, the U.S. has the dubious distinction of leading the world in terms of incarceration. As the Pew Center on the States noted recently, we now imprison one out of every hundred of our citizens.

What about our own state? Hawaii has also dramatically increased its reliance on incarceration in the last three decades. Hawaii now incarcerates over 6,000 inmates (actually 6,036 as of the beginning of this year).[1] That is up from 5,053 in 2000. That's a twenty percent increase just since the turn of the century.

[1] Pew Center on the States, **One in a Hundred: Behind Bars in America.** 2008. Page 5

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Hawaii's prison population has increased at a faster pace than the nation as a whole. Specifically, between the turn of the century and the end of 2006, Hawaii's prison population increased by 2.8 percent a year, compared to a national average of only 1.7% per year.[2]

California's prison population, by comparison, increased by only 1.2%, and New York's prison population actually decreased by 1.7%.[3]

Research conducted in Hawaii of those released on parole in 1996 and followed for 2-3 years found that over half were returned to custody (53.9%), and only a quarter of those returned were returned for new crimes. This means that three quarters were returned for technical violations.[4] Such re-incarcerations are costly, and in this particular economic climate it becomes very important that we look closely at polices which mindlessly increase incarceration (particularly for technical violations). Prison over-crowding has continued to be a problem, as well as increased reliance on mainland private prisons, precisely because we have not found ways to deal with drug dependency short of re-incarceration.

One additional point: recent research on the classification system used by DPS by the Criminal Justice Institute suggests that many of Hawaii's inmates, male and female are technically "over classified" which means they are being held in costly facilities, some thousands of miles from their homes and families, unnecessarily.

Specifically, according to CJI, "approximately 60% of non-violent inmates on the mainland are minimum or community custody" and could be housed in minimum or community custody beds." Recall that Hawaii now has nearly a fifth, or over 2,000 of our prisoners housed in mainland facilities (18.1 percent).[5]

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[2] Sabol, William J. and Heather Couture, **Prison Inmates at Midyear 2007.** Bureau of Justice Statistics, National Institute of Justice, 2007, pg. 3.
[3] Ibid.
[4] Kassebaum, Gene and Janet Davidson, **Parole Decision Making in Hawaii.** Dept. of the Attorney General. 2001.
[5] Camp, Camille and Patricia Hardyman, Criminal Justice Institute. **Classification: Systematic Approach to Sound Correctional Management.**

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Such decisions have enormous costs associated with them, which is yet another reason for an audit of the private facilities with whom the State has contracted. In this grim economic time, there are clearly cost savings that could be enjoyed if Hawaii chose to incarcerate fewer of our citizens. Corrections budgets have long been the fastest growing segment of state budgets. According to CBS News, taxpayers are paying an estimated $40 billion a year for prisons. Feeding and caring for an inmate costs about $20,000 a year on average, and construction costs are about $100,000 per cell.[6] Incarceration, including our own, does not come cheap. The Pew Center on the States noted that between 1987 and 2007, the amount that states spent on corrections doubled.

There are clear trade-offs here. As the Pew study documents higher education has been a clear loser; their study documented that between 1987 and 2007, corrections budgets rose by 127 percent (meaning they more than doubled) while higher education funding increased by a far more modest amount: only 21 percent. Colleges and Universities, in turn, passed the cost of higher education along to tax payers, in the form of steep tuition increases. Consider that UHM increased its tuition 20 percent for both in-state and out-of-state students in 2006. In fact, the University of Hawaii at Manoa achieved a dubious distinction that year: we increased our tuition more than any other public University in the country. [7]

Generally, the public does not link corrections costs and college tuitions, but they should, because every dollar spent on cells is taking money from other important government services, including access to an affordable public university education. The nation also loses in this trade off. At a time when our country clearly needs to invest in education for our citizens to face the challenges of a new century (including rising competition abroad), college educations have become increasingly unaffordable for

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[6] Rebecca Tuhus-Dubrow, "Prison Reform Talking Points." **The Nation.** 2003. http://www.thenation.com/doc/20040105/tuhusdubrow

[7] Sprect, Mary. "Tuition Increases Moderate?" **USA Today. 8/30/2006.** http://www.usatoday.com/news/education/2006-08-30-tuition-increases_x.htm

UNIVERSITY OF HAWAI'I AT MĀNOA
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average families in Hawaii and elsewhere.

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The Twenty-Fifth Legislature, State of Hawaii
Hawaii State Senate
Committee on Public Safety and Military Affairs

Testimony by
Hawaii Government Employees Association
February 3, 2008

S.B. 83 – RELATING TO CORRECTIONS

The Hawaii Government Employees Association, AFSCME, Local 152, AFL-CIO, supports S.B. 83, which calls for the Auditor to conduct performance audits of private prisons on the Mainland with Hawaii inmates. The performance audits of private prisons would focus on the treatment and services provided to Hawaii inmates, the facilitation of family and community connections, and the department of public safety's monitoring and enforcement of those contracts.

It is disturbing there has never been an audit of the private Mainland prisons which Hawaii has contracted with to house the State's inmates, despite the fact that the state spent more than $50 million in 2007 to transfer inmates from Hawaii to private prisons on the Mainland. Of particular concern is that deaths and serious injuries have occurred at several of the contract prisons. We believe that an independent audit could be helpful in determining how cost-effective it is to transfer prisoners out-of-state, and whether it reduces recidivism in Hawaii.

Thank you for the opportunity to testify in support of S.B. 83.

Respectfully submitted,

Nora A. Nomura
Deputy Executive Director

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COMMITTEE ON PUBLIC SAFETY AND MILITARY AFFAIRS
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STRONG SUPPORT
SB 83 - Audit of Private Prisons
Sent to: PSMTestimony@capitol.hawaii.gov

Aloha Chair Espero, Vice Chair Bunda and Members of the Committee!

My name is Kat Brady and I am the Coordinator of Community Alliance on Prisons, a community initiative working to improve conditions of confinement for our incarcerated individuals, enhance our quality of justice, and promote public safety. We come today to speak for the 6,000+ individuals whose voices have been silenced by incarceration, always mindful that more than 2,000 of those individuals are serving their sentences abroad, thousands of miles from their homes and loved ones.

SB 83 authorizes the Legislative Auditor to conduct performance audits of private prisons housing Hawai`i inmates, namely Red Rock Correctional Center, Saguaro Correctional Center, and Otter Creek Correctional Center.

Community Alliance on Prisons strongly supports this measure.

The Shameful Statistics of Hawai`i's Banishment:
Hawai`i has been banishing our people to serve their sentences abroad, thousands of miles from home, in private prisons since 1995, when we sent the first three hundred men to Texas, where they built the prison for the Bobby Ross Group. Sadly, the numbers of Hawai`i's individuals serving their sentences abroad have increased dramatically. Here are the end of fiscal year counts for prisoners serving their sentences in contracted facilities (private prisons) cited in the Department of Public Safety's 2007 Annual Report:

Year	Number of Hawai`i Prisoners in Contracted Prisons
1996	300
1997	300
1998	600
1999	1,178
2000	1,079
2001	1,194
2002	1,232
2003	1,295
2004	1,579
2005	1,730
2006	1,844
2007	2,009

Source: 2007 Annual Report, Department of Public Safety, page 34

No Exit Strategy:
It is fourteen years later, and Hawai`i still has no exit strategy for this 'temporary situation'. In fact, the numbers have risen dramatically. What is really egregious about this is that the Department of Public Safety's classification consultants have projected that Hawai`i will have more than 55% of incarcerated women and more than 30% of incarcerated men who are classified as Community Custody. The Department's own definition of Community Custody is: *Inmates who have 24 months or less to serve on their sentence and are eligible to participate in community release programs such as work furlough, extended furlough, or residential transitional living facilities.* (*Source:* 2007 Annual Report, Department of Public Safety, page 14)

Audit Is Long Overdue:
This audit is long overdue. In 14 years there has never been an independent audit of the contracted prisons to which we banish our people. Make no mistake about it, private prisons are in business to make money. They are accountable first and foremost to their shareholders. Why would they have an incentive to rehabilitate individuals when their profits come from keeping the beds filled?

Instead they have hired lobbyists, who never testify in the committee hearings, but roam the back halls of the Legislature pushing CCA's agenda. This is one of the reasons that CCA actually calls Three Strikes Laws a home run. It sure is for them...guaranteed beds.

The Department of Public Safety will tell the Legislature that they do the audits. In our experience, it actually appears that the Department provides 'cover' for CCA. We have received hundreds of letters from incarcerated individuals, families and others who tell quite a different story about CCA's operations.

A visit to Sagauro and Red Rock in November 2007 was incredibly revealing and it appears that things have gotten worse over the past year. When the Department was asked how much CCA has paid in fines for violating the contract, the replied that CCA has thirty days to address the violation and they always do.

A good example from Saguaro, the prison built in the Sonoran Desert for Hawai`i individuals, stems from the numerous complaints received about shower water running into the dorms because of poor construction. We spoke to the Department about this because of the public health implications and were told that it was a minor fix and not a construction problem. Just last month I received information from Saguaro that the showers in some of the dorms were being ripped up because of the problem of water running into the dorms.

Recent Reports Support the Need for Independent Look:
Revelations in TIME magazine's March 13, 2008 issue have placed CCA under the national microscope http://www.time.com/time/nation/article/0,8599,1722065,00.html). Hawai'i, as CCA's second largest customer is sure to receive national notice as fallout from this scandal. The aloha state should at least show an interest in getting at the truth of these matters.

Here is a brief rundown of incidents affecting Hawai`i inmates that have happened in CCA facilities:
Saguaro:

- **August 2007** - The heads of the education and addiction-treatment programs at a private Arizona prison holding Hawaii inmates abruptly quit their jobs complaining of poor management, inadequate facilities and lack of staffing.
- **August 26, 2008** – Hawai`i inmate **James Kendrick**, 60, collapsed while playing basketball in the recreation yard, inmates near him said he grabbed chest and collapsed - CPR was administered (by our men who report the staff did nothing). He was **pronounced dead** 2:30 p.m. Arizona time.

- **October 2008 - Hawai`i inmate, Mr. Cartel, died** after calling for help, being told to 'hang on' after calling for medical help. After waiting and then discovering that the emergency button in his cell was not working, he died when CCA staff finally got him to the medical unit. TOO LATE.
- **Ongoing Complaints** - Weather has been 40 degrees in the morning, yet all incarcerated individuals have yet to be issued winter clothing, which is needed since they must go outside to go to recreation, medical unit, and dining hall.
- Families and incarcerated individuals report that the only 'program' that has been consistently running is SHIP (Special Housing Incentive Program) or better known as LOCKDOWN. How does being locked in a cell for 23 hours a day (SHIP I); or 22 hours a day (SHIP II), or 21 hours a day (SHIP III) assist an individual in examining his behavior and planning for reentry. Do we want bitter and angry individuals coming home or rehabilitated individuals who are really and able to be contributing members of our community?

Otter Creek:

- **October 2005** - Women are processed into Otter Creek; Diarrhea and vomiting widespread and persisted for the first several months; CAP found that the water at OCCC is groundwater and Wheelwright, KY is an abandoned mining town; Women advised by nurse not to drink the water – nurse later sanctioned.
- **December 1, 2005** - Hawai`i woman, RR, rushed to the hospital with pneumonia after being denied help at the medical unit; Denied follow-up doctor's visit.
- **December 18, 2005** - Hawai`i woman, WK, rushed to the hospital after many pleas for medical help because of persistent arm and leg pain. It took security seven minutes to open her door to give her nebulizer and 2 hours to get to Hazard Medical Center; WK underwent triple by-pass surgery.
- **December 31, 2005** - **Sarah Ah Mau, Hawai`i inmate, died** after being repeatedly threatened with lockdown if she continued to ask for medical help
- **January 15, 2006** – phone call from women - Women with diabetes made to take medicine at inappropriate times; Several Kentucky inmates are in the hospital
- **January 19, 2006** – phone call from women - WK up and walking in yard for the first time. Still no follow-up surgical visit; Women still denied their asthma and physician-prescribed medication; Women being told they are not Kentucky prisoners, but Hawai`i tells them they are under Kentucky's control – mass confusion and conflicting rules
- **January 27, 2006** – WK rushed to hospital at 2:30 AM
- **February 2007 – letter from a Mom:** I need your help. Otter Creek is like a "concentration camp". The lights are on 24 hours a day and there is never any enforcement to keep the women from talking 24 hours a day. My daughter is cracking up. I can't get any help. I think there might have been another death in the last few weeks there that was covered up. The way XXX described what happened, the woman needed medical help for headache, was told to go lie down. Next morning she was blue and they took her out on a stretcher. Don't know if she was alive or not.
- **August 27, 2007** – **Latasha Glover, Kentucky inmate, died**
- **January 22, 2008 – Carla J. Meade, Warden Joyce Arnold's secretary smuggles a gun into prison and commits suicide in the Warden's office.**

The Department says that they receive regular reports from the CCA prisons where Hawai`i individuals are serving their sentences. They also say that there are Hawai`i monitoring teams at the prison 3 weeks out of every month. Why then don't their reports address what the people who live there and their families have complained about?

"Ronald T. Jones, the former CCA manager, alleges that the company even began keeping two sets of books – one for internal use that described prison deficiencies in telling detail, and a second set that Jones describes as "doctored" for public consumption, to limit bad publicity, litigation or fines that could derail CCA's multimillion-dollar contracts with federal, state or local agencies." (Source: TIME MAGAZINE)

The doctored books have euphemisms such as 'altered facility schedule due to inmate action' to report a prison riot. Does that sound like a riot to you?

Another except from the Time Magazine Article in March 2008:

*"Jones knows CCA intimately. Until last summer, the longtime Republican was in charge of "quality assurance" records for CCA prisons across the U.S. He says that in 2005, after CCA found itself embarrassed on several occasions by the public release of internal records to government agencies, Puryear mandated that detailed, raw reports on prison shortcomings carry a blanket assertion of "attorney-client privilege," thus forbidding their release without his written consent. From then on, Jones says, the audits delivered to agencies were filled with increasingly vague performance measures. **"If the wrong party found out that a facility's operations scored low in an audit, then CCA could be subject to litigation, fines or worse,"** explains Jones. "When Mr. Puryear felt there was highly sensitive or potentially damaging information to CCA, I would then be directed to remove that information from an audit report."*

When a Kentucky inmate died last August I asked the department the circumstances, they replied that she was not our inmate, so it was not of concern to us. What? We had 175 women there at that time - any person's death should be of concern and we should be told. The state is liable for the health and safety of individuals entrusted to their custody.

This bill would give taxpayers an independent view - and un-doctored look, if you will - at how our contracts are being enforced and how private contracted prisons are complying with its provisions. It is obvious that something is very wrong. And we know it. The nation knows it. How will Hawai'i respond?

Since 2000, the State Has Paid Over $5.5 Million in Claims Against the Department of Public Safety:
The state is still responsible for the care of individuals sentenced by our courts regardless of where those individuals are housed. What liability does the state/taxpayer bear since now we know we are not getting the real story of what is happening to Hawai'i individuals entrusted to their care?

Here is a listing of Claims Against the Department of Public Safety since 1999:

Year	Amount
2009 (to date)	$ 95,000
2008	$ 548,794
2007	$ 295,246
2006	$ 341,487
2005	$ 87,500
2004	$2,000,000
2003	$ 126,085
2002	$ 120,239
2001	$ 727,652
2000	$1,298,455
	$5,610,413

An audit - even at a cost of $500,000 - is a good investment since Hawai'i taxpayers have funded over $5.5 million dollars since 2000 to settle claims against the Department of Public Safety.

Through their hard-earned tax dollars, the good people of Hawai'i pay the Corrections Corporation of America more than $50 million a year. The Department has recently reported that the day rate is going up in Arizona from $57 a day to $78 per day, assuring that the taxpayers will be taking money out of much-needed services to fatten the coffers of CCA to keep these beds full. DBEDT reports that for every dollar exported, Hawai`i loses $3 in economic activity. In these austere economic times, we must take a close look at how we are spending our citizens' money. We have a right to know if our tax dollars are making a difference or just furthering a broken system.

In 2008, the Superintendent of Schools had a piece in the Honolulu Advertiser proclaiming the usefulness of independent audits.

Almost 14 years of moving individuals around like chess pieces warrants a close examination and the formation of an exit strategy - let's start by getting at the truth.

We need answers, not more hardened criminals. As Dr. Philip Zimbardo said when CAP brought him in for a seminar, "We put felon in prison and we exit criminals." The classification study reported that 84% of our incarcerated women and 63% of incarcerated men are nonviolent offenders.

Community Alliance on Prisons urges the committee to pass SB 83 and to pass it onto WAM with a STRONG recommendation for passage. Hawai`i can no longer look the other way when the state will be facing huge claims from at least three deaths at CCA prisons (Ah Mau, Kendricks, Cartel) in the future. An audit will provide the data you need to make necessary and important policy changes.

Mahalo for this opportunity to testify.

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Aloha Chair Espero, Vice Chair Bunda and Members of the Committee!

My name is Ken E.K. Hunt and I am voicing strong support in passage of this bill, SB 83. The Bill, authorizes the Legislative Auditor to conduct performance audits of private prisons housing Hawai`i inmates, namely Red Rock Correctional Center, Saguaro Correctional Center, and Otter Creek Correctional Center.

Audits are simply the best way to verify that expenditures are being spent in the way that they should be, by an independent outside auditor. As a recipient of Federal and State funds, our program, BEST, is subject to an audit every single year. Our agency, Maui Economic Opportunity, Inc. is required to conduct an audit each year and does so, resulting in clear audits each time.

Why should we not expect the State of Hawaii to do the same? We as taxpayers have the right to demand that this action takes place.

BEST is a recipient of State funds through the Department of Public Safety and the PSD will ask us for these audits. We must be able to expect the same from the Department.

We simply ask the PSD and the State assure its citizens that the programs, services, and funds given to a private contractor like CCA be audited. Passage of this bill will be the first step in that direction.

Mahalo for allowing me to submit this testimony.

Ken E.K. Hunt
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From: Kevin Block [kevin.block@meoinc.org]
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COMMITTEE ON PUBLIC SAFETY AND MILITARY AFFAIRS
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Aloha Chair Espero, Vice Chair Bunda and Members of the Committee!

My name is Kevin Block. I am the Assistant Director of the BEST Program which serves incarcerated and formerly incarcerated individuals in Maui County. Our clients and their families and our community at large are directly impacted by the State of Hawaii's policy of exporting a portion of its inmate population to the mainland via the CCA.

We believe that it is in the best interest of all stakeholders in the state to have accountability standards enacted in the form of an audit. We are spending too much money and the stakes are too high for failure as we are exporting our most precious resource: our family members. There have been many reports, both on and off the record, that certainly warrant further investigation by an independent, third party auditor.

We realize that the State budget cutbacks are a cause for concern for any bill that may seem like an appropriation. However, I would like to remind the hearing members that since the year 2000, the State has paid over 5.5 million dollars in claims against the Department of Public Safety. The State is still responsible for individuals who are incarcerated elsewhere and it is both our fiscal and a moral duty to ensure oversight of CCA's activities. It is unheard of that the State would spend $50 million dollars a year on CCA contracts without auditing them once for the last 14 years. Our non-profit operates on a budget that is a small fraction of that and we are audited constantly!

We urge the legislature to support passage of SB 83 so that we may be accountable to our families and communities.

Mahalo for taking the time to consider my testimony.

KEVIN BLOCK, J.D.
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Prisoners retain their First Amendment right to receive information while incarcerated. *Turner v. Safley*, 482 U.S. 78, 84, 107 S.Ct. 2254, 96 L.Ed.2d 64 (1987) ("Prison walls do not form a barrier separating prison inmates from the protections of the Constitution."); *Prison Legal News v. Cook*, 238 F.3d 1145, 1149 (9th Cir. 2001) (holding that a prison regulation banning standard-rate mail "implicates both Publisher's and Prisoners' First Amendment rights"); *see also Morrison v. Hall*, 261 F.3d 896, 905 (9th Cir. 2001) ("The Supreme Court has repeatedly recognized that restrictions on the delivery of mail burden an inmate's ability to exercise his or her First Amendment rights."). This First Amendment right is operative unless it is "inconsistent with [a person's] status as a prisoner or with the legitimate penological objectives of the corrections system." *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 129, 97 S.Ct. 2532, 53 L.Ed.2d 629 (1977) (quoting *Pell v. Procunier*, 417 U.S. 817, 822, 94 S.Ct. 2800, 41 L.Ed.2d 495 (1974)).

The Supreme Court in *Turner* established a four factor test to determine whether a prison policy serves legitimate penological objectives:

> (1) whether the regulation is rationally related to a legitimate and neutral governmental objective; (2) whether there are alternative avenues that remain open to the inmates to exercise the right; (3) the impact that accommodating the asserted right will have on other guards and prisoners, and on the allocation of prison resources; and (4) whether the existence of easy and obvious alternatives indicates that the regulation is an exaggerated response by prison officials.

Prison Legal News, 238 F.3d at 1149 (citing *Turner*, 482 U.S. at 89-90, 107 S.Ct. 2254); *see also Thornburgh v. Abbott*, 490 U.S. 401, 413, 109 S.Ct. 1874, 104 L.Ed.2d 459 (1989) (holding that the *Turner* test applies to a prison's regulation of incoming mail).

CDC argues that the internet policy serves at least two legitimate penological interests under the *Turner* test. First, it contends that permitting prisoners to receive material downloaded from the internet would drastically increase the volume of mail that the prison had to process. Second, it asserts that internet-generated mail creates security concerns because it is easier to insert coded messages into internet material than into photocopied or handwritten material and because internet communications are harder to trace than other, permitted communications. However, as the district court explained in a detailed and persuasive analysis that we adopt, CDC failed to meet the *Turner* test because it did not articulate a rational or logical connection between its policy and these interests. *Clement*, 220 F.Supp.2d at 1110-13. Prohibiting all internet-generated mail is an arbitrary way to achieve a reduction in mail volume. *See Morrison*, 261 F.3d at 903-04 (striking down, for similar reasons, a prison regulation that prohibited prisoners from receiving all bulk rate, third class,

and fourth class mail). CDC did not support its assertion that coded messages are more likely to be inserted into internet-generated materials than word-processed documents. Moreover, Clement submitted expert testimony that it is usually easier to determine the origin of a printed email than to track handwritten or typed mail. Because the district court carefully considered and properly applied the *Turner* factors, we affirm its holding that the Pelican Bay internet-generated mail policy violates Clement's First Amendment rights.

III.

We turn to CDC's contention that the injunction entered by the district court is too broad because it enjoins the enforcement of the internet mail policy in all California prisons. Because the injunction is no broader than the constitutional violation, the district court properly entered a statewide injunction.[fn11]

The Prison Litigation Reform Act ("PLRA") sets forth several requirements limiting the breadth of injunctive relief:

> Prospective relief in any civil action with respect to prison conditions shall extend no further than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs. The court shall not grant or approve any prospective relief unless the court finds that such relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right.

18 U.S.C. § 3626(a)(1)(A); *see also Armstrong v. Davis*, 275 F.3d 849, 870 (9th Cir. 2001) (noting that in *Lewis v. Casey*, 518 U.S. 343, 359, 116 S.Ct. 2174, 135 L.Ed.2d 606 (1996), the Supreme Court reiterated "the longstanding maxim that injunctive relief against a state agency or official must be no broader than necessary to remedy the constitutional violation").

An injunction employs the "least intrusive means necessary" when it "`heel[s] close to the identified violation,' and is not overly `intrusive and unworkable' . . . [and] would [not] require for its enforcement the continuous supervision by the federal court over the conduct of [state officers]." *Id.* at 872 (quoting *Gilmore v. California*, 220 F.3d 987, 1005 (9th Cir. 2000) and *O'Shea v. Littleton*, 414 U.S. 488, 500-01, 94 S.Ct. 669, 38 L.Ed.2d 674 (1974)).

The district court properly addressed the injunction to all prisons under CDC control. "The scope of injunctive relief is dictated by the extent of the violation established." *Armstrong*, 275 F.3d at 870 (quoting *Lewis*, 518 U.S. at 359, 116 S.Ct. 2174). Clement has provided uncontroverted evidence that at least eight California prisons have adopted a policy banning all internet-generated mail, and that more are considering it. There is no indication in the record that the policies that other California prisons have enacted differ in any material way from Pelican Bay's blanket prohibition. Because a substantial number of California prisons are considering or have enacted virtually identical policies, the unconstitutional policy

has become sufficiently pervasive to warrant system-wide relief. *Id.*

The injunction here is no broader than necessary to remedy the First Amendment violation. The injunction prohibits banning internet materials simply *because* their source is the internet. It does not prohibit restrictions for any legitimate penological or security reason. Without violating the injunction, legitimate restrictions could be adopted by any prison to meet its individual needs, for example page limitations, or a ban on recipes for pipe-bombs.

The state offers no argument that a total internet mail ban might be constitutional if implemented at a different prison. In such circumstances, it would be inefficient and unnecessary for prisoners in each California state prison to separately challenge the same internet mail policy; it would simply force CDC to face repetitive litigation. Moreover, if the policy is invalid at Pelican Bay, we can conceive of no reason why it would be valid elsewhere. It is well known that Pelican Bay houses maximum-security prisoners under the most restrictive conditions of any California prison.

The district court's injunction is also sufficiently narrow to "avoid unnecessary disruption to the state agency's `normal course of proceeding.'" *Ashker v. California Dep't of Corrections*, 350 F.3d 917, 921-22, 924 (9th Cir. 2003) (holding that enjoining enforcement of book labeling policy was not too broad because it closely matched the identified violation and did not interfere with the prison's policy of searching each package) (quoting *Gomez v. Vernon*, 255 F.3d 1118, 1128 (9th Cir. 2001)). The injunction does not require court supervision, enjoins only enforcement of the unconstitutional policy and does not interfere with prison mail security measures.

The district court considered the PLRA requirements and found that the injunction it issued was properly tailored to the constitutional violation. *See Armstrong*, 275 F.3d at 872 (upholding injunction where "the district court specifically made the findings required by the PLRA"). We agree. We affirm the judgment in favor of

Clement and uphold the statewide permanent injunction entered by the district court.

AFFIRMED.

[fn1] At oral argument, counsel for CDC also contended that the district court's order was broader than its judgment and the injunction. This argument is specious in that the judgment and the injunction control.

AMERICAN CIVIL LIBERTIES UNION of HAWAI'I

Via Email:	PSMTestimony@Capitol.hawaii.gov
Committee:	Committee on Public Safety and Military Affairs
Hearing Date/Time:	Tuesday, February 3, 2009, 1:15 p.m.
Place:	Room 229
Re:	*Testimony of the ACLU of Hawaii in Support of SB 83, Relating to Corrections*

Dear Chair Espero and Members of the Committee on Public Safety and Military Affairs:

The American Civil Liberties Union of Hawaii ("ACLU of Hawaii") writes in strong support of SB 83, which seeks to authorize the auditor to conduct performance audits of private prisons housing Hawaii inmates, namely Saguaro Correctional Center, Red Rock Correctional Center, and Otter Creek Correctional Center, all operated by the Corrections Corporation of America ("CCA"). Simply put, an audit of the CCA contracts could save the State of Hawaii substantial sums of money. For example, the State of Oklahoma recently withheld nearly $600,000 from CCA because CCA was not complying with its contractual obligations.[1] These payments were only withheld after the Oklahoma Legislature requested a performance audit of the prisons.

In these difficult economic times, it is important that private prisons are carefully scrutinized to determine whether they are a wise use of our limited funds. The ACLU of Hawaii's experience with private prisons has been consistently negative, in that we continue to receive hundreds of requests for assistance from Hawaii inmates in CCA facilities. Indeed, the ACLU of Hawaii will be conducting in-person interviews with inmates at Saguaro in a few weeks; although we only resort to litigation when all other methods of dispute resolution have failed, we fear that we will have no other choice but to sue to rectify the myriad constitutional violations that exist at the facility unless the Legislature takes swift and decisive action.

We have received hundreds of complaints indicating that inmates are not receiving the services for which we – Hawaii's taxpayers – are paying. For example, we have received many complaints that inmates are not receiving basic necessities like soap, toothpaste, and cold weather clothing, despite the fact that the contract between CCA and the State requires CCA to pay for these items. In other words, these reports indicate that Hawaii's taxpayers are paying for items that are not being delivered.

[1] Tom Lindley, In Get-Tough Stance, DOC Withholds Prison Payments, *Tulsa World*, Dec. 16, 2008, available at http://www.tulsaworld.com/news/article.aspx?subjectid=11&articleid=20081216_16_A1_OKLAHO157983.

American Civil Liberties Union of Hawai'i
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www.acluhawaii.org

The reports we have been receiving also suggest that CCA is not meeting its most basic of constitutional obligations in housing inmates. To take just one example, inmates at Saguaro Correctional Center have reported that they are forced to choose one religion – and one religion only – when attending services. Therefore, an inmate can be *either* Hawaiian *or* Christian, but not both (such that inmates have to choose whether to attend a Makahiki ceremony or Christmas services). Correctional institutions in Hawaii seem to recognize the reality that many individuals observe *both* Hawaiian cultural practices *and* Christianity (along with the reality that such spiritual and cultural practices have a significant positive impact on these inmates), though CCA reportedly does not.

Furthermore, we have received several reports suggesting that CCA may be keeping inmates longer than necessary; because Hawaii pays CCA per inmate per day of incarceration, the longer inmates are held, the more money CCA receives. We have received several complaints of inmates being granted parole by the Hawaii Paroling Authority, then being held for four months or more by CCA (based on vague and unsubstantiated reasons for ignoring the paroling authority's orders). One month of additional incarceration can easily cost the State and the taxpayers nearly $2,000 – money that is sorely needed for other programs like drug rehabilitation, mental health care, and education – and the Legislature need not (and should not) allow these reports to be ignored.

An audit will help to determine whether the millions of dollars paid to private prisons to house Hawaii's inmates is the most effective use of that money. They will also indicate whether CCA is complying with its contractual obligations.

The mission of the ACLU of Hawaii is to protect the fundamental freedoms enshrined in the U.S. and State Constitutions. The ACLU of Hawaii fulfills this through legislative, litigation, and public education programs statewide. The ACLU of Hawaii is a non-partisan and private non-profit organization that provides its services at no cost to the public and does not accept government funds. The ACLU of Hawaii has been serving Hawaii for over 40 years.

Thank you for this opportunity to testify.

Sincerely,

Daniel M. Gluck
Senior Staff Attorney
ACLU of Hawaii

American Civil Liberties Union of Hawai'i
P.O. Box 3410
Honolulu, Hawai'i 96801
T: 808.522-5900
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E: office@acluhawaii.org
www.acluhawaii.org

TO: COMMITTEE ON PUBLIC SAFETY AND MILITARY
Sen. Will Espero, Chair
Sen. Robert Bunda, Vice Chair
Tuesday, February 3, 2009
1:15 PM
Room 229, Hawaii State Capitol

RE: Testimony in Support of SB 89 Relating to Corrections: Prison Performance CCR

Dear Senator Espero and Members of the Committee on Public Safety and Military:

My name is attorney Daphne Barbee-Wooten and I represent inmates who have been transferred to Saguaro Correction Facility in Elroy, Arizona from Hawaii. I have received many complaints from inmates that legal mail is being intercepted by the guards and they are being written up when they send complaints to their attorneys as having "contraband". In one specific case, my client was charged with having contraband, which included possessing grievances which he was authorized to have by other inmates showing the retaliatory pattern by the guards of taking away legal documents from them. My client also informed me that when I send case law pertinent to his case and his ongoing appeal, the case law is taken away from him as contraband. When I wrote to the State Ombudsman, I was told it was not within their jurisdiction. Enclosed is a copy of their letter to me. When I wrote to Mr. Tommy Johnson and wrote to Saguaro Correctional Facility's warden, I was told that the prison was within its rights to confiscate legal mail. I even wrote to the Attorney General who provided an erroneous case law stating that it was in the prison's right to confiscate legal mail. I enclosed copies of the correct case law. I still receive reports that Saguaro correctional facility is confiscating legal mail, intercepting legal mail, and prosecuting inmates as having contraband, case law and/or grievances. I requested copies of the definition of contraband from the State, Mr. Tommy Johnson, and from Saguaro Correctional Facility. I have not received any definition. My client was placed in a hole, segregation for 30 days for allegedly having this contraband grievance concerning being wrongfully punished and retaliated for filing complaints about the prison conditions.

I believe Saguaro Correctional Facility is violating Constitution of inmates' First and Sixth Amendment rights to correspond with their attorneys and to review case law which is relevant to their cases. There needs to be oversight of Saguaro as the State appears to wash its hands and supports whatever Saguaro's warden wants. Attached to my testimony are correspondence to Saguaro and State Public Safety and their response.

I am also attaching case law which clearly states "Several courts have held that mail relating to a prisoner's legal matters may not be read and may only be opened in the prisoner's presence". See Parish v. Johnson, 800 F.2d 600 (6th Cir. 1986), Clement v. California Department of Corrections, 364 F.3d 1148 (9th Cir. 2004). One of the important purposes of correctional facilities is rehabilitation and correction. Encouraging inmates to follow the law is important and people learn by examples. If the "correctional facilities" do not follow the law and

do not even allow inmates to read the law or to file complaints that their legal rights are being violated, it is not a correctional facility worthy of financial support from the State of Hawaii. A prison facility considering case law to be contraband is absurd as well as unconstitutional. A review of Saguaro is necessary to ensure it treats Hawaii inmates in a fair and constitutional manner. Enclosed are documents in support of this testimony.

Dated: Honolulu, Hawaii 2-1-09

D Barbee Wooten

Daphne Barbee-Wooten
Attorney at Law

DECLARATION OF ERIC A. WILSON

I, ERIC A. WILSON, HEREBY DECLARE UNDER PENALTY OF PERJURY AS FOLLOWS:

1. I AM INCARCERATED AT SAGUARO CORRECTIONAL CENTER PURSUANT TO A HAWAII WORK SHARE AGREEMENT. I WAS CONVICTED IN THE HAWAII STATE COURTS AND ORIGINALLY SENTENCED IN THE STATE OF HAWAII. DUE TO EXISTING OVERCROWDED CONDITIONS WITHIN THE DEPARTMENT OF PUBLIC SAFETY, THE STATE OF HAWAII TRANSFERRED ME TO THE SAGUARO CORRECTIONAL CENTER ON JUNE 25, TH 2008 (SEE ATTACHED).

2. I WROTE LETTERS TO MY ATTORNEY WHICH ENCLOSED DOCUMENTS GIVEN TO ME BY OTHER INMATES TO SUPPORT MY CASE AND MY GRIEVANCES AGAINST THE SAGUARO CORRECTIONAL CENTER, WHICH IS CENSORING AND OPENING "LEGAL MAIL."

3. ON OCTOBER 30th, 2008, A CORRECTIONAL COUSELOR NAMED MARTINEZ OPENED UP MY OUTGOING LEGAL MAIL, READ THE CONTENTS, AND STATED THAT I HAD UNAUTHORIZED DOCUMENTS. MY LEGAL MAIL WAS GIVEN TO THE UNIT TEAM MANAGER NAMED SANCHEZ, AND DECLARED TO BE "CONTRABAND." I, IMMEDIATELY INITIATED THE GRIEVANCE PROCESS WITH AN INMATE REQUEST FORM.

4. ON OCTOBER 31, ST 2008 CORRECTION OFFICER RODRIGUEZ TOLD ME TO REPORT TO OPERATIONS TO SEE THE ASSISTANT WARDEN GRIEGO, AND THE GRIEVANCE COORDINATOR VALENZUELA. I WAS TOLD BY ASSISTANT WARDEN GRIEGO THAT I WAS BEING PLACED IN SEGREGATION FOR ASSISTING OTHER INMATES WITH LEGAL WORK, AND OR THE GRIEVANCE PROCESS. THAT I SHALL REMAIN IN SEGREGATION UNTIL HIS INVESTIGATION WAS COMPLETED.

ON NOVEMBER 3RD 2008 I WAS GIVEN A DISCIPLINARY REPORT BY SERGEANT WILLIAMS. I WAS WRITTEN UP FOR UNAUTHORIZED RECEIPT OF PROPERTY, AND REMAINED IN SEGREGATION UNTIL MY DISCIPLINARY HEARING.

5. ON NOVEMBER 10TH, 2008 THE DETENTION HEARING OFFICER ESTRADA FOUND ME GUILTY EVEN THOUGH THERE WASN'T ANY EVIDENCE PRESENTED AT THE HEARING. ATTACHED IS MY INMATE REQUEST/GRIEVANCE, AND COPIES OF MY DISCIPLINARY REPORT AND DETENTION HEARING DECISION.

6. I APPEALED THE DETENTION HEARING DECISION BECAUSE I DID NOT HAVE ANY UNAUTHORIZED DOCUMENTS AND IT IS MY UNDERSTANDING FROM THE LAW THAT LEGAL MAIL IS ENTITLED TO GREATER CONFIDENTIALITY, AND FREEDOM FROM CENSORSHIP.

7. ACCORDING TO THE DETENTION HEARING DECISION I WAS TO BE GIVEN 20 DAYS IN SEGREGATION IN THE HOLE, AND WITH CREDIT FOR TIME SERVED 10/31/08 TO 11/19/08

8. I RECEIVED 1 PHONE CALL FROM MY ATTORNEY ON NOVEMBER 13TH, 2008 AND IT WAS AGREED THAT I WAS TO MAKE 1 LEGAL PHONE CALL TO HER OFFICE EVERYDAY UNTIL I WAS RELEASED FROM SEGREGATION. I MADE 1 PHONE CALL TO MY ATTORNEY ON NOVEMBER 14TH, AND THE LINE WAS BUSY. AFTER THAT I SUBMITTED SEVERAL LEGAL PHONE CALL REQUEST TO THE SAGUARO CORRECTIONAL CENTER STAFF, BUT NO ONE HONORED MY REQUEST.

9. I WAS PLACED IN THE HOLE FAR BEYOND THE 20 DAYS, I DID 35 DAYS IN THE HOLE, 15 DAYS PAST MY SANCTION TIME.

10. I BELIEVE SAGUARO CORRECTIONAL CENTER IS VIOLATING MY CONSTITUTIONAL RIGHTS TO HAVE ACCESS TO THE COURTS, TO THE LEGAL SYSTEM, AND TO MY ATTORNEY

DECLARATION OF SAPATUMOE'ESE MALUIA, #A0079710

I, Sapatumoe'ese Maluia, A0079710, do hereby declare, certify, and state under the penalty of perjury as follows:

1. I am a Hawaii inmate incarcerated at Saguaro Correctional Center, in Eloy, Arizona.

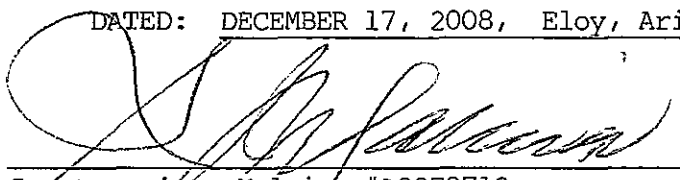
2. Saguaro Correctional Center ("SCCC") is run by Corrections Corporation of America ("CCA"), a private prison operator, under a Contract agreement with the State of Hawaii, Department of Public Safety.

3. I wrote, showed and gave documents to my next door celly inmate Eric Wilson, as examples for his review, and he had my permission to use it for his purposes including pass it on to his attorney, if he so chooses.

4. I also gave him my personal paperback Webster dictionary to assist with his spelling when he writes.

5. Eric Wilson did not have any unauthorized documents from me because I specifically allowed him to have the documents. The documents were to assist him in his legal case.

DATED: DECEMBER 17, 2008, Eloy, Arizona



Sapatumoe'ese Maluia, #A0079710
CCA-Saguaro Correctional Center
1250 E. Arica Road
Eloy, AZ 85231-9622

DECLARANT.

DAPHNE E. BARBEE
ATTORNEY AT LAW
1188 BISHOP STREET, SUITE 1909, HONOLULU, HAWAII 96813
TELEPHONE (808) 533-0275

December 2, 2008

Mr. Tommy Johnson
Department of Public Safety
919 Ala Moana Boulevard, Room 400
Honolulu, Hawaii 96814

Re: Civil Rights Violations at Saguaro Correctional Center

Dear Mr. Johnson:

I previously wrote letters concerning my client Eric Wilson's incarceration at Saguaro Correctional Center. The warden of Saguaro Correctional Center called me and confirmed that my client was being placed in the hole for having grievances and legal documents which were opened by a guard. The warden stated that such legal documents were "contraband". Enclosed are letters I sent to the warden as well as to Janet at the Hawaii Department of Public Safety. Although Mr. Wilson should have an opportunity to call his lawyer, when I was able to reach him he told me had made numerous requests to call his lawyer and they were not honored by the guards at Saguaro. Furthermore, Eric Wilson explained that the grievances he had sent to me were his grievances and other grievances from other inmates corroborating his grievance concerning use of the law library and Saguaro's cruel and inhumane treatment of the inmates for exercising their First Amendment rights of filing grievances and retaliation which they received.

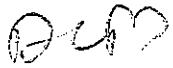
The warden from Saguaro called my client Eric Wilson "Johnnie Cochran". I sent case law to the warden as well as to Attorney General Mark Bennett. I have not heard anything else back from the warden at Saguaro nor has Mark Bennett responded. My client continues to be placed in the hole and segregation. This placement in segregation for having grievances and sending them to me violates well established law which states "A prison official's discretion is not unlimited...and several courts have held that mail relating to a prisoner's legal matters may not be read and may only be opened in the prisoner's presence". See Parish v. Johnson, 800 F.2d 600 (6th Cir. 1986), at page 604, and Clement v. California Department of Corrections, 364 F.3d 1148 (9th Cir. 2004).

I understand from the ACLU that there have been numerous complaints by Hawaii inmates about Saguaro Correctional Center's opening their legal mail and punishing inmates who complain about the conditions at Saguaro by retaliating and placing these inmates in the hole. There appears to be a pattern of Saguaro violating the inmates' Constitutional rights. When the

Saguaro warden contacted me, he informed me that Saguaro was the best ranking prison in the United States and had just gone through a complete inspection where there were no violations noted. Given the numerous complaints and the manner in which specifically Mr. Wilson is being treated at Saguaro, Saguaro has serious problems and needs improvement.

Please contact me and let me know if anything will be done to alleviate the Constitutional violations at Saguaro.

Sincerely,



Daphne E. Barbee
Attorney at Law

cc. Mr. Eric Wilson
ACLU
encl.

LINDA LINGLE
GOVERNOR

CLAYTON A. FRANK
DIRECTOR

DAVID F. FESTERLING
Deputy Director
Administration

TOMMY JOHNSON
Deputy Director
Corrections

JAMES L. PROPOTNICK
Deputy Director
Law Enforcement

STATE OF HAWAII
DEPARTMENT OF PUBLIC SAFETY
919 Ala Moana Boulevard, 4th Floor
Honolulu, Hawaii 96814

No. PSD #2008-2827

December 9, 2008

Ms. Daphne E. Barbee, Attorney at Law
1188 Bishop Street, Suite 1909
Honolulu, Hawaii 96813

RE: Alleged Civil Rights Violations at Saguaro Correctional Center

Dear Ms. Barbee:

This is in response to your letter dated December 2, 2008, alleging civil rights' violations at the CCA Saguaro Correctional Center on behalf of your client, inmate Eric Wilson. Thank you for bringing your concerns to my attention. Upon receipt of your letter a review of your concerns was conducted as well as a review of pertinent policies and legal statutes.

Now that a review has been completed, I am able to share the findings with you. As you know, Warden Thomas provided you with a written response to your letter dated Nov 5, 2008. In fact, Warden Thomas' response was provided to you on Nov 6, 2008. In his response, he explained the frequency of allowable legal and personal telephone calls. He also acknowledged receipt of your fax that included case law stating that legal mail should not be opened by guards.

With respect to your concerns regarding telephone calls to/from your client, if you wish to schedule telephone calls with your client, you may do so by contacting our Mainland Branch at 837-8020. The staff of the mainland branch maintains the schedule and coordinates all attorney calls with Warden Thomas' staff. This helps to ensure that clients are available, and that adequate time, space, and privacy is provided for the call. In addition, if your client wishes to initiate telephone calls to you, he must simply submit a request form which is readily available to him with your name and telephone number so that the information can be verified, then you will be added to his authorized call list. These practices are well established, have been in place for some time, and do not violate an inmate's right to communicate with his/her attorney.

Please be advised that all legal mail is opened by a staff member (i.e. case managers, unit managers, correctional counselors, correctional officers, etc.) in the presence of the inmate and is scanned for contraband, but is not read. This is done to ensure the safety and security of the facility, staff, and inmates alike and ensures contraband is

not introduced into the facility using this privileged means of communication. This practice is generally used throughout the country, including Department of Public Safety facilities and does not violate an inmate's civil rights. It is important to remember that the facility is ultimately responsible for the health, safety, and welfare of the inmates and the staff. As such, the staff must verify the contents of any legal parcel to ensure that contraband is not being introduced into the facility. There are occasions when persons have used privileged legal mail for illegal purposes.

Finally, if I can be of further assistance, please don't hesitate to write to me again or you can reach me at 587-1340.

Sincerely,

Tommy Johnson
Deputy Director for Corrections

c: Clayton A. Frank, Director, Dept. of Public Safety
Mainland Branch Records (Eric Wilson – A-266647)

DAPHNE E. BARBEE
ATTORNEY AT LAW
1188 BISHOP STREET, SUITE 1909, HONOLULU, HAWAII 96813
TELEPHONE (808) 533-0275

November 5, 2008

Mr. Todd Thomas
Warden
Saguaro Correctional Center
1250 E. Arica Rd.
Eloy, Arizona 85231

Dear Warden Todd Thomas:

This will confirm the telephone conversation with you on November 5, 2008. You telephoned me in response to receiving my letter of complaint that my client Eric Wilson had his legal mail opened and confiscated at Seguaro . During our conversation you confirmed that Mr. Wilson was placed in segregation and the hole for attempting to send out legal mail which included grievances about the Correctional Center from other inmates. You referred to my client as " Johnnie Cochran". When I asked what you meant, you could not explain why you made this remark. I asked you whether you were prohibiting jail house lawyers and complaints about the facility and you did not directly respond. You informed me that Mr. Wilson was placed in segregation for helping with grievances of other inmates which you referred to as contraband. I asked if I could speak with Eric Wilson and you said no. You told me he could have 1 phone call a month as punishment. Segregating an inmate for being a jail house lawyer or for being "Johnnie Cochran" is unconstitutional. I am enclosing case law stating legal mail should not be opened by guards. If other inmates request assistance from Mr. Wilson and give him permission to research issues, why is this "contraband" ?

Please send me the rules regarding legal mail, and prohibiting inmates from assisting others in their grievances and the definition of contraband, which results in segregation and placement in the "hole". I also request the tape copy of our conversation which I understand Seguaro facility tape records.

Sincerely,

Daphne E. Barbee
Attorney at Law

cc: Mr.Mark Bennett, Hawaii State Attorney General
Mr. Tommy Thompson, Hi Department of Public Safety
Hawaii State Ombudsman
Eric Wilson
ACLU

CORRECTIONS CORPORATION OF AMERICA

Saguaro Correctional Center

November 6, 2008

Daphne E. Barbee, ESQ.
Attorney At Law
Century Square, Suite 1909
1188 Bishop Street
Honolulu, HI 96813
808-533-0275

Dear Ms. Barbee,

In response to your fax dated 11/05/08, we did have a telephone conversation on 11/05/08 @ 5:40 PM local time. During our telephone conversation, you requested that I grant you immediate phone access, so that you could speak to your client. I informed you that this was not the proper protocol and that you could contact Hawaii Mainland Branch to assist you which is our normal protocol. You also requested that I provide you with all documents that were confiscated from your client. My response to you was that you client may provide you with any legal documents that were his, and that you have no legal rights to other inmates legal paperwork. When you say that I referred to your client as "Johnnie Cochran", we both made reference to him as a jail house lawyer. I also informed you that there were strict policies on inmate legal aides and that your client was not an approved legal aide at Saguaro Correctional Center. You asked how many calls that you client has a right to when in the Segregation Unit, my response to you was he has unlimited access to legal calls and 1 (one) personal call a month. Other calls would be based on an emergency situation only.

I appreciate you including in your fax, a copy of case law stating that legal mail should not be opened by guards. Our policies are in compliance with the federal law. Our Correctional Officers are properly trained and are in full compliance. If Mr. Wilson would like to become a Law Library Aide at Saguaro Correctional Center, he may do so through the proper channels. Any request for policies and procedures can be done through the Hawaii Mainland Branch or through our Corporate Office in Nashville, Tennessee. I also wanted to inform you that staff conversations are not taped; therefore I cannot provide you with a tape of our conversation. If I can be of any further assistance please feel free to contact me at the facility.

Sincerely,

Todd Thomas
Warden

Cc: Mr. Tommy Thompson, Hawaii DPS
Shari Kimoto, Administrator Hawaii DPS
Mr. Mark Bennett, Hawaii State Attorney General
Hawaii State Ombudsman
ACLU
Inmate: Eric Wilson #A0266647
SCC Records

DAPHNE E. BARBEE
ATTORNEY AT LAW
1188 BISHOP STREET, SUITE 1909, HONOLULU, HAWAII 96813
TELEPHONE (808) 533-0275

December 15, 2008

Mr. Tommy Johnson
Deputy Director for Corrections
Department of Public Safety
919 Ala Moana Boulevard, 4th Floor
Honolulu, Hawaii 96814

Re: Eric Wilson, Civil Rights Violations at Saguaro Correctional Center

Dear Mr. Johnson:

Thank you very much for your letter dated December 9, 2008 concerning my letter of complaint regarding Saguaro Correction Center and its treatment of my client Mr. Eric Wilson.

In your letter, it states that Warden Thomas wrote to me on November 6, 2008. I never received any letter from him on November 6, 2008. Please provide me with a copy of this letter, and I am sending Warden Thomas a copy of my response to you.

My concern is that Mr. Wilson was placed in the hole, segregation, for allegedly having contraband, legal grievances concerning Saguaro, when a guard opened his legal mail. This is in violation of my client's constitutional rights to receive and send legal mail and to have full access to the courts. Mr. Wilson was placed in segregation for over 30 days. He put in requests to call his attorney with the guards. His request was not honored. It appears that inmates are being punished for exercising their constitutional rights in writing grievances and legal mail. My understanding from the ACLU and Mr. Wilson is that this is not the first time that inmates at Saguaro who have been punished for filing legal grievances and retaliated against. I am bringing this to your attention as Warden Thomas informed me that Saguaro was one of the best prisons and the treatment of inmates regarding their legal mail and their rights to access to the court contradict Warden Thomas' assertion.

Sincerely,

Daphne E. Barbee
Attorney at Law

cc. Mr. Eric Wilson
Warden Thomas

Robin K. Matsunaga
Ombudsman

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In reply, please refer to:
#09-01666 (PK)

November 12, 2008

Ms. Daphne E. Barbee
Attorney At Law
1188 Bishop Street, Suite 1909
Honolulu, HI 96813

Dear Ms. Barbee:

Re: Your Complaint Regarding Saguaro Correctional Center

This letter is in response to your telephone request on November 10, 2008 for a written response from our office.

We received your letter dated November 6, 2008, in which you stated that you were writing on behalf of your client Eric Wilson, a Hawaii inmate currently housed in the Saguaro Correctional Center (SCC) in Eloy, Arizona. You stated that Mr. Wilson has been unable to send you legal mail "without it being confiscated by the guards." You included a copy of a your letter dated October 30, 2008 to Attorney General Mark Bennett, and a copy of your letter dated November 5, 2008 to SCC Warden Todd Thomas.

As we informed you during our telephone conversation on November 10, 2008, our office does not have authority to investigate complaints about the SCC. Therefore, you should address your client's concerns to the Mainland Branch (MB) of the Department of Public Safety. The MB staff monitors the contractual performance of the mainland correctional facilities and is in regular contact with those facilities. The MB may be reached at:

Department of Public Safety
919 Ala Moana Boulevard, Room 400
Honolulu, HI 96814

If you write to the MB and do not receive a timely or reasonable response, you may write or call us again and we can review the actions of the MB.

Sincerely yours,

Paul Kanoho

PAUL KANOHO
Analyst

Approved by _____
ROBIN K. MATSUNAGA
Ombudsman

PK:so

CLEMENT v. CALIFORNIA DEPT. OF CORRECTIONS, 364 F.3d 1148 (9th Cir. 2004)

Frank S. CLEMENT, Plaintiff-Appellee, v. CALIFORNIA DEPARTMENT OF CORRECTIONS; Teresa Schwartz; Auggie Lopez; Susan Steinberg, M.D.; Dwight Winslow, M.D.; T. Puget, C/O, Defendants, and Cal Terhune; Robert Ayers; D. Stewart, Mailroom Staff, Defendants-Appellants.

No. 03-15006.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted March 8, 2004.

Filed April 20, 2004.

[EDITORS' NOTE: THIS PAGE CONTAINS HEADNOTES. HEADNOTES ARE NOT AN OFFICIAL PRODUCT OF THE COURT, THEREFORE THEY ARE NOT DISPLAYED.]

Rochelle Holzmann, Supervising Deputy Attorney General of the State of California, for the defendants-appellants.

Robert A. Mittelstaedt, Craig E. Stewart of Jones Day; Jennifer Starks; Ann Brick of the American Civil Liberties Union Foundation of Northern California; and Donald Specter and Heather Mackay of the Prison Law Office, for the plaintiff-appellee.

Lee Tien and Kevin Bankston of the Electronic Frontier Foundation, San Francisco, for amicus curiae Prison Legal News.

Appeal from the United States District Court for the Northern District of California, Claudia Wilken, District Judge, Presiding. D.C. No. CV-01860-CW.

Before: B. FLETCHER, REINHARDT, Circuit Judges, and RESTANI, Judge.[fn*]

[fn*] Honorable Jane A. Restani, Judge, United States Court of International Trade, sitting by designation.

PER CURIAM.

Plaintiff/Appellee Frank Clement, an inmate at Pelican Bay State Prison ("Pelican Bay"), alleges in this 42 U.S.C. § 1983 action that his First Amendment rights were violated by Pelican Bay's enforcement of its policy prohibiting inmates from receiving mail containing material downloaded from the internet. The district court denied the motion for summary judgment by the defendants/appellants, the California Department of Corrections and the individual corrections officials (collectively, "CDC").

The district court then sua sponte granted summary judgment for Clement and issued a permanent, statewide injunction against the enforcement of the internet mail policy. CDC appeals. We affirm the district court's judgment and uphold the injunction.

I.

In 2001, Pelican Bay adopted an internet-generated mail policy that provided: "No Internet Mail. After reviewing staffing levels and security issues internet mail will not be allowed. To do so would jeopardize the safety and security of the institution." The policy prohibits only mail containing material that has been downloaded from the internet but is not violated

if information from the internet is retyped or copied into a document generated in a word processor program. The policy prohibits photocopies of downloaded internet materials but not of non-internet publications. Pelican Bay receives at most 500 pieces of mail containing internet materials, out of 300,000 total letters per month.

At least eight other California prisons have adopted similar policies. Prisoners are not allowed to access the internet directly, so Clement asserts that the policies effectively prevent inmates from accessing information that is available only on the internet, or is prohibitively expensive and time-consuming to obtain through other methods. For example, there is record evidence that several non-profit groups, such as Stop Prisoner Rape, publish information only on the internet, and that many legal materials are readily accessible only on the internet.

The district court denied CDC's motion for summary judgment. Although Clement had not moved for summary judgment, the district court sua sponte held that the Pelican Bay internet mail policy violated his First Amendment rights and entered judgment for Clement. *Clement v. California Dep't of Corrections*, 220 F.Supp.2d 1098, 1114 (N.D.Cal. 2002) (citing *Portsmouth Square, Inc. v. Shareholders Protective Comm.*, 770 F.2d 866 (9th Cir. 1985)). The court then entered a permanent injunction, which provides: "The Defendants as well as their officers, directors, employees, agents and those in privity with them are enjoined from enforcing any policy prohibiting California inmates from receiving mail because it contains Internet-generated information."

II.

The First Amendment "embraces the right to distribute literature, and necessarily protects the right to receive it." *Martin v. City of Struthers, Ohio*, 319 U.S. 141, 143, 63 S.Ct. 862, 87 L.Ed. 1313 (1943). It protects material disseminated over the internet as well as by the means of communication devices used prior to the high-tech era. *Reno v. ACLU*, 521 U.S. 844, 868, 117 S.Ct. 2329, 138 L.Ed.2d 874 (1997). "[T]he right to receive publications is . . . a fundamental right. The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them." *Lamont v. Postmaster General of U.S.*, 381 U.S. 301, 308, 85 S.Ct. 1493, 14 L.Ed.2d 398 (1965) (Brennan, J., concurring).

resulting from the tort that is the basis of the action that the existence of the damages is normally to be anticipated. . . ." Restatement (Second) of Torts § 904(1) (1979).

[fn11] Although the district court also found that Parrish's Fourteenth Amendment rights were violated by Turner's actions, we do not believe that in a suit by a prisoner alleging the imposition of cruel and unusual punishment that the Fourteenth Amendment provides any greater rights to damages than the Eighth Amendment. *See Whitley,* 106 S.Ct. at 1088.

[fn12] The current vitality of *Kincaid's* literal application of *Carey* in the Seventh Circuit is in question. While *Kincaid* has been followed on its facts, *see Crawford v. Garnier,* 719 F.2d 1317, 1324-25 (7th Cir. 1983) (per curiam), two decisions evidence a willingness to follow an analytical approach to damages, *see Lenard v. Argento,* 699 F.2d 874, 888-89 (7th Cir.), *cert. denied,* 464 U.S. 815, 104 S.Ct. 69, 78 L.Ed.2d 84 (1983); *Owen,* 682 F.2d at 657-59; *see also Freeman v. Franzen,* 695 F.2d 485, 494 (7th Cir. 1982) (since actual injuries shown no need to consider if damages may be presumed for a violation of substantive due process), *cert. denied,* 463 U.S. 1214, 103 S.Ct. 3553, 77 L.Ed.2d 1400 (1983). The latest decision of the Seventh Circuit, *Madison County Jail Inmates v. Thompson,* 773 F.2d 834 (7th Cir. 1985), in dictum stated, "It is true that *Owen* and *Lenard* recognize that under certain circumstances it is proper to presume damages." *Id.* at 841 (footnote omitted). Thus, the court's mechanical application of *Carey* in *Kincaid* may be an anomaly.

[fn13] The Fifth Circuit is apparently following its decision in *Familias Unidas* and applying *Carey's* actual injury requirement mechanically to the violation of all constitutional rights without analysis. *See Farrar v. Cain,* 756 F.2d 1148, 1152 (5th Cir. 1985); *Ryland v. Shapiro,* 708 F.2d 967, 976 (5th Cir. 1983); *Basiardanes v. City of Galveston,* 682 F.2d 1203, 1220 (5th Cir. 1982); *Keyes v. Lauga,* 635 F.2d 330, 336 (5th Cir. 1981).

[fn14] For example, in a case in which a person has been unconstitutionally incarcerated for a "status offense," *see Robinson v. California,* 370 U.S. 660, 82 S.Ct. 1417, 8 L.Ed.2d 758 (1962), or in which a prisoner's punitive confinement is grossly disproportionate, *see Wright v. McMann,* 460 F.2d 126, 132-33 (2d Cir.), *cert. denied,* 409 U.S. 885, 93 S.Ct. 115, 34 L.Ed.2d 141 (1972), the closest commonlaw analogy apparently would be false imprisonment for which general damages were presumed at common law. *See McCormick, supra,* § 107, at 375-76.

[fn15] The district court cited no authority for its holding that a "lasting and severe" injury is needed to establish a claim for damages. Besides lacking any support either in the case law or in the common law, requiring a lasting and severe injury as a prerequisite to the obtaining of damages for an Eighth Amendment

violation is inconsistent with the principle of providing "fair compensation for injuries caused by the deprivation of a constitutional right." *Carey*, 435 U.S. at 258, 98 S.Ct. at 1049. We, therefore, reject imposing such a significant burden on Eighth Amendment plaintiffs.

[fn16] We include in this category Turner's placing of Parrish's food tray out of his reach.

[fn17] The district court made no findings concerning the appropriateness of assessing the punitive damages against Turner requested by the plaintiffs. *See Smith v. Wade*, 461 U.S. 30, 103 S.Ct. 1625, 75 L.Ed.2d 632 (1983). On remand, the district court should do so.

the necessary factual determinations to resolve these questions.

[31] Finally, we consider the appropriate measure of damages for Turner's deliberate failure to provide Parrish with medical care.[fn16] This Court previously has dealt with the appropriate standard for damages for a denial of medical care, albeit in the context of pre-trial detainees. *Shannon v. Lester,* 519 F.2d 76 (6th Cir. 1975). In *Shannon,* we held that a plaintiff may recover for any injury caused by the delay in care and any concomitant pain, suffering, or mental anguish. *Shannon,* 519 F.2d at 79-80; *accord Fielder v. Bosshard,* 590 F.2d 105, 110-11 (5th Cir. 1979); *Walnorch v. McMonagle,* 412 F. Supp. 270, 277 (E.D.Pa. 1976). Although *Shannon* was based on the Fourteenth Amendment, we believe that its principles are equally applicable to Eighth Amendment claims since the tortious conduct and resultant injuries are the same and since no principled reason exists why a different standard of damages should apply in an Eighth Amendment context. Thus, on remand, the district court should consider whether and to what extent Parrish was injured by the delay in receiving medical care.

[32] For the foregoing reasons, the judgment of the district court is reversed and remanded for further proceedings not inconsistent with this opinion.[fn17]

[fn1] These holdings have not been challenged on appeal.

[fn2] In considering Turner's conduct toward Giles, the district court judge detailed Giles' testimony and assumed that it was true for purposes of his decision. In resolving the issues presented on appeal, we likewise take Giles' testimony as true.

[fn3] The Second Circuit has recently indicated that in light of intervening Supreme Court decisions this aspect of *Sostre* may no longer be good law. *Heimerle v. Attorney General,* 753 F.2d 10, 12-13 (2d Cir. 1985).

[fn4] On remand, the district court should make formal factual findings on this claim in accordance with Fed.R.Civ.P. 52(a), *see supra* note 2, and consider whether Turner would be entitled to good faith immunity for his actions.

[fn5] Giles also asserts that Turner's conduct contravened substantive due process under the Fourteenth Amendment. *See Lewis v. Downs,* 774 F.2d 711 (6th Cir. 1985) (per curiam). Since the Fourteenth Amendment provides a prisoner with no greater protection than the Eighth Amendment, *Whitley v. Albers,* ___ U.S. ___, 106 S.Ct. 1078, 1088, 89 L.Ed.2d 251 (1986), we consider Giles' claim only under the Eighth Amendment.

[fn6] *See supra* note 4.

[fn7] The district court, although finding that Parrish's and

Giles' conditions of confinement were unconstitutional, held that the defendants committed these violations while acting in their official capacities. Although not considered by the district court or either party on appeal, we note that absent waiver the Eleventh Amendment bars the imposition of damages in an official capacity suit against state officials. *Kentucky v. Graham*, ___ U.S. ___, 105 S.Ct. 3099, 3107, 87 L.Ed.2d 114 (1985); *Spruytte v. Walters*, 753 F.2d 498, 512 (6th Cir. 1985), *cert. denied*, ___ U.S. ___, 106 S.Ct. 788, 88 L.Ed.2d 767 (1986). On remand, the district court should consider whether the Eleventh Amendment bars damages for these constitutional violations and, since the district court's holding in this regard may moot the issue, we decline to consider the damages, if any, which Parrish and Giles would be entitled to for these unconstitutional conditions of confinement.

[fn8] Two cases have made statements indicating that the availability of injunctive relief may obviate the need to grant damages for a constitutional violation. *Hunter v. Auger*, 672 F.2d 668 (8th Cir. 1982); *Jacobson v. Tahoe Regional Planning Agency*, 474 F. Supp. 901 (D.Nev. 1979). In *Hunter*, the court, after holding that insufficient evidence existed to support an award of compensatory damages, noted that "[m]oreover" plaintiff's rights had been "fully vindicated" by declaratory and injunctive relief. *Hunter*, 672 F.2d at 677. We do not read this single statement, without citation of authority, as adopting a rule that injunctive relief may be granted in lieu of damages. Rather, in light of the court's holding that insufficient facts existed to support an award of compensatory damages, we view the court's reference to the adequacy of injunctive relief as gratuitous and unnecessary to the opinion.

In *Jacobson*, the district court judge indicated that damages might not be an appropriate remedy when injunctive and declaratory relief would be adequate. *Jacobson*, 474 F. Supp. at 903. However, the district court's statements, in this regard, were compelled by its holding that, as a matter of law, the plaintiffs were precluded from recovering damages from the defendants. *Id.* Thus, we do not find the language in *Jacobson* inconsistent with the result we reach in this opinion.

[fn9] The district court also held that Turner's interference with Parrish's mail violated substantive due process under the Fourteenth Amendment. We do not believe that, in a suit concerning a prison official's interference with a prisoner's mail, substantive due process provides the prisoner with any greater protection or right to damages than the specific guarantees of the First Amendment. *Cf. Whitley*, 106 S.Ct. at 1088. In any event, we would be hesitant to hold that Turner's conduct in handling Parrish's mail considered by itself and in the prison context was "so offensive to human dignity" as to shock our conscience. *Rochin v. California*, 342 U.S. 165, 172, 174, 72 S.Ct. 205, 209, 210, 96 L.Ed. 183 (1952).

[fn10] Throughout this opinion we use the term "general damages" in accordance with the common-law definition, i.e., "`[g]eneral damages' are compensatory damages for a harm so frequently

904(1) comment a (1979); C. McCormick, Handbook on the Law of Damages §§ 8, 14, at 33-35, 53 (1935). Due to the numerous interests protected and types of conduct prohibited by the Eighth Amendment, rarely will the existence and extent of harm be apparent from the simple allegation that an Eighth Amendment violation has occurred. Next, unlike suits under the First and Fourth Amendments, Eighth Amendment claims cannot be classified under a single traditional tort doctrine; no one tort doctrine is sufficiently expansive to cover the array of conduct prohibited by the Eighth Amendment. Further, unlike injuries emanating from a First Amendment violation, injuries occurring in an Eighth Amendment context are not likely to be of an evanescent nature. The establishing of cruel and unusual punishment will often require the showing of physical abuse from which injuries and concomitant damages will normally be easy to prove. *See Lancaster,* 701 F.2d at 866 ("would appear much easier to demonstrate damages in a cruel and unusual [punishment] case"); *Doe,* 697 F.2d at 1124 n. 24 (mental suffering easier to prove in cruel and unusual punishment cases). We hold, therefore, that general damages may not be presumed whenever the Eighth Amendment is violated and turn to what type of injury is needed to recover damages.

[27] At first blush, it would seem appropriate to simply follow *Carey* and hold that an "actual injury" is needed to obtain damages under the Eighth Amendment. *See Lancaster,* 701 F.2d at 866; *see also Madison*
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County Jail Inmates v. Thompson, 773 F.2d 834, 844 (7th Cir. 1985). Upon further examination of the practicalities and the ramifications of requiring a prisoner to *always* establish an actual injury as a prerequisite to obtaining damages, we decline to adopt such a rule. As we have previously discussed, the Eighth Amendment protects prisoners from a wide variety of conduct. The numerous types of tortious conduct and resultant injuries which the Eighth Amendment redresses militate heavily against our adopting an actual injury standard, because we simply cannot be certain that an actual injury requirement would be reflective of the common law or an appropriate prerequisite to obtaining damages in every situation.[fn14] *Cf. Doe,* 697 F.2d at 1124 n. 24 (noting that in some cases emotional distress might be inferred from an Eighth Amendment violation). In fact, having held that Eighth Amendment violations are not capable of being analogized to any single type of tortious conduct, it would be anomalous for us to assert that one single damage theory will sufficiently redress every act or condition constituting cruel and unusual punishment. Also, a single Eighth Amendment violation may subsume several separate and district acts. The requiring of actual injury in such cases provides little guidance: must the prisoner show actual injury flowing from one, the majority, or all of the tortious acts? Besides problems of application, an actual injury requirement in these "totality of the circumstances" cases may be inconsistent with the common law, contrary to the purpose the actual injury requirement is supposed to serve. For example, if the constitutional violation is composed of assaults, batteries, or other dignitary torts, an actual injury requirement would be contrary to the common-law rule which presumes general damages from this type of tortious conduct. *See Walje,* 773 F.2d at 731-32; D. Dobbs, Handbook on

the Law of Remedies §§ 7.1, 7.3 (1973). Finally, a wooden application of an actual injury requirement is contrary to the Supreme Court's decision in *Carey*. The Court, in *Carey*, warned that "the elements and prerequisites for recovery of damages appropriate to compensate injuries caused by the deprivation of one constitutional right are not necessarily appropriate to compensate injuries caused by the deprivation of another." *Carey*, 435 U.S. at 264-65, 98 S.Ct. at 1052-53. Thus, an actual injury should only be required when it appropriately remedies the constitutional violation. Since an across-the-board actual injury requirement in the context of the Eighth Amendment presents serious problems of application and fails to consider that in some instances damages may be inferable merely from the conduct constituting the constitutional violation, we decline to hold that establishing an actual injury is a necessary predicate to receive damages for an Eighth Amendment violation.

[28] Instead, we believe that each tortious act comprising or composing the Eighth Amendment violation should be considered on its own merits. *Accord Doe*, 697 F.2d at 1124 n. 21 (noting that analogies may be drawn to various common-law torts). Although we recognize that this is an *ad hoc* approach, our holding is necessitated by the broad range of conduct which may fall within the ambit of cruel and unusual punishment. In addition, this approach will best serve to implement the common law of damages. By considering the damage consequences of each tortious act, a prisoner will be forced to carry the same burdens and be benefitted by the same presumptions as any other tort plaintiff. More importantly, by tailoring the damages to the specific interests invaded, our approach will greatly reduce the
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chances that a prisoner will either be under or over compensated for his injuries. *See Stachura*, 106 S.Ct. at 2543; *Carey*, 435 U.S. at 258-59, 98 S.Ct. at 1049-50. We, therefore, turn to the conduct presented in this case.[fn15]

[29] Turner's waving of a knife in front of Parrish obviously constituted a common-law assault. *See* Restatement (Second) of Torts § 21 (1979). As previously discussed, at common law general damages were presumed to flow from an assault. *See Brandon*, 719 F.2d at 154-55; D. Dobbs, Handbook on the Law of Remedies § 7.1, at 528-29 (1973). Consequently, we hold that Parrish is entitled to general damages for Turner's assaults upon him.

[30] Turner's deprecation of Parrish presents a less clear case. At common law, verbal abuse alone generally did not rise to the level of tortious conduct in the absence of physical injury resulting from the abuse. 2 F. Harper, F. James & O. Gray, The Law of Torts §§ 9.1, 9.2 (1985). The law, however, has been changing in this area to allow recovery in the absence of a physical injury if the conduct by the tortfeasor is both extreme and outrageous and causes severe emotional distress. Restatement (Second) of Torts § 46 (1979); *see, e.g., Ross v. Burns*, 612 F.2d 271, 273 (6th Cir. 1980) (applying Michigan law). In this case, we find it unnecessary to decide which standard applies because even if physical injury is not a prerequisite to recovery, insufficient factual findings exist for us to conclude, for the first time on appeal, that Turner's taunting was extreme and outrageous or that Parrish suffered severe emotional distress from this abuse. Hence, on remand, the district court should make

Carey v. Piphus, 435 U.S. 247, 258, 98 S.Ct. 1042, 1049, 55 L.Ed.2d 252 (1978), that the starting point for analyzing damages under Section 1983 is the common law and indicated that substantive constitutional rights are subject to the same damages principles as procedural rights. *Stachura*, 106 S.Ct. at 2542-43. In *Stachura*, the Court explicitly rejected the argument that damages could be given for the value of *substantive* constitutional rights as misperceiving *Carey*'s analysis; the Court held that *Carey* did "not establish a two-tier system of constitutional rights." *Id.* at 2544. The application of a substantive/procedural dichotomy, therefore, would be contrary to *Carey*'s and *Stachura*'s admonitions for courts to first consider the common law, not whether the constitutional provision violated was substantive or procedural. *See Doe v. District of Columbia*, 697 F.2d 1115, 1122-23 (D.C. Cir. 1983); *Lancaster v. Rodriguez*, 701 F.2d 864, 866 (10th Cir.) (per curiam), *cert. denied*, 462 U.S. 1136, 103 S.Ct. 3121, 77 L.Ed.2d 1373 (1983); *see generally* Note, *Damage Awards for Constitutional Torts: A Reconsideration After* Carey v. Phiphus, 93 Harv.L.Rev. 966, 972-74 (1979-80).

Second, this Court's opinions in *Brandon* and *Walje*, despite some possible language to the contrary, did not apply a substantive/procedural dichotomy. Rather, in both cases, this Court looked to the common law and applied the most analogous common-law rule of damages. *Walje*, 773 F.2d at 731-32 (discussing damages at common law for violations of a person's free speech and voting rights); *Brandon*, 719 F.2d at 154-55 (analogizing Fourth Amendment violations to common-law assault and battery). Third, a substantive/procedural dichotomy focuses upon the wrong issue. The purpose of damages under Section 1983 is to compensate for the injury caused by the constitutional deprivation. *Smith v. Heath*, 691 F.2d 220, 226 (6th Cir. 1982); *Morrow v. Igleburger*, 584 F.2d 767, 769 (6th Cir. 1978), *cert. denied*, 439 U.S. 1118, 99 S.Ct. 1027, 59 L.Ed.2d 78 (1979). Thus, the focal point of the inquiry must be the injury sustained and the appropriate means of redressing it.

[24] Last, although a cursory glance at the case law would indicate that the circuits are split on whether *Carey*'s actual injury requirement applies to violations of substantive constitutional rights, *see Ganey*, 759 F.2d at 340-41; *Owen*, 682 F.2d at 657-59, this "split" is more illusory than real. Although those courts which have refused to apply *Carey*'s actual injury requirement to substantive constitutional violations have often distinguished *Carey* on the ground that it only concerned the deprivation of procedural rights, the majority of these cases have, like our decisions in *Brandon* and *Walje*, proceeded to analogize the constitutional interests at issue to the law of torts. *See Bell v. Little Axe Independent School District No. 70 of Cleveland County*, 766 F.2d 1391, 1408-12 (10th Cir. 1985) (analogizing First Amendment claims to common-law denial of voting rights actions); *Hobson*, 737 F.2d at 61-63 & n. 173 (analyzing possible damages which might occur from a First Amendment violation); *Doe*, 697 F.2d at 1122-1124 (analogizing cruel and unusual punishment to common-law tort rules); *Herrera v. Valentine*, 653 F.2d 1220, 1229-31 (8th Cir. 1981) (analyzing relationship between Fourth Amendment violations and common-law dignitary torts); *Halperin v. Kissinger*, 606 F.2d 1192, 1207 &

n. 100 (D.C. Cir. 1979) (Fourth Amendment rights of a much different character than procedural due process rights), *aff'd by an equally divided court*, 452 U.S. 713, 101 S.Ct. 3132, 69 L.Ed.2d 367 (1981) (per curiam). The confusion in this area apparently stems from two decisions in which the courts, with very little analysis, applied *Carey*'s actual injury requirement to the denial of First Amendment rights. *Kincaid v. Rusk*, 670 F.2d 737, 745-46 (7th Cir. 1982);[fn12] *Familias Unidas v. Briscoe*, 619 F.2d 391, 402 (5th Cir. 1980);[fn13] *see also Smith v. Coughling*, 748 F.2d 783, 789 (2nd Cir. 1984) (applying an actual injury requirement to a Sixth Amendment violation without any analysis). Other than these two "literalist" interpretations of *Carey*, however, this Court and other Courts of Appeals have been

attempting to follow *Carey*'s mandate of "adapting common-law rules of damages to provide fair compensation for injuries caused by the deprivation of a constitutional right." *Carey*, 435 U.S. at 258, 98 S.Ct. at 1049. The Supreme Court in *Stachura* indicated its approval of this analytical approach to damages by acknowledging that in some cases damages may be presumed merely from the act constituting the constitutional violation. *Stachura*, 106 S.Ct. at 2545; *see also id.* at 2546 (Marshall, J., concurring) (emphasizing "that the violation of a constitutional right, in proper cases, may itself constitute a compensable injury"). Accordingly, we decline to adopt a substantive/procedural framework for analyzing damages for violations of constitutional rights and proceed to consider the appropriate measure for damages under the Eighth Amendment.

[25] Our analysis must start with the nature and type of interests protected by the Eighth Amendment. *See Carey*, 435 U.S. at 259, 98 S.Ct. at 1050. In generalities, the Eighth Amendment proscribes disproportionate punishments, *Weems v. United States*, 217 U.S. 349, 366-67, 30 S.Ct. 544, 548-49, 54 L.Ed. 793 (1910), "unnecessary and wanton infliction of pain," *Gregg v. Georgia*, 428 U.S. 153, 173, 96 S.Ct. 2909, 2925, 49 L.Ed.2d 859 (1976) (plurality opinion), and conduct repugnant to "evolving standards of decency," *Trop v. Dulles*, 356 U.S. 86, 101, 78 S.Ct. 590, 598, 2 L.Ed.2d 630 (1958) (plurality opinion). In concrete terms, the Eighth Amendment protects prisoners from being severely beaten, *e.g.*, *Collins v. Hladky*, 603 F.2d 824 (10th Cir. 1979) (per curiam), intentionally denied medical care for serious medical needs, *e.g. Westlake v. Lucas*, 537 F.2d 857 (6th Cir. 1976), recklessly subjected to violent attacks or sexual assaults, *e.g.*, *Martin v. White*, 742 F.2d 469, 474 (8th Cir. 1984), and denied "the basic elements of hygiene," *Wright v. McMann*, 387 F.2d 519, 526 (2d Cir. 1967). As this short list demonstrates, the Eighth Amendment has been interpreted "in a flexible and dynamic manner," *Gregg*, 428 U.S. at 171, 96 S.Ct. at 2924, to address numerous acts and omissions. With this in mind, we consider what showing is necessary to recover damages for an infringement of Eighth Amendment rights.

[26] Initially, we decline to hold that general damages may be presumed from an Eighth Amendment violation. General damages are presumed to flow from some tortious conduct because "the existence of the harm may be assumed and its extent is inferred as a matter of common knowledge." Restatement (Second) of Torts §

objective was furthered by Turner's unexplained waving of a knife in Giles' face, knife-point extortion of potato chips and cookies, incessant taunting, or failure to relay Giles' requests for medical care to the nurses. Next, Turner's conduct was extreme. Assaults with a knife, theft, and the deliberate failure to provide needed medical care are serious occurrences in any setting. Another important factor is that Turner's behavior, specifically, the paraplegic slurs, acted to strip Giles of his dignity and reinforce the fact that Giles was dependent upon Turner for his continued well-being. Any reasonable person would suffer significant mental anguish knowing that his health was in the hands of a person performing the type of deviant acts which Turner did. Finally, all of the foregoing is to an extent exacerbated by Giles' paraplegic condition; Giles' condition placed him at the mercy of Turner and prevented him from attempting to avoid or mitigate his contact with or reliance upon Turner.

[15] Considering Turner's behavior towards Giles in its totality, we conclude that Turner's actions inflicted unnecessary and wanton pain upon Giles. Causing a prisoner to sit in his own feces, assaulting a prisoner with a knife, extorting food from a prisoner, and verbally abusing a prisoner are all unnecessary acts which result in pain being inflicted. Further, simply the type, number, and seriousness of the acts committed demonstrate that they were performed wantonly. The assaults, verbal abuse, and failure to relay Giles' requests for care were all done intentionally. We hold, therefore, that the district court erred in determining that Turner had not violated Giles' Eighth Amendment rights and remand this issue for further consideration.[fn6] We now consider the damages issues presented by this appeal.

16] **II. Damages**[fn7]

[17] The district court held that Parrish was only entitled to nominal damages because

injunctive relief was more efficacious than damages and because his injuries were not "lasting and severe." We first consider whether the presence of injunctive relief may vitiate a claim for damages.

[18] The starting point for analyzing damages for violations of constitutional rights is the common law. *Memphis Community School District v. Stachura*, ___ U.S. ___, 106 S.Ct. 2537, 2543, 91 L.Ed.2d 249 (1986); *Carey v. Piphus*, 435 U.S. 247, 253-56, 98 S.Ct. 1042, 1046-48, 55 L.Ed.2d 252 (1978). At common law, once an injunction had been granted, damages were commonly given for the torts committed prior to and pending the suit. Restatement (Second) of Torts § 951(a) (1979); Restatement (Second) of Torts § 944 comment g (1979) ("When the injunction is granted against the continuance or repetition of torts, it has long been the practice to give, in the same suit, damages for the tortious conduct anterior to trial. . . ."); *see Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 82 S.Ct. 894, 8 L.Ed.2d 44 (1962). The district court did not cite nor have we found any precedent expressly holding to the contrary.[fn8] Furthermore, no reason exists to deviate from the common law rule in this respect. A plaintiff injured by a series of constitutional torts, like any

7] A. First Amendment

[8] Giles testified that Turner would randomly open and read his personal mail and that Turner would also taunt him by waving the open mail in front of him. Giles contends that this conduct violated his First Amendment rights.

[9] While prisoners have some First Amendment rights in receiving mail, *see Pell v. Procunier*, 417 U.S. 817, 822, 94 S.Ct. 2800, 2804, 41 L.Ed.2d 495 (1974); *Meadows v. Hopkins*, 713 F.2d 206, 209-10 (6th Cir. 1983), it is clear that prison officials may place reasonable restrictions upon these rights, *Bell v. Wolfish*, 441 U.S. 520, 544-52, 99 S.Ct. 1861, 1876-81, 60 L.Ed.2d 447 (1979). In order to maintain prison security and to check for contraband, prison officials may, pursuant to a uniform and evenly-applied policy, open an inmate's incoming mail. *See Wolff v. McDonnell*, 418 U.S. 539, 574-77, 94 S.Ct. 2963, 2983-85, 41 L.Ed.2d 935 (1974); *Bumgarner v. Bloodworth*, 768 F.2d 297, 301 (8th Cir. 1985) (per curiam). Prison security may also require that limitations be placed upon the type and amount of mail a

Page 604

prisoner may receive. *See Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 129-31, 97 S.Ct. 2532, 2539-41, 53 L.Ed.2d 629 (1977). Yet, a prison official's discretion is not unlimited in this regard and several courts have held that mail relating to a prisoner's legal matters may not be read and may only be opened in the prisoner's presence, *Taylor v. Sterrett*, 532 F.2d 462, 477 (5th Cir. 1976), *Bach v. Illinois*, 504 F.2d 1100, 1102 (7th Cir.) (per curiam), *cert. denied*, 418 U.S. 910, 94 S.Ct. 3202, 41 L.Ed.2d 1156 (1974); *Smith v. Robbins*, 454 F.2d 696 (1st Cir. 1972); *see Harrod v. Halford*, 773 F.2d 234, 236 n. 1 (8th Cir. 1985) (per curiam), *cert. denied*, ___ U.S. ___, 106 S.Ct. 2254, 90 L.Ed.2d 699 (1986); *but see Sostre v. McGinnis*, 442 F.2d 178, 201 (2d Cir. 1971) (en banc), *cert. denied*, 404 U.S. 1049, 92 S.Ct. 719, 30 L.Ed.2d 740 (1972),[fn3] and at least one court has extended these protections to media mail, *Guajardo v. Estelle*, 580 F.2d 748, 759 (5th Cir. 1978); *see also Nolan v. Fitzpatrick*, 451 F.2d 545, 547 (1st Cir. 1971). Further, the burden remains upon the prison officials to put forth legitimate reasons for interfering with a prisoner's incoming mail. *See Procunier v. Martinez*, 416 U.S. 396, 413, 94 S.Ct. 1800, 1811, 40 L.Ed.2d 224 (1974); *Brooks v. Seiter*, 779 F.2d 1177, 1180-81 (6th Cir. 1985).

[10] In this case, we are not confronted with a regularly applied regulation requiring the opening of all prisoners' incoming mail, *see Meadows*, 713 F.2d at 208-09, or a random interference with a prisoner's mail based upon a reasonable suspicion that the prison's security was being jeopardized. Rather, this case concerns Turner's arbitrary opening and reading of Giles' personal mail. No justification — other than harassment — has been forwarded for Turner's conduct. A capricious interference with a prisoner's incoming mail based upon a guard's personal prejudices violates the First Amendment. *Cf. Brooks*, 779 F.2d at 1180. Accordingly, we hold that the district court erred in

denying Giles' First Amendment claim and remand this claim for further proceedings.[fn4]

11] B. Eighth Amendment[fn5]

[12] The Eighth Amendment protects prisoners against the imposition of "cruel and unusual punishment." U.S. Const. amend. VIII. By definition, therefore, not every intrusion upon a prisoner's bodily integrity will rise to the level of an Eighth Amendment violation. *See Johnson v. Glick,* 481 F.2d 1028, 1033 (2d Cir.) ("Not every push or shove . . . violates a prisoner's constitutional rights."), *cert. denied,* 414 U.S. 1033, 94 S.Ct. 462, 38 L.Ed.2d 324 (1973). The maintenance of prison security and discipline may often require that prisoners be subjected to physical contact which at common law would be actionable as an assault or battery and which, in retrospect, may have been excessive. But, the good faith use of physical force in pursuit of valid penological or institutional goals will rarely, if ever, violate the Eighth Amendment. *See Whitley v. Albers,* ___ U.S. ___, 106 S.Ct. 1078, 1084, 89 L.Ed.2d 251 (1986); *Rhodes v. Chapman,* 452 U.S. 337, 346, 101 S.Ct. 2392, 2398, 69 L.Ed.2d 59 (1981). A violation of the Eighth Amendment nevertheless will occur if the infliction of pain upon a prisoner is both unnecessary and wanton. *Estelle v. Gamble,* 429 U.S. 97, 103, 97 S.Ct. 285, 290, 50 L.Ed.2d 251 (1976). In determining whether a prisoner's

claim rises to this level, the reason or motivation for the conduct, the type and excessiveness of the force used, and the extent of injury inflicted should be considered. *Cf. Lewis v. Downs,* 774 F.2d 711, 713 (6th Cir. 1985) (per curiam). This analysis, however, must be carefully circumscribed to take into account the nature of the prison setting in which the conduct occurs and to prevent a prison official's conduct from being subjected to unreasonable *post hoc* judicial second-guessing. *See Whitley,* 106 S.Ct. at 1084-85. We consider the district court's holding in light of these considerations.

[13] The district court held that Giles had failed to establish an Eighth Amendment claim because he was not subjected to the full panoply of Turner's misbehavior and because he failed to demonstrate that Turner's actions were the result of a special animus. While we do not take issue with these factual findings, we do not believe that in order to establish an Eighth Amendment violation Giles had to show that he was subjected to all of Turner's aberrant conduct. The question before the district court was not whether Giles suffered as much as Parrish, but rather was whether Turner inflicted unnecessary and wanton pain upon Giles. Similarly, although demonstrating a particularly malicious intent may be important in determining whether a constitutional violation has occurred, we do not believe that this degree of intent is an indispensable element of an Eighth Amendment claim. *See Whitley,* 106 S.Ct. at 1084 ("An express intent to inflict unnecessary pain is not required. . . ."). As with any other case, Giles' case must be scrutinized based upon its own particular facts.

[14] Initially, the actions of Turner towards Giles are devoid of logic or reason. No legitimate penological or institutional

United States 6th Circuit Court of Appeals Reports

PARRISH v. JOHNSON, 800 F.2d 600 (6th Cir. 1986)

GEORGE PARRISH AND CHARLES GILES, PLAINTIFFS-APPELLANTS, v. PERRY JOHNSON, CHARLES ANDERSON, K.L. COLE, AND CLARENCE TURNER, DEFENDANTS-APPELLEES.

No. 84-1642.

United States Court of Appeals, Sixth Circuit.

Argued June 2, 1986.

Decided September 5, 1986.

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[EDITORS' NOTE: THIS PAGE CONTAINS HEADNOTES. HEADNOTES ARE NOT AN OFFICIAL PRODUCT OF THE COURT, THEREFORE THEY ARE NOT DISPLAYED.]
Page 602

Larry Bennett (argued), Detroit, Mich., Jody LeWitter, for plaintiffs-appellants.

Frank J. Kelley, Atty. Gen. of Mich. Lansing, Mich., Thomas A. Kulick (argued), for defendants-appellees.

Appeal from the United States District Court for the Eastern District of Michigan.

Before KEITH and BOGGS, Circuit Judges, and CELEBREZZE, Senior Circuit Judge.

CELEBREZZE, Senior Circuit Judge.

[1] Plaintiffs-appellants George Parrish and Charles Giles appeal from a district court's decision finding that Parrish's and Giles' conditions of confinement were unconstitutional and that defendant-appellee Clarence Turner subjected Parrish to cruel and unusual punishment and violated Parrish's First Amendment rights.[fn1] On appeal, Parrish contends that the district court erred in awarding only nominal damages for the punishment he endured and Giles argues that Turner violated his First, Eighth, and Fourteenth Amendment rights. We reverse.

[2] Since the facts of this case are critical to the resolution of the issues raised before this Court, we set out the district court's factual findings in detail.[fn2] Both Parrish and Giles were paraplegics incarcerated at the State Prison for Southern Michigan. As a result of their condition, both men exhibited a diminished control over their bladder and bowel functions and, consequently, would frequently soil themselves. While Giles was able to clean himself, Parrish, who suffered from a fused hip joint, needed assistance to change. Assistance, however, due to both staff shortages and intentional neglect on the part of prison personnel, was often slow in arriving forcing Parrish, on a regular basis, to sit in his own feces for several hours.

Besides being extremely unpleasant, this situation was medically dangerous because Parrish risked infecting his decubitis ulcers. Although Giles could clean himself, mismanagement and neglect rendered this ability nugatory; Giles was either not supplied with anything with which to clean himself or was given one small rag which quickly became soiled and unusable. Thus, like Parrish, Giles would routinely sit in his
Page 603
own waste for significant periods of time. These deplorable hygenic conditions were exacerbated by verbal degradations, sporadic assaults, and acts of malfeasance and nonfeasance committed by Turner, a prison guard, against Parrish and Giles.

[3] Turner aggravated the unsanitary conditions of Parrish's confinement by habitually refusing to relay or procrastinating in transmitting Parrish's requests for aid to the nurses. Turner also committed several assaults upon Parrish. On one occasion, Turner brandished a knife in order to extort cigarettes from parrish and, on another, in what at best could be described as a bizarre episode, Turner while standing on top of a table shouting obscenities waved a knife at Parrish. Turner further enhanced Parrish's suffering by placing Parrish's food tray in positions in which Parrish was unable to retrieve it and by serving the food accompanied with taunts that he had contaminated the food with venereal disease (a disease which Turner, in fact, had). Finally, Turner also interfered with Parrish's private phone conversations and personal mail: he would interrupt Parrish's phone calls by loudly speaking obscenities into the receiver and capriciously refuse to distribute and open and read Parrish's legal and personal mail. Giles received similar treatment.

[4] Turner was equally remiss in relaying Giles' requests for care and twice accosted Giles with a knife. The first assault occurred on an elevator when Turner, for no apparent reason, pulled a knife and waved it in front of Giles' face. Turner repeated this action approximately one month later in order to extort potato chips and cookies from Giles. "Quite frequently" Turner ridiculed and tormented Giles by calling him, among other things, a "crippled bastard" who should be dead and telling Giles that he had defiled his food with venereal disease. Finally, Turner randomly opened and read Giles' personal mail.

[5] Based upon the foregoing factual findings, the district court concluded that Parrish's and Giles' conditions of confinement were unconstitutional and that Turner's conduct had violated Parrish's First, Eighth, and Fourteenth Amendment rights. However, the district court judge refused to find that Turner had violated Giles' constitutional rights because Giles had not been subjected to the full panoply of Turner's misbehavior and had failed to demonstrate a special animus. Turning to the appropriate remedy for the constitutional violations, the district court judge reasoned that since injunctive relief was more appropriate than damages and since Parrish's injuries were not "lasting or severe," Parrish was only entitled to an award of nominal damages. This appeal ensued. Before proceeding to the damage questions presented by this case, we first consider whether the district court erred in holding that Turner's conduct did not violate Giles' First and Eighth Amendment rights.

6] **I. Giles' First and Eighth Amendment Claims**

the Drug Policy Forum

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February 3, 2009

To: Senator Will Espero, Chair
Senator Robert Bunda, Vice Chair
And Member of the Committee on Public Safety and Military Affairs

From: Jeanne Ohta, Executive Director

RE: SB 83 Relating to Corrections (Performance Audits)
Hearing: February 3, 2009, 1:15 p.m., Room 229

Position: Support

I am Jeanne Ohta, Executive Director of the Drug Policy Forum of Hawaii. Thank you for this opportunity to testify in support of SB 83 which authorizes the Legislative Auditor to conduct performance audits of private prisons housing Hawai`i inmates, namely Red Rock Correctional Center, Saguaro Correctional Center, and Otter Creek Correctional Center.

Hawai`i now has over 2,000 people in mainland prisons. This audit is long overdue. In 14 years there has never been an independent audit of the contracted prisons. It is extremely important that this $50 million contract is audited. The taxpayers of Hawai`i deserve to know if the services contracted for are being fulfilled.

Private prisons are for-profit corporations, accountable as most of those businesses are to their shareholders and investors; with profits as their primary motive. They have a self-serving interest in keeping their census up to capacity, much like hotels and other lodging businesses. It is because of this self-interest on the part of private prisons that an audit should be conducted.

An audit seems even more appropriate as the Department of Public Safety has recently reported that the rate per day is going up in Arizona from $57 to $78. Before committing the state to these higher rates, there should be an independent examination of existing agreements.

I ask the committee to pass SB 83 so that we may have an independent report on $50 million of taxpayer money. Thank you for this opportunity to testify.

COMMITTEE ON PUBLIC SAFETY & MILITARY AFFAIRS
Sen. Will Espero, Chair
Sen. Robert Bunda, Vice Chair
Tuesday, February 3, 2009
Room 229 at 1:15pm

SUPPORT: SB 83 Relating to Corrections
Private Prison Performance Audit

Aloha Chair Espero, Vice Chair Bunda and Members of the Committee:

My name is Carrie Ann Shirota, and I am writing in strong support of SB 83. My experiences as a former Public Defender and Civil Rights Enforcement Attorney, past staff member of a reentry program on Maui and member of Community Alliance on Prisons have shaped my advocacy efforts to promote rehabilitation, accountability and transparency within our correctional system, and focus on alternatives to prisons.

There are over a hundred reasons why our State legislators should support an independent audit of private prisons that we send our brothers and sisters too. In the interest of time, I would like to highlight a few of those reasons:

1. **Profit v. Public Safety**. CCA is beholden to its shareholders, not the citizens of Hawai`i. CCA's primary goal is to make a profit. As members of this community, our goal is of a different nature - ensuring that incarcerated men and women are treated humanely and are provided with opportunities to address the factors that contributed to their criminal behavior. An independent audit would help to ensure that our tax payer dollars are allocated for correctional programs, policies and practices that are cost-effective.

2. **The Real Cost of Private Prisons.** The public has been repeatedly told that it costs less for Hawai`i to ship men and women to private prisons on the American continent than it is provide housing in Hawai`i. Yet, CCA's day bed rate cost does not include a number of expenses (i.e. medical, transportation, wages, etc.) The public deserves the know the truth about the actual and indirect costs of shipping men and women to private prisons on the American Continent.

3. **Actual Delivery of Services**. Despite the fact that CCA has failed to deliver on numerous programs and services outlined in Contracts, including substance abuse treatment, Hawai`i continues to contract and "reward" CCA with more business. We need an independent audit to take a hard look at the contract and assess if we are receiving the services that we paid for.

4. **Violence, Riots and Prison Gangs**. Numerous stories, both locally and nationally, have outlined the violence, and riots that occur at CCA prisons - at significantly higher rates than Hawai`i prisons. We are also aware that the transfer of our prisoners to private prisons contributed to the growth of bona fide prison gangs from Hawai`i that have since been recognized as "security threat groups." An independent audit will examine the conditions of confinement and whether incarcerated men and women from Hawai`i are exposed to higher rates of violence, riots and prison gang activity at private prisons.

In summary, an independent audit of private prisons is necessary to ensure the twin goals of transparency and accountability.

Mahalo for this opportunity to submit testimony in strong support of SB 83.

Sincerely,

Carrie Ann Shirota, Esq.
Kahului, Hawai`i
cashirota@aol.com

Hepatitis Prevention, Education, Treatment & Support Network of Hawai'i

Prisoner Reintegration and Family Reunification Program

1286 Queen Emma Street
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February 3, 2009

COMMITTEE ON PUBLIC SAFETY
Senator Will Espero, Chair
Senator Bunda, Vice-chair
Tuesday, February 3, 2009
1:15 p.m.
Conference room 229
SB 83
Relating to Corrections
SUPPORT

I supported a similar bill last year, as I feel that accountability of my tax dollars is not only important, but is my right. The economic collapse that we are now facing is attributed to the 'we can do whatever we want and not be held accountable,' attitude that top officials across the nation have practiced unhindered. In these times, a greater need to keep a lid on our tax dollars is now an issue that we are forced to consider, especially considering the fact that the price to keep Hawaii inmates in mainland facilities continues to rise, with no end in sight.

Thank you for the opportunity to testify in this matter, it is of great importance to consider.

Andy Botts, Director
Prisoner reintegration program

COMMITTEE ON PUBLIC SAFETY AND MILITARY AFFAIRS

Sen. Will Espero, Chair
Sen. Robert Bunda ,Vice Chair
Tuesday, February 3,2009
1:15 PM
Room 229

SB83 Strongly Support

Hello Chair Espero, Vice Chair Tsutsui and Members of the Committee.

My name is Cathy Tilley and I am a member of the Community Alliance on Prisons and I have a son who is an inmate at Saguaro Correctional Facility in Arizona.

I strongly support SB83 authorizing the auditor to conduct performance audits of private prisons housing Hawaii inmates. The PSD has put our family member is the hands of CCA and it is there responsibility to make sure the money is spent the way it is suppose to be spent and that the treatment and programs are run correctly. No one in business would turn their money and people over to another state and not do regular audits to make sure they were getting what they paid for and that should hold for the PSD.

These audits should be open to public scrutiny. As the new president of the USA is asking for more transparency in government the same should apply to state government. It is now time to start making the changes that will give the people a true picture of how we are spending our money on Corrections and if we are getting what we pay for.

I have heard first had of some of the things going on at Saguaro Correctional Facility that I find to be very unprofessional and without an audit the public will not be made aware and the people who are acting in an unprofessional matter will not be held accountable.

It is imperative that this bill passes both for the safety of the inmates and the concern for how our state funds are being used.

Sincerely yours,
Cathy Tilley
621 Pauku St
Kailua HI 96734
808 261 6274

aquino3-Linda

From: Jyoti Mau [light@jyotimau.com]
Sent: Monday, February 02, 2009 10:16 AM
To: PBStestimony
Subject: Testimony for the Committee on Public Safety and Military Affairs

COMMITTEE ON PUBLIC SAFETY AND MILITARY AFFAIRS

Sen. Will Espero, Chair

Sen. Robert Bunda, Vice Chair

Tuesday, February 3, 2009

1:15 PM

Room 229

SB83

SUPPORT

Dear Legislators,

Please PASS this bill to help provide Hawaii residents with a trust that the private prisons in which Hawaiian inmates are being sent to are treating them humanely. The fact that there has never been an independent audit of the private prisons Hawaii contracts with in the continental US is shameful, and has proven harmful. Our government needs to protect those who are being sent away, especially when it was testified last year by Marion Higa (Legislative Auditor) that it would cost approximately $500,000 to do an audit of all three prisons (Saguaro Correctional Center, Red Rock Correctional Center, and Otter Creek Correctional Center). When compared to the hundred of thousands that the state pays (from our taxpayers dollars) to settle PSD claims each year, it seems more reasonable and effective to enact an independent audit so that we know our funding is truly addressing the core of the problem. In these challenging economic times, our government should be more mindful of how they spend our money. And if they are helping to relieve more facets of this problem by spending less, than that is a win-win in itself. Above all, our more than 2000 inmates abroad (not to also mention those fortunate to still remain in Hawaii) need protection and attention to ensure that they are truly being taken through a process of reform, so that when they are released they will not feel further abused and disheartened. Thank you all for all your efforts and time in helping us to live in a more civilized society.

Aloha,

Jyoti Mau

COMMITTEE ON PUBLIC SAFETY AND MILITARY AFFAIRS
Sen. Will Espero, Chair
Sen. Robert Bunda, Vice Chair
Tuesday, February 3, 2009
1:15 PM
Room 229
STRONG SUPPORT
SB 83 – Audit of Private Prisons
Sent to: PSMTestimony@capitol.hawaii.gov

Aloha Chair Espero, Vice Chair Bunda and Members of the Committee!

My name is Dayle Bethel. As a citizen of Hawaii, I am deeply concerned about the health, safety, and provisions for rehabilitation of the 6000 + Hawaiian individuals incarcerated in prisons, particularly the more than 2000 who are incarcerated in private prisons on the U.S. Mainland.

It is unconscionable that we have consigned these Hawaiian individuals to these private prisons and have not, in the 14 years since we first began sending Hawaiian inmates to the Mainland, had an independent audit of these prisons. It almost seems as if we have sent these individuals far away and washed our hands of them.

These inmates are human beings like each of us. They have the same capacity to feel fear, anxiety, joy, and hope. I believe that with opportunity for access to education and counseling many of them, possibly most of them, could be rehabilitated and returned to society to become responsible, law-abiding citizens. For just a fraction off the millions of dollars we pay each year to these private, contracted prisons, we could develop an educational and counseling reentry program to rehabilitate these incarcerated members of our society.

Please pass SB 83.

Sincerely,
Dayle Bethel

TO: COMMITTEE ON PUBLIC SAFETY AND MILITARY AFFAIRS
Senator Will Espero, Chair
Senator Robert Bunda, Vice Chair

FROM: Carmael Kamealoha Stagner, private citizen & spouse of inmate incarcerated at Saguaro Correctional Facility

SUBJECT: TESTIMONY IN FAVOR OF SB 83

DATE: Tuesday, February 3, 2009
TIME: 1:15 p.m.
PLACE: Conference Room 229
State Capitol
415 South Beretania Street

PSMTestimony@Capitol.hawaii.gov .

SB 83

RELATING TO CORRECTIONS.
Authorizes the auditor to conduct performance audits of private prisons housing Hawaii inmates, namely Red Rock Correctional Center, Saguaro Correctional Center, and Otter Creek Correctional Center.

Honorable committee chairpersons Senator Will Espero and Senator Robert Bunda,

This testimony is in favor of a fiscal audit of the Hawaii State Agreement Contract no. 55331, which allows for Hawaii tax payer dollars to support human trafficking and chattel slavery practices under the guise of overcrowding in Hawaii prisons.

Performance audits of the above-named facilities shall be conducted as a companion to fiscal and performance audits of the Department of Public Safety's Mainland Branch Unit.

What was deemed a temporary fix to prison overcrowding about15 years ago, has developed into a fissure that rips apart Hawaiian families, stopping the breath of children, who cannot be in the presence of their mothers and fathers.

How do you quantify the value of a Hawaiian body? Justifying bonded captivity in a foreign land?

What is the social cost to Hawaiian children?

Perhaps a performance audit will show how well CCA and PSD treat enslaved Hawaiians.

The state of Hawaii Department of Public Safety (PSD) supports human trafficking and chattel slavery of Hawaiians through its contract with the Corrections Corporation of America (CCA), known as the State of Hawaii Agreement Contract NO. 55331.

The 2007 Hawaii State legislature noted that 45% of the incarcerated population identify themselves as part-or native Hawaiian (http://capitol.hawaii.gov/session2008/bills/HB1734_HD1_.pdf). What percentage of that population is warehoused in CCA's Saguaro Correctional Facility (SCF)?

Unfortunately a 2001 inquiry of the number of incarcerated adults categorized by race and ethnicity made by the state of Hawaii Department of the Attorney General regulatory division Deputy Attorney General Ms. Lisa Itomura was denied by the Office of the Lieutenant Governor's Office of Information Practices (http://www.state.hi.us/oip/opinionletters/opinion%2001-03.pdf).

Here is the anti-social and unjust parallel of the plight of Hawaiian inmates concomitant with those of African-American descent:

Jaron Browne's 2008 article in the social and environmental justice journal *Race, Poverty, Environment*, Rooted in Slavery: Prison Labor Exploitation, the United States has once again surpassed its own world record for incarcerating the highest percentage of its population. The Bureau of Prison Statistics has released data confirming that at the end of 2005, one in 32 adults has been in prison, on probation, or on parole(http://www.urbanhabitat.org/node/856). National statistics state that racial bias seems to define major aspects of the criminal justice system, including but not limited to police targeting, to crimes charged and rates of conviction for African-American men between the ages of 20 and 39.

The United States prison system reflects a Third World industry similar to free enterprise zones in Africa, Asia and Latin America, who use human trafficking and chattel slavery to support their industries. Prisoners are not protected by minimum wage laws or overtime, and are explicitly barred from the right to organize and collectively bargain. Browne points out that the conditions for the overwhelmingly Black and Latino men and women inside the United States prison system are so similar to that of workers in the maquiladoras and sweatshops of the global South that Oregon politicians in 1995 were courting Nike to move their production from Indonesia into Oregon prisons. "We propose that (Nike) take a look at their transportation costs and their labor costs," Oregon State Representative Kevin Mannix explained in an interview with researcher Reese Erlich, "We could offer [competitive] prison inmate labor" in Oregon.[2]

Browne underscores how this practice is rooted in Slavery:

> Current prison conditions allows such an exploitative industry to develop, as the origin of the United States itself. Before the abolition of slavery there was no real prison system in the United States; punishment for crime consisted of physical torture, referred to as corporal or capital punishment. While the model prison in the United States was built in Auburn, New York in 1817, it wasn't until the end of the Civil War, with the official abolition of slavery, that the prison system took hold.
>
> In 1865, the 13th Amendment officially abolished slavery for all people except those convicted of a crime and opened the door for mass criminalization.

Prisons were built in the South as part of the backlash to Black Reconstruction and as a mechanism to re-enslave Black workers. In the late 19th-century South, an extensive prison system was developed in the interest of maintaining the racial and economic relationship of slavery.

Louisiana's famous Angola Prison illustrates this history best. In 1880, this 8000-acre family plantation was purchased by the state of Louisiana and converted into a prison. Slave quarters became cell units. Now expanded to 18,000 acres, the Angola plantation is tilled by prisoners working the land—a chilling picture of modern day chattel slavery (http://www.urbanhabitat.org/node/856).

Just a few decades later, Browne warns we are witnessing the return of all of these systems of prison labor exploitation. Private corporations are able to lease factories in prisons, as well as lease prisoners out to their factories.

Private corporations are running prisons-for-profit. Government-run prison factories operate as multibillion dollar industries in every state, and throughout the federal prison system. CCA is a private corporation paid through Hawaii taxpayer dollars to traffick Hawaiians into chattel slavery.

Human traffickers use various techniques to instill fear in victims and to keep them enslaved. Some traffickers keep their victims under lock and key. However, the more frequent practice is to use less obvious techniques including:

- Debt bondage - financial obligations, honor-bound to satisfy debt ***(Hawaii State Agreement Contract NO. 55331)***

- Isolation from the public - limiting contact with outsiders and making sure that any contact is monitored or superficial in nature ***(Eloy, Arizona is xxx miles away. Video visitation sessions with family members are 1x monthly, for 15 minutes).***

- Isolation from family members and members of their ethnic and religious community ***(Hawaiians may not exchange the ha, an important spiritual practice, with their family members; Hawaiians may not participate in both spiritual ceremonies like Makahiki, and cultural classes like language, chant and dance, and also attend organized religious services like Christian, Mormon, Catholic, Buddhist etc...)***

- Confiscation of passports, visas and/or identification documents ***(part of chattel practice)***

- Use or threat of violence toward victims and/or families of victims ***(daily communication from staff to inmates)***

- The threat of shaming victims by exposing circumstances to family ***(SHIP program)***

- Telling victims they will be imprisoned or deported for immigration violations if they contact authorities ***(SHIP program)***

- Control of the victims' money, e.g., holding their money for "safe-keeping" ***(limited access to funds)***

http://www.acf.hhs.gov/trafficking/about/index.html

In these tough economic times, it seems hardly feasible to fund a practice that fails to disclose its fiduciary responsibilities to its providers, the taxpayers of Hawaii.

COMMITTEE ON PUBLIC SAFETY AND MILITARY AFFAIRS

Sen. Will Espero, Chair, Sen. Robert Bunda, Vice Chair

Tuesday, February 3, 2009, 1:15 PM, Room 229

STRONG SUPPORT
SB 83 – Audit of Private Prisons

Sent to: PSMTestimony@capitol.hawaii.gov

Dear Chair Espero, Vice Chair Bunda and Committee Members:

My name is Diana Bethel and I am writing to express my concern about the treatment of the approximately 2,000 Hawaii prison inmates who are housed in private prisons on the mainland. I was shocked to find out that there have been numerous human rights abuses inflicted upon Hawaii inmates, but that the Department of Public Safety has been negligent in responding to these complaints and even in monitoring the prisons in which they have occurred.

Clearly an independent audit is called for. These private prison contracts are costing Hawaii's taxpayers over $50,000,000 a year. We should be getting our money's worth in terms of safe prisons and effective services that will enable returning inmates to successfully reenter our communities on their return to Hawaii.

Please pass SB 83 so that a long past overdue audit can be performed, and the state can remedy any liability issues that have cost the taxpayers over $5,000,000 so far in claims for this unconscionable negligence of oversight.

Thank you for addressing this critical public safety issue.

Aloha,

Diana Bethel, Concerned Citizen
1441 Victoria St., Honolulu, Hawaii 96822

aquino3-Linda

From: Mary Elizabeth [nugayou@yahoo.com]
Sent: Sunday, February 01, 2009 11:57 AM
To: PBStestimony
Subject: Testimonies for Public Safety and Military Affairs Meeting on 2/3/09
Attachments: stat5331.jpg

COMMITTEE ON PUBLIC SAFETY AND MILITARY AFFAIRS

Sen. Will Espero, Chair

Sen. Robert Buda, Vice Chair

Tuesday, February 3, 2009

1:15 PM

Room 229

Bill # SB 83, Relating to Corrections

STRONG SUPPORT

The people of the State of Hawaii are paying $50 million dollars to CCA for the inmates housed in the mainland. This amount is at a loss to the state of $3 for every $1 we export. Yet, the people of Hawaii do not know what we are getting for the millions of dollars we are unquestionably paying CCA.

The inmates hot water hours have been cut down, their water is being recycled from the drain, clothing quality is so poor that they deteriorate within a few washings, food quality has dropped, limited classes and programs so majority cannot participate. The list goes on. CCA is a money making organization so their bottom line is to make money. The inmates are at the mercy of CCA, but, we, as caretakers, need to hold CCA responsible and the only way we can do that is to have an audit.

Thank you for your consideration.

With warm regards,

Elaine Funakoshi

455-9136