LINDA LINGLE
GOVERNOR

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

CLAYTON A. FRANK
DIRECTOR

DAVID F. FESTERLING
Deputy Director
Administration

TOMMY JOHNSON
Deputy Director
Corrections

JAMES L. PROPOTNICK
Deputy Director
Law Enforcement

No. _

TESTIMONY ON HOUSE BILL 969
RELATING TO PRIVATE PRISON PERFORMANCE AUDIT

by
Clayton A. Frank, Director
Department of Public Safety

House Committee on Public Safety
Representative Faye P. Hanohano, Chair
Representative Henry J.C. Aquino, Vice Chair

Thursday, February 5, 2009; 9:15AM
State Capitol, Conference Room 309

Representative Hanohano, Representative Aquino, and Members of the Committee:

The Department of Public Safety (PSD) opposes House Bill 969. This 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. It should be noted that all CCA facilities nationwide are accredited and audited by the American Correctional Association (ACA). ACA conducts comprehensive inspections and audits of all facility operations, reviews policies and procedures, required training and certification of staff, to include licensure, and ensure nationally accepted standards are being met with respect to the custody, care, and rehabilitation of offenders.

Further, 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 used to house inmates from Hawaii meet ACA's stringent requirement for certification standards. In fact, both the Saguaro and Red Rock facilities

that house our male inmates received a perfect score of 100% from the ACA during their certification process. While the Otter Creek facility that houses our female inmates scored 99.6% of out a possible 100% during their it's certification process with ACA.

This measure is unnecessary and repetitive as the Department also conducts quarterly contractual audits of CCA facilities that house inmates from Hawaii using 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 to those that may not have access to the internet.

Further, statements in the language of this measure are incorrect and misleading. The allegation that CCA "began keeping two sets of books" has not been 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 our 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.

On September 17, 2008, four (4) federal staff attorneys (Denise Pennick, Heather Gamache – U.S. District Court of Hawaii & Suzanne King, and Michael David Richter – U.S. District Court Tucson Arizona) toured 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 on October 3, 2008, four (4) staff members from the Office of the Ombudsman, which included the Ombudsman, Mr. Robin Matsunaga, Ms. Yvonne Faria, Mr. Gansin Li, and Ms. Dawn Matsuoka visited the Otter Creek facility 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 visit each of the three (3) CCA facilities that house inmate from Hawaii at least twice a year. During my most recent visit during November 2008, I was accompanied by 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, reviewed inmate grievance procedures, ate meals with our inmates, and held several group meetings with them to discuss a variety of issues.

It should also be noted that the Department of Public Safety that sought out the services of 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 provides no further information or proof of the statements. 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). It has been our experience that some inmates refuse to participate in available programs while others wait until they are close to the end of their minimum sentence(s) to sign up for the programs, then complain about their status on the waiting list. Some of those same inmates in-turn complain about the lack of programs, but fail to mention that had they signed up for the programs in a timely manner as recommended, the majority of the programs would be

completed by the time they become eligible to be returned to Hawaii for the sex offender treatment and/or work furlough programs.

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.

Lastly, PSD's contracts with CCA and the contractual obligations contained therein are clearly the most scrutinized in the State as evidenced by this measure and others that have been introduced over the last few years, which are due in part to many unsubstantiated allegations, which fly in the face of the facts.

Therefore, PSD does not support House Bill 969, as this measure is clearly unnecessary. Thank you for the opportunity to provide testimony on this matter.

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

Prisoner Reintegration and Family Reunification Program

1286 Queen Emma Street
Honolulu, Hawaii 96813
www.idlinks.com
Andy Botts, Director
poidogpub@hawaiiantel.net
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February 5, 2009

COMMITTEE ON PUBLIC SAFETY
Rep. Faye Hanohano, Chair
Rep. Henry J.C. Aquino, Vice-chair
Tuesday, February 3, 2009
9:15 a.m.
Conference room 309
HB 969
RELATING TO PRIVATE PRISON PERFORMANCE AUDIT
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 the nation is 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. That attitude is typical in prison matters, because it's a subject that the general public doesn't know about, much less care. However, in these times of financial uncertainty, a greater emphasis on this issue is crucial to consider, especially considering the fact that the price to keep Hawaii inmates in mainland facilities continues to rise, with no end in sight, at a cost we can't afford.

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

Andy Botts, Director
Prisoner reintegration program
Author, Nightmare In Bangkok

AMERICAN CIVIL LIBERTIES UNION of HAWAI'I

Via E-mail:	PBSTestimony@Capitol.hawaii.gov
Committee:	Committee on Public Safety
Hearing Date/Time:	Thursday, February 5, 2009, 9:15 a.m.
Place:	Room 309
Re:	*Testimony of the ACLU of Hawaii in Support of HB 969, Relating to Private Prison Performance Audit*

Dear Chair Hanohano and Members of the Committee on Public Safety:

The American Civil Liberties Union of Hawaii ("ACLU of Hawaii") writes in strong support of HB 969, 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.

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

[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.

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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
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www.acluhawaii.org

TO: COMMITTEE ON PUBLIC SAFETY
Rep. Faye Hanohano, Chair
Rep. Henry Aquino, Vice Chair
Thursday, February 5, 2009
9:15 AM
Room 309, Hawaii State Capitol

RE: Testimony in Support of HB 969 – Private Prison Audit

FROM: Atty Daphne Barbee-Wooten
1188 Bishop Street, Suite 1909, Honolulu, Hawaii 96813, (808) 533-0275

Dear Representative Hanohano:

I am attorney Daphne Barbee and I represent inmates who have been transferred to Saguaro Correction Facility in Elroy, Arizona. 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 and 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 against the prison.

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 appears to support 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). To ensure constitutional requirements are met. Remember that 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 United States.

Dated: Honolulu, Hawaii 2-4-09

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 25TH 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 UNAUTHERIZED 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 31ST, 2008 CORRECTION OFFICER RODRIGUEZ TOLD ME TO REPORT TO OPERATIONS TO SEE THE ASSISTANT WARDEN GRIEGO, AND THE GRIEVANCE COORDINATOR VENEZUELA. 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 was no 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 sanctions 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.

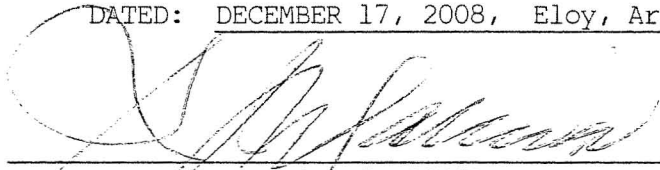
2. Saguaro Correctional Center ("SCCC") is run by Corrections Corporation of America ("CCA"), a private prison operator, under a Contract agreement with the State of Hawaii, Department of Public Safety.

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.

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

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

LINDA LINGLE
GOVERNOR

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

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Deputy Director
Law Enforcement

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)

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
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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.

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

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

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**

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, 2985-86, 41 L.Ed.2d 935 (1974); *Bumgarner v. Bloodworth*, 768 F.2d 287, 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, 2538-41, 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), [fn31] and at least one court has extended these protections to media mail, *Guajardo v. Estelle*, 580 F.2d 748, 758 (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, 102, 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

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, 253-55, 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

other tort plaintiff, should be able to recover "for all harm past, present and prospective." Restatement (Second) of Torts § 910 (1979). We hold, therefore, that the availability of injunctive relief fails to affect an attendant claim for damages. Hence, we consider the damage standards applicable to this case.

19] A. First Amendment.[fn9]

[20] This Court has recently held that general damages[fn10] are presumed to occur when First Amendment rights are

violated. *Walje v. City of Winchester, Kentucky*, 773 F.2d 729, 731-32 (6th Cir. 1985); *accord Stachura*, 106 S.Ct. at 2544 (noting that it may be appropriate to presume general damages from some constitutional violations). The district court, thus, erred in requiring Parrish to establish a "lasting or severe" injury in this context and, accordingly, we remand Parrish's First Amendment violations for a determination of general damages. We caution the district court, however, that Parrish may not recover any damages for the inherent value of his First Amendment rights violated. *See Stachura*, 106 S.Ct. at 2544 ("no room" for jury's perception of importance of constitutional right). Instead, on remand, the district court judge should determine whether Turner's action's in interfering with Parrish's mail and phone calls caused Parrish any pain, suffering, emotional distress, or impairment of employment prospects. *Hobson v. Wilson*, 737 F.2d 1, 61 & n. 173 (D.C. Cir. 1984), *cert. denied*, ___ U.S. ___, 105 S.Ct. 1843, 85 L.Ed.2d 142 (1985). Next, we turn to the violations of Parrish's Eighth Amendment rights.

21] B. Eighth Amendment.[fn11]

[22] We begin our analysis of damages for Eighth Amendment violations recognizing that language exists in some of this Court's prior decisions which indicates that general damages may be presumed for the violation of any substantive constitutional right. *See Walje*, 773 F.2d at 731 ("[I]n Section 1983 actions establishing violations of substantive constitutional rights, general damages may be awarded even if there is no showing of actual injury."); *Brandon v. Allen*, 719 F.2d 151, 154-55 (6th Cir. 1983) (indicating general damages available for violations of substantive constitutional rights), *rev'd on other grounds sub nom. Brandon v. Holt*, 469 U.S. 464, 105 S.Ct. 873, 83 L.Ed.2d 878 (1985); *see generally Owen v. Lash*, 682 F.2d 643, 657-58 (7th Cir. 1982) (Stewart, J., discussing procedural/substantive controversy); *Ganey v. Edwards*, 759 F.2d 337, 340-41 (4th Cir. 1985) (citing *Brandon* as adopting procedural/substantive dichotomy). Since the prohibition against the imposition of cruel and unusual punishment is a substantive constitutional right, that is, derived from the Eighth Amendment, the application of a substantive/procedural dichotomy to this case would lead to the result that Parrish would be entitled to general damages for the constitutional violation. We believe, however, that such a dichotomy is contrary to the Supreme Court's teaching in *Carey* and to the analysis developed by this Court in *Walje* and *Brandon*.

[23] First, the Supreme Court recently re-affirmed its holding in

Carey v. Piphus, 435 U.S. 247, 253, 98 S.Ct. 1042, 1046, 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).

Page 608

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, 225 (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,* 739 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, 788 (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 §

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,* 721 F.2d at 365 ("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,* 721 F.2d at 356; *see also Madison*

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
Page 611
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

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.[fn6] 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 72 (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.[fn7]

[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

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, 975 (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 253, 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.

United States 9th Circuit Court of Appeals Reports

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.

Page 1149

[EDITORS' NOTE: THIS PAGE CONTAINS HEADNOTES. HEADNOTES ARE NOT AN OFFICIAL PRODUCT OF THE COURT, THEREFORE THEY ARE NOT DISPLAYED.]
Page 1150

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).

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, 902 (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

Page 1154

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.

From:
Sent: Wednesday, February 04, 2009 12:29 PM
To: PBStestimony
Subject: Testimony
Attachments: stat1482.jpg

Categories: Purple Category

COMMITTEE ON PUBLIC SAFETY

Rep. Faye P. Hanohano, Chair

Rep. Henry Aquino, Vice Chair

Thursday, February 5, 2009

09:15 a.m.

Room 309

Bill # HB 969, Relating to Private Prison Audit

STRONG SUPPORT

Thank you for the opportunity to submit my testimony.

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 smelly shower 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.

Please support the passage of this bill.

Elaine Funakoshi

COMMITTEE ON PUBLIC SAFETY

Rep. Faye P. Hanohano, Chair

Rep. Henry Aquino, Vice Chair

Thursday, February 5, 2009

9:15 AM

Room 309

Bill # HB 409, Relating to Corrections

SUPPORT

Thank you for the opportunity to submit my testimony.

Presently, there is no real oversight of whether CCA is keeping their part of the contractual agreement with the State of Hawai□i. At present, they have free-wheeling management going on, taking advantage of the inmates and the state. The Mainland Branch, when questioned, cannot answer questions relating to what is CCA□s responsibility. They always call CCA and ask them what is their responsibility. It makes one wonder who is paying who?

As an aside, the inmates generally makes $.25 an HOUR - they pay $.25 per MINUTE to make a phone call.

Please envision yourself walking in the inmates shoes. Yes, they are paying their price to society, but is it fair to treat them unfairly?

I kindly ask for your support in the passage of this bill.

Elaine Funakoshi

COMMITTEE ON PUBLIC SAFETY
Rep. Faye P. Hanohano, Chair
Rep. Henry J.C. Aquino, Vice Chair
Thursday, February 5, 2009
Room 309 at 9:15am

STRONG SUPPORT: HB 969 Relating to Private Prison Performance Audit

Aloha Chair Hanohano, Vice Chair Aquino and Members of the Committee!

My name is Carrie Ann Shirota, and I am writing in strong support of HB 969. Given that the State of Hawai`i has the highest percentage of out of state prisoner transfers in the United States, it is imperative that our elected officials and community are fully aware of the fiscal costs associated with these for profit private prison contracts, and whether this practice enhances or decreases public safety. In fiscal year 2007, the Department of Public Safety spent $50,291,459.61 to transfer inmates from Hawai`i out of state private prisons in Oklahoma, Mississippi, Arizona, and Kentucky.

As a taxpayer and citizen who believes in rehabilitation opportunities to stop the cycle of incarceration, I would like to know the breakdown of how the $50 million dollars were spent. In particular, I am interested in learning about the amount of money spent on programs, such as education, substance abuse treatment, mental health services, vocational training and medical care, as well as the effectiveness of these services. I am also interested in the number of in person and teleconference visits, and contracts outlining the telephone rates. We should be investing in programs that work, and better prepare men and women for their transition back into the community as law-abiding, contributing members of their families and our community.

In addition, the audit should detail the Department of Public Safety's execution of its duties in the areas of: 1) monitoring private prisons; 2) enforcement of contract provisions and c) public access to contract and monitoring reports. Public access to these contracts, monitoring reports, and other demographic data relating to persons housed out of state is critical in order to provide for accountability and transparency, and to determine if out-of-state transfers is cost-effective to reducing recidivism rates in Hawai`i.

Significantly, a growing number of United States jurisdictions have established independent Oversight Committees to ensure public and private facilities that confine individuals for alleged or adjudicated crimes meet their legal obligation to ensure constitutional conditions of confinement. See, "Opening Up a Closed World: What Constitutes Effective Prison Oversight" Conference sponsored by the Lyndon B. Johnson School of Public Policy at the University of Texas-Austin,. http://www.utexas.edu/lbj/prisonconference/index.php. In August 2008, the American Bar Association approved a policy recommendation requesting federal and state governments to establish public entities independent of any correctional agency to regularly monitor and report publicly on the conditions in all correctional facilities.

The proposed measure is consistent with ABA's recommendation calling upon an independent body to monitor and publicly report on the conditions in all correctional facilities. This will help the State to fulfill its mandate to ensure constitutional conditions of confinement for incarcerated persons whether they are housed in-state or transferred to private prisons on the U.S. continent.

As elected officials, our community looks to you for leadership in shaping legislation and ensuring that hard earned tax dollars are spent in a fiscally responsible matter. Please hold the Department of Public Safety responsible for an accounting of its $50+million dollar expenditure. In addition, I humbly

ask that you contemplate the real costs associated with warehousing prisoners both in Hawai`i and in out of state prisons. In order to reduce the revolving door to prison, we must increase educational and vocational training, treatment programs, family strengthening programs and other reentry support services starting from the first day of incarceration.

Mahalo for this opportunity to submit testimony in support of HB 969!

Sincerely,

Carrie Ann Shirota, Esq.
Wailuku, Hawaii 96793
Phone: 808-269-3858

COMMITTEE ON PUBLIC SAFETY
Representative Faye Hanohano, Chair
Representative Henry Aquino, Vice Chair
Thursday, February 5, 2009
9:15 AM
Room 309
PBSTestimony@capitol.hawaii.gov
HB969 - Private Prison Performance Audit
STRONG SUPPORT

Chair Hanohano, Vice Chair Aquino, and Members of the Committee:

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 not adequately responded to these complaints and is remiss in not sufficiently 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 HB969 so that a long past overdue audit can be performed, and the state can remedy any liability issues that have already cost the taxpayers over $5,000,000 so far in claims for this lack of oversight.

Thank you for addressing this critical public safety issue.

Aloha,

Diana Bethel
1441 Victoria St.
Honolulu, Hawaii 96822

the Drug Policy Forum

LATE TESTIMONY

P.O. Box 61233
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Email: info@dpfhi.org
Website: www.dpfhi.org

February 5, 2009

To: Representative Faye Hanohano Chair
Representative Henry J.C. Aquino, Vice Chair
And Members of the Committee on Public Safety

From: Jeanne Ohta, Executive Director

RE: HB 969 Relating to Private Prison Audit
Hearing: February 5, 2009, 9:15 a.m., Room 309

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 HB 969 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 medical, mental health, substance abuse treatment, education, vocational training, and food 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, and their costs low, 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 HB 969 so that we may have an independent report on $50 million of taxpayer money. Thank you for this opportunity to testify.