

# **“JAIL SCHOOL”**

**JAIL LITIGATION: FROM CLASS ACTION LAWSUITS TO PRO SE LITIGATION**

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## **I. IMMUNITY**

As with any claim asserted against a government employee or official, the first line of defense is the affirmative defense of immunity from suit, either absolute or qualified. Consequently, a good understanding of both of these types of immunity is very important to the practitioner.

The modern doctrine of immunity, either qualified or absolute, is the result of explicit judicial balancing of adverse interests which are implicated in suits brought by private persons allegedly injured by the acts of public officials. See *Butz v. Economou*, 98 S. Ct. 2909, 2912 (1978). On one hand, there is the private desire to obtain redress from governmentally imposed injuries; as well as, the public interest in both punishment and deterrence of official wrongdoing. *Id.* On the other hand, there is the public aim of shielding officials from liability so that they do not become overly cautious in the performance of their duties. See *Harlow v. Fitzgerald*, 102 S. Ct. 2727, 2736-38 (1982); *Butz*, 98 S. Ct. at 2909-12; see also *The Supreme Court*, 1981 Term, 96 Harv. L. Rev. 4, 229 (1982); Schuck, *Suing Our Servants: The Court, Congress, and the Liability of Public Officials for Damages*, 1980 Sup. Ct. Rev. 281, 281-85 (1980).

### **A. Absolute Immunity**

As courts have weighed the conflicting values inherent to the immunity concept, the courts have acknowledged that the scales do not always tip evenly. *Butz*, 98 S. Ct. at 2909-12. For those officials whose governmental functions are especially sensitive or whose constitutional status requires complete protection from suit, the Supreme Court has recognized an absolute immunity defense. *Eastland v. United States Servicemen's Fund*, 95 S. Ct. 1813, 1821 (1975)(legislators have absolute immunity for acts in their legislative capacity); *Stamp v. Sparkman*, 98 S. Ct. 1099, 1108 (1978)(judges have absolute immunity for acts in their judicial capacity); *Imbler v. Pachtman*, 96 S. Ct. 984, 994-95 (1976)(prosecutors have absolute immunity for acts in initiating and pursuing a prosecution); *Butz*, 98 S. Ct. at 2912. (other executive officers have absolute immunity for performing prosecutorial or adjudicative functions); *Nixon v. Fitzgerald*, 102 S. Ct. 2690, 2704 (1982)(The President of the United States is protected by absolute immunity).

As a general rule, the doctrine of absolute immunity will only come into play in jail suits when the Plaintiff attempts to assert a cause of action against individual county commissioners or individual city councilman for the performance of their legislative functions. When this does occur, the individual commissioners and councilman (including the mayor and the county judge) are entitled to an absolute immunity from suit for the performance of their legislative functions.

### **B. Qualified Immunity**

Officials whose functions do not require complete insulation from liability are not protected by the doctrine of absolute immunity. *Butz*, 98 S. Ct. at 2909-12. Instead, these individuals have been accorded a qualified immunity. *Id.* (qualified immunity recognized

for certain Executive Branch officials); *Scheuer v. Rhodes*, 94 S. Ct. 1683, 1692-93 (1974)(qualified immunity recognized for governors and their aides); *Pierson v. Ray*, 87 S. Ct. 1213, 1218-19 (1967)(qualified immunity recognized for police officers).

Prior to 1982, the court utilized a two-prong, subjective/objective test for qualified immunity. See *Wood v. Strickland*, 95 S. Ct. 992, 1000-01 (1975). Under this test, public officials had the burden of proving their good faith. See *id.* Many courts, under this test, considered the subjective element to be a question of fact, and this approach was criticized in *Harlow*, 102 S. Ct. 2727, 2737-38 (1982). The court reasoned that this approach was not workable because, in part, substantial costs were being accumulated to litigate the subjective good faith of governmental officials. *Id.* These costs included the risk of trial, distraction of officials from their governmental duties, inhibition of discretionary actions, and deterrence of able people from entering public service. *Id.* at 2737.

As a result of the hardships under the subjective/objective test, the Supreme Court eliminated the subjective element of the qualified immunity test. *Id.* at 2738. The Court concluded that utilizing the new standard would allow many claims to be resolved by summary proceeding. *Id.* at 2738-39.

As a general rule, under the doctrine of qualified immunity, government officials are shielded from liability as long as their actions can reasonably be thought consistent with the rights they are alleged to have violated. *Anderson v. Creighton*, 107 S. Ct. 3034, 3038 (1987). In other words, government officials are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable officer would have known. *Harlow*, 102 S. Ct. at 2738. For a right to be clearly established, the contours of the right must be sufficiently clear that a reasonable person would understand that what he was doing would violate that right. *Melear v. Spears*, 862 F.2d 1177, 1183 (5th Cir. 1989).

### **C. Stay Of Discovery Or Disclosure Pending Ruling On Immunity Issue**

A district court should freeze pre-trial discovery until the district court can determine whether a substantial basis for the defense of qualified immunity exists. *Elliot v. Perez*, 751 F.2d 1472, 1478 (5th Cir. 1985). Officials should be free not only from ultimate liability, but also from discovery and other pre-trial concerns, if they are entitled to qualified immunity. *Id.* This rule was fashioned due to the fact that qualified immunity is an immunity from suit, and extends beyond just a defense of liability. *Id.* A defendant who raises a meritorious issue of qualified immunity is entitled to dismissal before the commencement of discovery, and courts have the obligation to carefully scrutinize a plaintiff's claim prior to subjecting a public official to the unnecessary burdens that a civil trial of this nature can bestow. *Jacquez v. Procnier*, 801 F.2d 789, 791 (5th Cir. 1986).

## **II. SUPERVISORY LIABILITY -- WHEN IS A SUPERVISOR LIABLE**

For a supervisor to be held liable under section 1983, the supervisor must either be personally involved in the acts causing the deprivation of an individual's constitutional

rights, or there must be some other causal connection between an act of the supervisor and the constitutional violation sought to be addressed. *Lozano v. Smith*, 718 F.2d 756, 768 (5th Cir. 1983); *C-1 by P-1 v. City of Horn Lake*, 775 F. Supp. 940 (N.D. Miss. 1990). To state a claim against a supervisory official, in his individual capacity, a plaintiff must plead and prove that the supervisory official was personally responsible for the plaintiff's alleged constitutional deprivation or was responsible for the plaintiff's alleged constitutional deprivation in accordance with case law governing the liability of supervisory officials for constitutional violations committed by their subordinates. *Doe*, 733 F. Supp. at 252 (E.D. Tex. 1990) (citing *Thompkins v. Belt*, 828 F.2d 298 (5th Cir. 1987)). Consequently, a supervisory official, in his individual capacity, may only be subject to suit if a plaintiff can plead and prove: 1) the official's affirmative participation in acts causing the constitutional deprivation, or 2) the official implemented an unconstitutional policy that caused plaintiff's injury. *Mouille v. City of Live Oak*, 977 F.2d 924, 929 (5th Cir. 1992); see *Thompkins*, 828 F.2d at 304; *Doe*, 733 F. Supp. at 258. Under Section 1983, supervisory officials are not liable for the actions of subordinates on any theory of vicarious liability. *Thompkins*, 828 F.2d at 303; *Doe*, 733 F. Supp. at 258. Without personal involvement on the part of the supervisor, the plaintiff is required to establish that the supervisor failed to supervise the employees adequately, the failure was grossly negligent and the failure to supervise caused the constitutional violation. *Bigford*, 834 F.2d at 1220; *Hinshaw v. Doffer*, 785 F.2d 1260, 1263 (5th Cir. 1986).

Additionally, the supervisory official may also be entitled to qualified immunity from suit. The supervisory official will not be subject to suit if the objective circumstances warranted a belief that the alleged unconstitutional conduct did not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Doe*, 733 F. Supp. at 258 (quoting *Harlow* 102 S. Ct. at 2738).

To state a claim against a supervisory official, a plaintiff must plead and prove that the supervisory official was personally responsible for the plaintiff's alleged constitutional deprivation or was responsible for the plaintiff's alleged constitutional deprivation in accordance with case law governing the liability of supervisory officials for constitutional violations committed by their subordinates. *Doe*, 733 F. Supp. at 252 (citing *Thompkins*, 828 F.2d 298).

A supervisory official, in his individual capacity, may only be subject to suit if a plaintiff can plead and prove: 1) the official's affirmative participation in acts causing the constitutional deprivation, or 2) the official implemented an unconstitutional policy that caused plaintiff's injury. *Mouille*, 977 F.2d at 929; see *Thompkins*, 828 F.2d at 304; *Doe*, 733 F. Supp. at 258. Under Section 1983, supervisory officials are not liable for the actions of subordinates on any theory of vicarious liability. *Thompkins*, 828 F.2d at 303; *Doe*, 733 F. Supp. at 258. Without personal involvement on the part of the supervisor, the plaintiff is required to establish that the supervisor failed to supervise the employee adequately, the failure was grossly negligent and the failure to supervise actually caused the constitutional violation. *Bigford*, 834 F.2d at 1220; *Hinshaw*, 785 F.2d at 1263.

Moreover, in addition to the stringent requirements set forth above, a supervisory official is also entitled to qualified immunity from suit. The supervisory official will not be subject to suit if the objective circumstances warranted a belief that the alleged unconstitutional conduct did not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Doe*, 733 F. Supp. at 258 (quoting *Harlow* 102 S. Ct. at 2738).

The causation standard in 42 U.S.C. Section 1983 is generally a proximate cause standard. Proximate cause in the 42 U.S.C. Section 1983 actions includes components of cause in fact and foreseeability. *Nettles v. Griffith*, 883 F. Supp. 136 (E.D. Tex. 1995).

### **III. SPECIFIC CONSTITUTIONAL VIOLATIONS THAT INMATES FREQUENTLY ASSERT**

#### **A. Medical Claims**

##### **1. Pretrial Detainees**

A pretrial detainee has a Fourteenth Amendment right to be free from punishment altogether and must be afforded reasonable medical care. *Colle v. Brazos County*, 981 F.2d 237, 244 (5th Cir. 1993). Consequently, pretrial detainees “are entitled to reasonable medical care unless the failure to supply that care is reasonably related to a legitimate governmental objective.” *Cupit v. Jones*, 835 F.2d 82, 85 (5th Cir. 1987); see also *Mayweather v. Foti*, 958 F.2d 91, 91 (5th Cir. 1992); *Jones v. Diamond*, 636 F.2d 1364, 1378 (5th Cir.) (en banc), cert. dismissed, 453 U.S. 950 (1981). To cite some specific examples, a private physician under contract to provide medical services to a county jail is not liable to a detainee who suffered from AIDS, under 42 U.S.C. Section 1983 or under the Texas Tort Claims Act, for alleged insufficient medical treatment, as the detainee was given reasonable medical care and suffered no adverse effects from time spent in jail. *Burton v. Cameron County*, 884 F. Supp. 234 (S.D.Tex. 1995).

##### **2. Convicted Felons**

To prevail on an Eighth Amendment claim for deprivation of medical care, a prisoner must prove that care was denied and that such denial constituted a “deliberate indifference to serious medical needs, constituting unnecessary and wanton infliction of pain.” *Johnson v. Treen*, 759 F.2d 1236, 1237 (5th Cir. 1985) (citing *Estelle v. Gamble*, 97 S. Ct., 285, 291 (1976)). In *Estelle*, Mr. Gamble complained repeatedly to prison authorities of severe pains in his back, chest, arms and legs. *Estelle*, 97 S. Ct. at 288-89. Additionally, he complained of “blank outs.” *Id.* at 288-89. Despite his repeated complaints, Gamble was only given examinations in the prison infirmary, pain pills and muscle relaxants for months. *Id.* at 288-89. After continuing his complaints in the face of disciplinary action for shirking work, Gamble was placed in administrative segregation and given quinidine as treatment for irregular cardiac rhythm. *Id.* at 288-89. Although Gamble had repeatedly made known his subjective feelings of substantial pain to prison officials, the district court dismissed Gamble’s complaint for failure to allege facts sufficient to support a conclusion



of deliberate indifference. *Id.* at 288-89. The Fifth Circuit Court of Appeals reversed and remanded the case with instructions to reinstate the complaint. *Id.* at 293. The Supreme Court then reversed the Fifth Circuit and held that the district court's decision should have been affirmed as it related to the claim for deprivation of medical care. *Id.* at 293.

In the wake of *Estelle*, the Fifth Circuit has held that to state a claim alleging deliberate indifference to serious medical needs of a prisoner, a plaintiff must plead facts showing an unnecessary and wanton infliction of pain prescribed by the Eighth Amendment. See *Johnson*, 759 F.2d at 1238. The facts underlying a claim of deliberate indifference must clearly evidence the medical need in question and the alleged official dereliction. *Id.* at 1238 (citing *Woodall v. Foti*, 648 F.2d 268 (5th Cir. 1981)). The legal conclusion of deliberate indifference, therefore, must rest on facts clearly evidencing wanton actions on the part of the defendants. *Id.* at 1238. As stated in *Johnson*, the Supreme Court defined the common law meaning of wanton in some detail:

Wanton means reckless -- without regard to the rights of others . . . .  
Wantonly means causelessly without restraint, and in reckless disregard to the rights of others. Wantonness is defined as a licentious act of one man towards the person of another, without regard to his rights; it has also been defined as a conscious failure of one charged with the duty to exercise due care and diligence to prevent an injury after the discovery of the peril, or under circumstances where he is charged with the knowledge of such peril, and being conscience of the inevitable or probable results of such failure.

*Id.* at 1238; see also *Walker v. Butler*, 967 F.2d 176 (5th Cir. 1992). Finally, mere negligence, neglect, or medical malpractice is insufficient to state a claim. *Graves v. Hampton*, 1 F.3d 315 (5th Cir. 1993); *Mendoza v. Lynaugh*, 889 F.2d 191 (5th Cir. 1993); *Field v. Bosshard*, 590 F.2d 105 107 (5th Cir. 1979). As stated in *Ruiz v. Estelle*, 679 F.2d 1115, 1149 (5th Cir. 1982), cert. denied, 103 S. Ct. 1438 (1983):

The Constitution does not command that inmates be given the kind of medical attention that judges would wish to have for themselves, nor the therapy that Medicare or Medicaid provide for the aged or needy. It prohibits only deliberate indifference to serious medical needs.

*Id.* at 1149.

Moreover, a delay in medical care can only constitute an eighth amendment violation if there has been deliberate indifference, which results in substantial harm. *Mendoza v. Lynaugh*, 889 F.2d 191, 195 (5th Cir. 1993). Plaintiff must establish both of these crucial elements to defeat a motion for summary judgment. See *id.*

In the context of medical claims, it has also been held that an individual entering jail on a probation or parole violations charge is a convicted felon and is protected by the Eighth Amendment's prohibition against cruel and unusual punishment rather than the Fourteenth Amendment. See generally *Van Cleave v. U.S.*, 854 F.2d 82 (5th Cir. 1989),

citing *Bell v. Wolfish*, 441 U.S. 520, 536 n.16 (1983). Consequently, in the Fifth Circuit, a convicted inmate, even if he is in jail on a probation or parole revocation charge, has to assert a claim that officials were deliberately indifferent to his or her serious medical needs, and a showing of nothing more than negligence cannot state a claim. *Jackson v. Cain*, 864 F.2d 1235, 1246 (5th Cir. 1989).

Simple disagreement with the medical treatment received or a complaint that the treatment received has been unsuccessful is insufficient to set forth a constitutional violation. *Johnson*, 759 F.2d at 1238; see also *Varnado v. Lynaugh*, 920 F.2d 320 (5th Cir. 1991). Even if the jail medical staff committed malpractice in dealing with an inmate's medical needs, this would not suffice to state a constitutional claim. *Varnado*, 920 F.2d at 323. Likewise, differing medical opinions, and even negligent medical attention, without more, do not support a claim under 42 U.S.C. Section 1983. *Burrell*, 158 F.R.D. 104. Stated simply, a disagreement between an inmate and his or her physician concerning whether certain medical care was appropriate is not actionable under 42 U.S.C. Section 1983. *Vanelos v. McFarland*, 41 F.3d 232 (5th Cir. 1995).

To cite some specific examples, a prisoner has no claim against prison officials under 42 U.S.C. Section 1983 for allegedly being given medicine that had been dropped on the floor and medicine not meant for him. *Freeze v. Griffith*, 849 F.2d 172 (5th Cir. 1988) (the inmate did not take any wrong medicine and never suffered an ill effects from taking medicine that had fallen on the floor). An inmate's allegation that medical treatment was administered without his consent and forced upon him after he previously tested positive for tuberculosis did not constitute deliberate indifference toward the medical needs of the prisoner nor did it constitute cruel and unusual punishment. *McCormick v. Stalder*, No. 96-30415 (Feb. 19, 1997) 1997 W.L. 40596. Finally, it has been held that an inmate failed to state an actionable claim for deliberate indifference to serious medical needs when he was denied an elevated bed, since the inmate saw doctors on numerous occasions, received physical therapy, heat applications, medication and other medical care designed to assist his recovery. *Burrell*, 158 F.R.D. 104.

From a purely evidentiary standpoint, medical records of sick calls, examinations, diagnoses, and medications may rebut an inmate's allegations of deliberate indifference to serious medical needs. *Vanelos*, 41 F.3d 232. As with most areas of law enforcement, documentation can be the key to avoiding liability.

### **3. HIV-positive Detainees**

Courts have held that a prison may segregate inmates with HIV without violating the constitution, although no court has imposed a duty on prisons to segregate such prisoners. *Oladipupo v. Austin*, 104 F.Supp.2d 626, (W.D. La. 2000); contrast *Muhammad v. Carlson*, 845 F.2d 175 (8th Cir.1988) (upholding prison's segregation of HIV-infected inmates) and *Cordero v. Coughlin*, 607 F.Supp. 9 (S.D.N.Y.1984) (holding that segregation of inmates with AIDS did not amount to cruel and unusual punishment or violate inmates' equal protection or free association rights), with *Robbins v. Clarke*, 946 F.2d 1331 (8th Cir.1991) (failure to segregate HIV-positive prisoners from the general population held not to

constitute cruel and unusual punishment) and *Glick v. Henderson*, 855 F.2d 536 (8th Cir.1988) (finding prison official's decision not to institute AIDS testing and segregation program was not unreasonable); see also *Feigley v. Fulcomer*, 720 F.Supp. 475 (M.D.Pa.1989) (rejecting claim that failure to require segregation constituted cruel and unusual punishment); *Woods v. White*, 689 F.Supp. 874 (W.D.Wis.1988) (holding that prisoner had a right to privacy which was violated by disclosure of his HIV-positive status to non-medical prison personnel and other inmates), *aff'd*, 899 F.2d 17 (7th Cir.1990). In light of the precedent discussed above, jails are not under an affirmative duty under the constitution to segregate those detainees with HIV from the non-infected detainees.

## **B. Denial Of Access To The Courts And Access To Legal Materials**

- 1. Inmates Are Entitled To An Adequate Law Library Or Adequate Assistance But There Is Room For Alternatives Other Than A Law Library.** *Bounds v. Smith*, 430 U.S. 817, 828, 97 S.Ct. 1491, 1498, 52 L.Ed.2d 72 (1977).

As stated by the Supreme Court in *Bounds*:

We hold, therefore, that the fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law. In a footnote (FN17), the Court went on to state, in pertinent part, "our main concern here is 'protecting the ability of an inmate to prepare a petition or complaint.'"

*Bounds*, 430 U.S. 817, 828, 97 S.Ct. 1491, 1498, 52 L.Ed.2d 72.

However, even the *Bounds* Court held that alternatives were acceptable.<sup>1</sup> It should be noted that while adequate law libraries are one constitutionally acceptable method to assure meaningful access to the courts, our decision here, as in *Gilmore*, does not foreclose alternative means to achieve that goal. Nearly half the States and the District of Columbia provide some degree of professional or quasi-professional legal assistance to prisoners. *Bryan v. Werner*, 516 F.2d 233 (CA3 1975); *Gaglio v. Ulibarri*, 507 F.2d 721 (CA9 1974); *Corpus v. Estelle*, 409 F.Supp. 1090 (SD Tex.1975).

Additionally, the Court held that this is not to say that economic factors may not be considered, for example, in choosing the methods used to provide meaningful access. *Bounds*, 430 U.S. 817, 828, 97 S.Ct. 1491, 1498, 52 L.Ed.2d 72. But the cost of protecting a constitutional right cannot justify its total denial. *Id.*

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<sup>1</sup> The Supreme Court stated that: "We reject the State's claim that inmates are "ill-equipped to use" "the tools of the trade of the legal profession," making libraries useless in assuring meaningful access.

In *Lewis v. Casey*, 518 U.S. 343, 116 S.Ct. 2174, 135 L.Ed.2d 606 (2002), the Supreme Court further clarified its holding in *Bounds* by holding as follows:

The foregoing analysis would not be pertinent here if, as respondents seem to assume, the right at issue--the right to which the actual or threatened harm must pertain--were the right to a law library or to legal assistance. But *Bounds* established no such right, any more than *Estelle* established a right to a prison hospital. The right that *Bounds* acknowledged was the (already well-established) right of *access to the courts*. *E.g.*, *Bounds*, 430 U.S., at 817, 821, 828, 97 S.Ct., at 1492-1493, 1494, 1498. In the cases to which *Bounds* traced its roots, we had protected that right by prohibiting state prison officials from actively interfering with inmates' attempts to prepare legal documents, *e.g.*, *Johnson v. Avery*, 393 U.S. 483, 484, 489-490, 89 S.Ct. 747, 748, 750-751, 21 L.Ed.2d 718 (1969), or file them, *e.g.*, *Ex parte Hull*, 312 U.S. 546, 547-549, 61 S.Ct. 640, 640-642, 85 L.Ed. 1034 (1941), and by requiring state courts to waive filing fees, *e.g.*, *Burns v. Ohio*, 360 U.S. 252, 258, 79 S.Ct. 1164, 1168-1169, 3 L.Ed.2d 1209 (1959), or transcript fees, *e.g.*, *Griffin v. Illinois*, 351 U.S. 12, 19, 76 S.Ct. 585, 590-591, 100 L.Ed. 891 (1956), for indigent inmates. *Bounds* focused on the same entitlement of access to the courts. Although it affirmed a court order requiring North Carolina to make law library facilities available to inmates, it stressed that that was merely "one constitutionally acceptable method to assure meaningful access to the courts," and that "our decision here ... does not foreclose alternative means to achieve that goal." 430 U.S., at 830, 97 S.Ct., at 1499. In other words, prison law libraries and legal assistance programs are not ends in themselves, but only the means for ensuring "a reasonably adequate opportunity to present claimed violations of fundamental constitutional rights to the courts." *Id.*, at 825, 97 S.Ct., at 1496.

Prison officials have considerable discretion in choosing the mechanism and forms of assistance they will furnish to prisoners for the purpose of allowing prisoners to file non-frivolous legal claims. *Brinson v. McKeeman*, 992 F. Supp. 897, 909-12 (W.D. Tex. 1997).

While the precise contours of a prisoner's right of access to the courts remains somewhat obscure, the Supreme Court has not extended this right to encompass more than the ability of an inmate to prepare and transmit a necessary legal document to a court. *Brinson*, 992 F. Supp. 897, 909-12 (W.D. Tex. 1997); see *Brewer v. Wilkinson*, 3 F.3d at 821. See also *Lewis v. Casey*, 518 U.S. at ----, 116 S.Ct. at 2179-81; *Norton v. Dimazana*, 122 F.3d at 290; and *Eason v. Thaler*, 73 F.3d 1322, 1329 (5th Cir.1996).

## **2. Actual Injury Required**

An inmate must be Prejudiced by Denial of Access. *McDonald v. Steward*, 132 F.3d 225, 230-31 (5th Cir. 1998). Before a prisoner may prevail on a claim that his constitutional right of access to the courts was violated, he must demonstrate "that his position as a

litigant was prejudiced by his denial of access to the courts.” *McDonald*, 132 F.3d at 230-31, *Eason*, 73 F.3d at 1328 (citing *Walker v. Navarro County Jail*, 4 F.3d 410, 413 (5th Cir.1993)).

As the Supreme Court in *Lewis* stated:

Because *Bounds* did not create an abstract, freestanding right to a law library or legal assistance, an inmate cannot establish relevant actual injury simply by establishing that his prison’s law library or legal assistance program is subpar in some theoretical sense. That would be the precise analog of the healthy inmate claiming constitutional violation because of the inadequacy of the prison infirmary. Insofar as the right vindicated by *Bounds* is concerned, “meaningful access to the courts is the touchstone,” *id.*, at 823, 97 S.Ct., at 1495 (internal quotation marks omitted), and the inmate therefore must go one step further and demonstrate that the alleged shortcomings in the library or legal assistance program hindered his efforts to pursue a legal claim. He might show, for example, that a complaint he prepared was dismissed for failure to satisfy some technical requirement which, because of deficiencies in the prison’s legal assistance facilities, he could not have known. Or that he had suffered arguably actionable harm that he wished to bring before the courts, but was so stymied by inadequacies of the law library that he was unable even to file a complaint. Although *Bounds* itself made no mention of an actual-injury requirement, it can hardly be thought to have eliminated that constitutional prerequisite. And actual injury is apparent on the face of almost all the opinions in the 35-year line of access-to-courts cases on which *Bounds* relied, see *id.*, at 821-825, 97 S.Ct., at 1494-1497. Moreover, the assumption of an actual-injury requirement seems to us implicit in the opinion’s statement that “we encourage local experimentation” in various methods of assuring access to the courts. *Id.*, at 832, 97 S.Ct., at 1500. One such experiment, for example, might replace libraries with some minimal access to legal advice and a system of court-provided forms such as those that contained the original complaints in two of the more significant inmate-initiated cases in recent years, *Sandin v. Conner*, 515 U.S. 472, 115 S.Ct. 2293, 132 L.Ed.2d 418 (1995), and *Hudson v. McMillian*, 503 U.S. 1, 112 S.Ct. 995, 117 L.Ed.2d 156 (1992)--forms that asked the inmates to provide only the facts and not to attempt any legal analysis. We hardly think that what we meant by “experimenting” with such an alternative was simply announcing it, whereupon suit would immediately lie to declare it theoretically inadequate and bring the experiment to a close. We think we envisioned, instead, that the new program would remain in place at least until some inmate could demonstrate that a nonfrivolous legal claim had been frustrated or was being impeded.

### **3. Right to Law Library Access Or Legal Assistance Not Unlimited**

Prisoners have a constitutional right of meaningful access to the courts through adequate law libraries or assistance from legally trained personnel. *McDonald*, 132 F.3d at 230-31; *Degrade v. Godwin*, 84 F.3d 768, 768-69 (5th Cir.1996) (quoting *Bounds*, 430 U.S. at 828). Nevertheless, this constitutional guarantee does not afford prisoners unlimited access to prison law libraries. Limitations may be placed on library access so long as the regulations are “reasonably related to legitimate penological interests.” *McDonald*, 132 F.3d at 230-31; *Lewis*, 518 U.S. 343, (quoting *Turner v. Safley*, 482 U.S. 78, 89, 107 S.Ct. 2254, 2261-62, 96 L.Ed.2d 64 (1987)); see also *Eason*, 14 F.3d at 9-10 (right of meaningful access to courts may be narrowed under certain circumstances).

Additionally, restrictions on direct access to legal materials may even be warranted when prison security is involved. *Brinson*, 992 F. Supp. at 909-12; see *Eason*, 73 F.3d at 1329; *Morrow v. Harwell*, 768 F.2d 619, 622 (5th Cir.1985).

### **4. Inmates’ Access Limited To Claims That Attack Their Sentences, Directly Or Collaterally, And Challenge The Conditions Of Their Confinement**

In *Lewis*, 518 U.S. 343, the Court stated as follow:

In other words, *Bounds* does not guarantee inmates the wherewithal to transform themselves into litigating engines capable of filing everything from shareholder derivative actions to slip-and-fall claims. The tools it requires to be provided are those that the inmates need in order to attack their sentences, directly or collaterally, and in order to challenge the conditions of their confinement. Impairment of any *other* litigating capacity is simply one of the incidental (and perfectly constitutional) consequences of conviction and incarceration.

*Lewis*, 518 U.S. 343. In explaining the rationale for this holding, the *Lewis* Court stated:

Finally, we must observe that the injury requirement is not satisfied by just any type of frustrated legal claim. Nearly all of the access-to-courts cases in the *Bounds* line involved attempts by inmates to pursue direct appeals from the convictions for which they were incarcerated, see *Douglas v. California*, 372 U.S. 353, 354, 83 S.Ct. 814, 815, 9 L.Ed.2d 811 (1963); *Burns*, 360 U.S., at 253; *Griffin, supra*, at 13, 18, 76 S.Ct., at 588, 590; *Cochran v. Kansas*, 316 U.S. 255, 256, 62 S.Ct. 1068, 1069, 86 L.Ed. 1453 (1942), or habeas petitions, see *Johnson v. Avery, supra*, at 489, 89 S.Ct., at 750-751; *Smith v. Bennett*, 365 U.S. 708, 709-710, 81 S.Ct. 895, 896-897, 6 L.Ed.2d 39 (1961); *Ex parte Hull, supra*, at 547-548, 61 S.Ct., at 640- 641. In *Wolff v. McDonnell*, 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974), we extended this universe of relevant claims only slightly, to “civil rights actions”—*i.e.*, actions under 42 U.S.C. § 1983 to vindicate “basic

constitutional rights.” 418 U.S., at 579, 94 S.Ct., at 2986. Significantly, we felt compelled to justify even this slight extension of the right of access to the courts, stressing that “the demarcation line between civil rights actions and habeas petitions is not always clear,” and that “[i]t is futile to contend that the Civil Rights Act of 1871 has less importance in our constitutional scheme than does the Great Writ.” *Ibid.*

**5. Some Additional Assistance May Be Required For The Illiterate Or Non-English Speaking Inmate**

In *Lewis*, 518 U.S. 343, the Supreme Court addressed this problem as follows:

When any inmate, even an illiterate or non-English-speaking inmate, shows that an actionable claim of this nature which he desired to bring has been lost or rejected, or that the presentation of such a claim is currently being prevented, because this capability of filing suit has not been provided, he demonstrates that the State has failed to furnish “adequate law libraries or adequate assistance from persons trained in the law,” *Bounds*, 430 U.S., at 828, 97 S.Ct., at 1498 (emphasis added). Of course, we leave it to prison officials to determine how best to ensure that inmates with language problems have a reasonably adequate opportunity to file nonfrivolous legal claims challenging their convictions or conditions of confinement. But it is that capability, rather than the capability of turning pages in a law library, that is the touchstone.

**6. Prisoner Who Waives Appointed Counsel And Other Arbitrary Denial**

A prisoner who knowingly and voluntarily waives appointed representation by counsel in a criminal proceeding is not entitled to access to a law library for purposes of that proceeding. *Brinson*, 992 F. Supp. at 909-12; see *Degrade*, 84 F.3d at 769.

**7. Prisoners In Administrative Segregation**

Arbitrary limitations and restrictions on access to legal materials, without the assistance of persons trained in the law, and without the ability of inmates in administrative segregation to examine legal digests, hornbooks, and other legal materials firsthand is unconstitutional. *Brinson*, 992 F. Supp. 897, 909-12 (W.D. Tex. 1997); see *Eason*, 14 F.3d at 8, 9-10, (holding that allegations of a total denial of all access to the prison law library for 25 days following a prison riot stated a constitutional violation); *Pembroke v. Wood County, Texas*, 981 F.2d at 229, (holding that the total denial of all access to the law library for seven months violated the plaintiff’s constitutional right of access to the courts), citing *Morrow*, 768 F.2d at 622, (holding that access to a weekly bookmobile coupled with circumscribed assistance from law students was insufficient to afford meaningful access to the courts); and *Green v. Ferrell*, 801 F.2d 765, 772 (5th Cir.1986), (holding that allowing inmates to select volumes twice each week from a list of books available in the

County law library and limiting inmates to no more than two volumes at a time violated the inmates' rights to meaningful access to the courts).

#### **8. No Constitutional Right To File Frivolous Lawsuits**

Finally, prisoners possess no constitutionally-protected right to file frivolous lawsuits. *Brinson*, 992 F. Supp. 897, 909-12 (W.D. Tex. 1997); see *Johnson v. Rodriguez*, 110 F.3d 299, 310-13 & 316 (5th Cir.1997), *cert. denied*, 522 U.S. 995, 118 S.Ct. 559, 139 L.Ed.2d 400 (1997).

#### **9. Inmates Are Allowed to Assist Each Other On Legal Matters**

In *Johnson*, 393 U.S. 483,, the Supreme Court struck down a regulation prohibiting prisoners from assisting each other with habeas corpus applications and other legal matters. *Johnson* was unanimously extended to cover assistance in civil rights actions in *Wolff*, 418 U.S. at 577-580,; see *Bounds*, 430 U.S. at 828.

However, prisoners possess no right to the assistance of any particular other prisoner or writ writer as long as the constitutional right of access to the courts by the putative recipient of such assistance is not infringed. *Brinson*, 992 F. Supp. at 909-12 (W.D. Tex. 1997); see *Tighe v. Wall*, 100 F.3d 41, 43 (5th Cir.1996).

#### **10. Inmates Must Receive Paper, Pens, Notaries And Stamps**

It is indisputable that indigent inmates must be provided at state expense with paper and pen to draft legal documents with notarial services to authenticate them, and with stamps to mail them. See *Bounds*, 430 U.S. 817. States must forgo collection of docket fees otherwise payable to the treasury and expend funds for transcripts. *Id.* It is well-established in this Circuit that access to typewriters and copy machines is *not* an essential part of the right of access to the courts. *Brinson*, 992 F. Supp. at 909-12; see *Beck v. Lynaugh*, 842 F.2d 759, 762 (5th Cir. 1988), (holding that denial of access to carbon paper and reproduction equipment and denial of face-to-face access to other inmates did not deprive an inmate of his right of access to the courts); and *Eisenhardt v. Britton*, 478 F.2d 855 (5th Cir.1973). There simply is no constitutional right of access to carbon paper, reproduction equipment, or to face-to-face meetings with other inmates possessed by pretrial detainees or prisoners. *Brinson*, 992 F. Supp. at 909-12; See *Beck v. Lynaugh*, 842 F.2d at 762.

#### **11. States Must Pay For Lawyers For Indigent Defendants**

State expenditures are necessary to pay lawyers for indigent defendants at trial, *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963); *Argersinger v. Hamlin*, 407 U.S. 25, 92 S.Ct. 2006, 32 L.Ed.2d 530 (1972), and in appeals as of right. See *Bounds*, 430 U.S. at 828 (citing prior authority).



## **12. Appointment of Counsel in Civil Rights Case**

Generally, there is no right to the appointment of counsel for indigent prisoners bringing section 1983 cases. See e.g., *Jackson v. Dallas Police Dep't*, 811 F.2d 260, 261 (5th Cir.1986). This court is vested with discretion to appoint counsel when doing so would advance the proper administration of justice; however, this court is not required to do so unless the case presents exceptional circumstances. *Ulmer v. Chancellor*, 691 F.2d 209, 213 (5th Cir.1982) (citing 28 U.S.C. § 1915(d)); *Branch v. Cole*, 686 F.2d 264, 266 (5th Cir.1982). A finding of exceptional circumstances depends on the following factors: (1) the type and complexity of the case; (2) whether the indigent is capable of adequately presenting his case; (3) whether the indigent is in a position to adequately investigate his case; and (4) whether the evidence will consist in large part of conflicting evidence that would require skill in the presentation of evidence and in cross examination. *Jackson*, 811 F.2d at 262 (citing *Ulmer*, 691 F.3d at 213). In addition, this court may consider whether appointing counsel will “aid in the efficient and equitable disposition of the case.” *Id.*

Although section 1983 cases are often complex, this factor alone does not warrant a finding of exceptional circumstances. See *id.* (citing *Branch*, 686 F.2d at 266). Franklin has demonstrated an adequate ability to present his claims and to investigate the facts and evidence related to his claims. His ability to adequately present his case is demonstrated in his complaint and accompanying brief in which he provided this court with an understanding of his claims and the bases and law upon which he supports his claims. In addition, he articulated very clearly his claims and the facts attendant to his claims at his *Spears* hearing. Finally, the evidence in this case does not consist of conflicting testimony that would require skill in presentation or cross examination because the evidence which the court must consider consists entirely of authenticated records, which comport with his testimony at the *Spears* hearing.

### **C. Excessive Use Of Force Claims**

#### **1. Arrestees**

Currently, allegations of excessive use of force on arrestees implicate the Fourth Amendment’s guarantee of freedom from “unreasonable seizures.” See *Graham v. Conner*, 109 S. Ct. 1865, 1870-71 (1989); *Mouille*, 977 F.2d at 927. Under the broad definition in *Graham*, seizure was defined as a “means or show of force or show of authority, . . . in some way restraining the liberty of a citizen.” *Graham*, 109 S. Ct. at 1871; *Mouille*, 977 F. 2d at 927. All claims that officers used excessive force in the course of an arrest must be analyzed under the Fourth Amendment and its “reasonableness” standard, rather than a substantive due process approach. *Graham*, 109 S. Ct. at 1871; *Mouille*, 977 F.2d at 927 n. 4. In *Graham*, the Court also stated that determining whether the force used to effect a particular seizure was “reasonable” under the Fourth Amendment required a careful balancing of the nature and quality of the intrusion on the individual’s Fourth Amendment interest against the countervailing governmental interest at stake. *Id.* The reasonableness of a particular use of force must be judged from the prospective of a reasonable officer on the scene, and the calculus of reasonableness must allow for the

fact that police officers are often forced to make split second judgments, in circumstances that are tense, uncertain and rapidly evolving, about the amount of force that is necessary in a particular situation. *Id.* In determining whether the force used to effect a particular seizure as “reasonable” under the Fourth Amendment, the question is whether the officers actions are “objectively reasonable” in light of the facts and circumstances confronting them, without regards to their underlying intent or motivation. *Id.*

The law in the Fifth Circuit prior to *Graham* was that the substantive due process clause of the Fourteenth Amendment governed such claims. *Mouille*, 977 F.2d at 927. Thus, when determining whether an officer was cloaked by qualified immunity for claims occurring prior to the Court’s decision in *Graham*, the Court still applies the Fourteenth Amendment standard as set out in *Shillingford v. Holmes*, 634 F.2d 263, 265 (5th Cir. 1981) in making a determination of whether a reasonable officer would have known that he or she was violating clearly established statutory or constitutional rights of which a reasonable person would have known. See *Mouille*, 977 F.2d at 928.

## **2. Convicted Felons**

Prior to 1992, the test as it related to convicted felons was that to make out a claim for excessive use of force, there had to be: 1) a significant injury; 2) that resulted directly and only from a use of force that was clearly excessive to the need; and the excessiveness of which was; 3) objectively unreasonable. *Johnson v. Morel*, 876 F.2d 477, 480 (5th Cir. 1989). The significant injury prong of the Johnson holding was, of course, called into doubt by *Hudson v. McMillian*, 112 S. Ct. 995, 997 (1992) (excessive force claim in eighth amendment context even without significant injury). *Mouille*, 977 F.2d at 929; *King v. Chide*, 974 F.2d 653, 657 (5th Cir. 1992). Indeed, the Fifth Circuit has held that the Supreme Court’s decision in *Hudson* “makes clear that we can no longer require persons to prove significant injury as we had used that term for years, under section 1983.” *Knight v. Caldwell*, 970 F.2d 1430, 1432 (5th Cir. 1992). As a result, the Plaintiff is only required to prove some injury that is not de minimis. *Harper v. Harris County*, 21 F.3d 597 (5th Cir.), rehearing denied, 29 F.3d 626 (5th Cir. 1994).

## **3. Pre-trial Detainees**

The ultimate question in the Fifth Circuit for suits brought by pre-trial detainees alleging excessive use of force in the context of a prison disturbance is whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically to cause harm, and the focus of this standard is on the detention facility official’s subjective intent to punish. *Valencia v. Wiggins*, 981 F.2d 1440 (5th Cir.), cert denied, 113 S.Ct. 2998, (1993). In making a determination regarding the detention facility official’s subjective intent to punish in a suit brought by a pre-trial detainee alleging excessive use of force during a prison disturbance, the trier of fact must consider such objective factors as extent of injuries suffered, apparent need for application of force, degree of force exerted, the threat reasonably perceived by the detention facility official and the need to act quickly and decisively. *Id.*

#### **4. Bystander Liability**

In the context of the use of excessive force, a police officer or jailer who is present at the scene and who does not take reasonable measures to protect a suspect from another officer's use of excessive force may be liable for civil rights violations depending on the nature and extent of the alleged excessive use of force. *Hale v. Townley*, 45 F.3d 914 (5th Cir.), rehearing denied, 51 F.3d 1047 (5th Cir. 1995). It is probable that this same rationale would apply in the context of any excessive use of force claim, regardless of whether it is asserted by an arrestee, pre-trial detainee or convicted felon.

#### **5. Verbal Threats Do Not Arise To A Constitutional Violation**

Verbal threats do not rise to the level of a constitutional violation. See *Calhoun v. Hargrove*, 312 F.3d 730, 734 (5th Cir. 2002). Mere allegations of verbal abuse do not present actionable claims under section 1983. *Oladipupo v. Austin*, 104 F.Supp.2d 626 (W.D. La. 2000); see *Bender v. Brumley*, 1 F.3d 271, 274 n. 4 (5th Cir.1993). "[A]s a rule, 'mere threatening language and gestures of a custodial officer do not, even if true, amount to a constitutional violation.'" *McFadden v. Lucas*, 713 F.2d 143, 146 (5th Cir.1983) (quoting *Coyle v. Hughs*, 436 F.Supp. 591, 593 (W.D.Okla.1977)).

#### **D. Food**

Inmates have a constitutional right to receive reasonably adequate food. *George v. King*, 837 F.2d 705 (5th Cir. 1987). To be actionable, a plaintiff must show that the jail diet had an adverse effect on his health. see *Newmam v. Alabama*, 559 F.2d 283, 291 (5th Cir. 1977) (Constitution does not require that prisoners be provided with any and every amenity which some person might think is necessary to avoid mental, physical, or emotional deterioration).

The Fifth Circuit has instructed that the fact that an inmate misses one meal does not necessarily implicate the inmates's constitutional rights. See *Palmer v. Johnson*, 193 F.3d 346, 352 (5th Cir.1999); *Green v. Ferrell*, 801 F.2d 765, 770 (5th Cir.1986); see also *Talib v. Gilley*, 138 F.3d 211, 214 n. 3 (5th Cir.1998) ("Missing a mere one out of every nine meals is hardly more than that missed by many working citizens over the same period.")

#### **E. Visitation**

##### **1. General Visitation**

Convicted inmates have no constitutional right to visitation. *Lynott v. Henderson*, 610 F.2d 340, 342 (5th Cir. 1980). Instead, for convicted prisoners, visitation privileges are a matter subject to the discretion of the prison officials. *Morrow*, 768 F.2d at 172. Pre-trial detainees have a right to reasonable visitation, absent a legitimate governmental reason to the contrary. *Id.*

## **2. Conjugal Visits**

It is well settled that “(f)ailure to permit conjugal visits does not deny an inmate a federal constitutional right.” *Montana v. Commissioners Court*, 659 F.2d 19, 20-23 (5th Cir. 1981) *McCray v. Sullivan*, 509 F.2d 1332, 1334 (5th Cir.), cert. denied, 423 U.S. 859, 96 S.Ct. 114, 46 L.Ed.2d 86 (1975); *Tarlton v. Clark*, 441 F.2d 384, 385 (5th Cir.), cert. denied, 403 U.S. 934, 91 S.Ct. 2263, 29 L.Ed.2d 713 (1971) (federal prisoner). The State of Texas is not required to permit prisoners conjugal visits. *Montana*, 659 F.2d at 20-23; *Guajardo v. Estelle*, 580 F.2d 748, 762 (5th Cir. 1978). While penal authorities in foreign countries have allowed prisoners to continue conjugal relationships with their spouses, no precedent exists for such practices in United States institutions. See, e.g., *Tarlton*, 441 F.2d at 385.

## **3. Contact Visits**

Convicted felons have no right to visitation, and contact visits may be denied pretrial detainees for “legitimate security reasons.” *Montana*, 659 F.2d at 20-23.

### **F. Grievances**

Inmates “do not have a constitutionally protected right to a grievance procedure.” *Oladipupo*, 104 F.Supp.2d 626; *Brown v. Dodson*, 863 F.Supp. 284, 285 (W.D.Va.1994) (citing *Flick v. Alba*, 932 F.2d 728, 729 (8th Cir.1991)); *Spencer v. Moore*, 638 F.Supp. 315, 316 (E.D. Mo.1986) (holding that “an inmate grievance procedure is not constitutionally required”). “When the claim underlying the administrative grievance involves a constitutional right, the prisoner’s right to petition the government for redress is the right of access to the courts, which is not compromised by the prison’s refusal to entertain his grievance.” *Oladipupo*, 104 F.Supp.2d 626; see *Flick*, 932 F.2d at 729. A number of courts have held that inmate grievance procedures are not constitutionally required, and so violations of such procedures do not deprive inmates of constitutionally protected rights. *Spencer*, 638 F. Supp. at 316, citing *O’Bryan v. County of Saginaw*, 437 F. Supp. 582 (E.D. Mich. 1977); see also *Azeez v. DeRobertis*, 568 F. Supp. 8 (N.D. Ill. 1982). In *Mann v. Adams*, 855 F.2d 639 (9th Cir.), cert. denied 109 S. Ct. 242 (1988), the Ninth Circuit Court of Appeals noted that inmates have no legitimate claim of entitlement to a grievance procedure, and thus no protected liberty interest exists. This position was also taken by the Eighth Circuit in *Flick*, 932 F.2d 728.

### **G. Jail Conditions**

#### **1. Convicted Felons**

In the context of convicted inmates, the eighth amendment cruel and unusual punishment standard governs the conditions of confinement. Indicia of confinement constituting cruel and unusual punishment include wanton and unnecessary infliction of pain, conditions grossly disproportionate to the severity of the crime warranting imprisonment, and the deprivation of the minimal civilized measures of life’s necessities.

*Wilson v. Lynaugh*, 878 F.2d 846, 848 (5th Cir.), cert. denied 493 U.S. 969 (1989). The Supreme Court has held, however, that to the extent that prison conditions are restrictive and even harsh, they are part of the penalty that criminal offenders pay for their offenses against society. *Rhodes v. Chapman*, 452 U.S. 337, 346-7 (1981).

The *Rhodes* Court held that any Eighth Amendment analysis must look to the evolving standards of decency that mark the progress of a maturing society, but cautioned that the standards are derived from objective factors. *Rhodes*, 452 U.S. at 346.

In compliance with the Supreme Court's opinion, the Fifth Circuit has stated that the Eighth Amendment does not afford protection against mere discomfort or inconvenience. *Wilson*, 878 F.2d at 849.

A plaintiff cannot state a claim by alleging that the conditions were filthy, as in *Bienvenu v. Beauregard Parish Police Jury*, 705 F.2d 1457 (5th Cir. 1983); by simply stating that he did not like the time that cleaning supplies were given out. This does not amount to a claim of constitutional dimensions.

A prison warden's liability for damages for squalid prison conditions which violated a prisoner's right to be free of cruel and unusual punishment required a showing that the infliction of harsh conditions was "unnecessary and wanton," which depended upon a number of factors, including the extent to which the warden knew of the unsanitary conditions, the prisoner's exposure to conditions, the steps taken to correct conditions, or remove prisoners from unsanitary cells, and what the warden could have done to protect prisoners from those conditions. *McCord v. Maggio*, 927 F.2d 844 (5th Cir. 1991).

A prisoner is also required to show significant injury as a prerequisite to a recover in a civil rights claim based on squalid prison conditions, requiring proof that he endured pain, suffering or mental anguish sufficiently significant to justify monetary relief for deprivation of his right to be free from cruel and unusual punishment; however, a prisoner is not required to show "lasting harm." *Id.*

## **2. Pre-trial Detainees**

In the context of pre-trial detainees, to determine whether a particular imposition or restriction on a pre-trial detainee amounts to punishment within the purview of the federal statute governing civil actions for deprivation of rights, the necessary inquiry is whether the disability is imposed for the purpose of punishment or is but incident to other, legitimate governmental purposes. *Simons v. Clemons*, 752 F. 2d 1053 (5th Cir. 1985). Unless there is express intent to punish, the imposition or restriction on a pre-trial detainee is not a violation of the 42 U.S.C. Section 1983 if there is an alternative purpose to which the imposition may rationally be connected, or unless it appears excessive in relation to the alternative purpose assigned. *Id.* Thus, denial of telephone and recreational privileges while a pre-trial detainee was in protective custody was not punishment, such as to support a 42 U.S.C. Section 1983 claim, where the placement was for detainee's own safety and availability of services was subject to personnel restraints. *Grabowski v. Jackson County*

*Public Defender's Office*, 47 F.3d 1386 (5th Cir. 1995). Similarity, an inmate's claim that he was temporarily forced to sleep on the jail floor due to overcrowding did not give rise to a violation of his constitutional rights and was not cognizable under 42 U.S.C. Section 1983, especially where there existed a legitimate governmental objective to house violent inmates or recidivists for the protection of the general public, despite existing overcrowded conditions.<sup>2</sup> *Castillo v. Bowles*, 787 F. Supp. 277 (M.D. Tex. 1988) (affirmed by the Fifth Circuit in an unpublished opinion), cert. denied, 110 S.Ct. 92 (1989).

## **H. Recreation**

Convicted inmates do not have a constitutional right, *per se*, to recreation; however, a deprivation of exercise which impairs health may amount to a constitutional violation under the Eighth Amendment. *Miller v. Carson*, 563 F.2d 741, 750-51 at n.13 (5th Cir. 1977). The absence of outdoor exercise opportunities may also constitute a violation of the Eighth Amendment. See *Montana*, 659 F.2d at 22; *McGruder v. Phelps*, 608 F.2d 1023, 1025 (5th Cir.1979).

## **I. Due Process**

### **1. Deprivation of Property**

It is necessary, in order to make out a procedural due process claim under Section 1983, for one to allege not only a deprivation of property by State action, but also that State procedures available for challenging the deprivation did not satisfy the requirements of due process. *Collins v. King*, 743 F. 2d 248 (5th Cir. 1984). Indeed, to state a claim under Section 1983 for the alleged violation of due process rights for confiscation or destruction of property, the Plaintiff must allege that he has a recognized liberty of property interest within the purview of the Fourteenth Amendment and that he was intentionally and recklessly deprived of that interest, even temporarily, under color of State law. *Walton v.*

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<sup>2</sup> Some Courts however, have held that the deprivation of a mattress is a constitutional violation. "[T]he State owes the same duty under the Due Process Clause and the Eighth Amendment to provide both pretrial detainees and convicted inmates with basic human needs, including medical care and protection from harm, during their confinement." *Hare*, 74 F.3d at 650; *Oladipupo*, 104 F.Supp.2d 626. A mattress is a basic human need, which must be provided to a detainee. *Id.* Several federal courts have found that forcing a pretrial detainee to sleep without a mattress, or on the floor on a mattress, for even a short period of time, constitutes a violation of the Fourteenth Amendment. See, e.g., *Thompson v. City of Los Angeles*, 885 F.2d 1439, 1449 (9th Cir.1989) (valid Fourteenth Amendment claim where pretrial detainee forced to sleep on the floor for two nights); *Lyons v. Powell*, 838 F.2d 28 (1st Cir.1988) (pretrial detainee's allegation that he was forced to sleep on floor mattress sufficient condition to show deprivation of due process); *Anela v. Wildwood*, 790 F.2d 1063, 1067 (3d Cir.1986) (allegation that City failed to provide bed or mattress to pretrial detainees states actionable constitutional claim); *Lareau v. Manson*, 651 F.2d 96, 105 (2d Cir.1981) (prison's use of floor mattresses for pretrial detainees unconstitutional "without regard to the number of days for which a prisoner is so confined"); *Martino v. Carey*, 563 F.Supp. 984, 1002 (D.Or.1983) (fact that jail overcrowding forced some pretrial detainees to sleep directly on floor contributed to finding that overcrowded conditions violated detainees' Fourteenth Amendment rights); *Vazquez v. Gray*, 523 F.Supp. 1359, 1365 (S.D.N.Y.1981) (use of floor mattresses for pretrial detainees unconstitutional).

*Alexander*, 44 F.3d 1297 (5th Cir. 1995); *Does v. Taylor Indep. School District*, 15 F.3d 443 (5th Cir. 1994), cert. denied, *Lankford v. Does*, 115 S.Ct. 70 (1995).

## **2. Searches in Jail**

In *Elliott v. Lynn*, 38 F.3d 188 (5th Cir. 1994), cert. denied, 115 S. Ct. 1976 (1995), the court held that a visual body cavity search of a prisoner conducted in the general presence of other inmates, guards and non-searching officers as part of an institution-wide shake down of the prison was constitutionally reasonable in the context of the prisoner's rights under the Fourth Amendment for purposes of the prisoner's 1983 cause of action, despite the fact that the privacy of the prisoner was compromised. The court held that emergency situations created by increasing number of murders justified the immediate search of inmates, because the crisis required immediate action and because of the large number of inmates. *Id.* The facts justified conducting strip searches in the most time-efficient place and manner available, and this meant a search conducted on collective as opposed to an individual basis. *Id.*

## **3. Jail Disciplinary Proceedings**

The role of federal courts in reviewing prison disciplinary proceedings, via civil rights actions, is a narrow one, and the court must uphold the administrative decision unless it was arbitrary and capricious. *Stewart v. Thigpen*, 739 F.2d 1002 (5th Cir. 1984). The court need not review a disciplinary board's fact findings de-novo, but need consider only whether the decision was supported by some facts or evidence at all. *Id.*

A prisoner has a claim under 42 U.S.C. Section 1983 for placement in segregation only if he possesses a liberty interest in remaining among the general prison population. *Dzanav v. Foti*, 829 F.2d 558 (5th Cir. 1987). Members of a disciplinary committee who hear cases in which inmates are charged with rule infractions, are entitled to qualified, but not absolute immunity, for personal damages for actions violative of United States Constitution. *Cleavenger v. Saxner*, 106 S. Ct. 496 (1985).

In reviewing a prison administrative action in a 42 U.S.C. Section 1983 civil rights cause of action, the court must uphold administrative decisions unless they arbitrary and capricious, and a decision is not arbitrary and capricious if it was made by specific exercise of professional judgment and on basis of factors clearly bearing on the appropriateness of the decision. *Gartrell v. Gaylor*, 866 F. Supp. 325 (S.D. Tex. 1994).

## **4. Violation of State's or County's Own Rules**

Even though a governmental entity acts in a manor which violates its own rules, or those of the State, there is no due process violation actionable under Section 1983, as long as appropriate individuals ultimately receive adequate process. *Ramirez v. Ahn*, 843 F.2d 864 (5th Cir.), rehearing denied, 849 F.2d 1471 (5th Cir. 1988), cert. denied, 109 S.Ct. 1545 (1989). Action by a governmental entity that violates its own rules or those of the

State does not constitute a constitutional deprivation. *Vaga v. Parsley*, 700 F. Supp. 879 (W.D. Tex. 1988).

Failure to follow procedural guidelines, standing alone, does not implicate constitutional liability. *Evans*, 986 F.2d 104.

#### **5. Failure To Follow State Laws Or Procedures Does Not Give Rise To A 1983 Claim**

The failure of state officials to fulfill their duties under state law does not give rise to a federal constitutional claim. *Brinson*, 992 F. Supp. at 909-12; See *Myers v. Klevenhagen*, 97 F.3d 91, 94 (5th Cir.1996), (holding that a prison official's failure to follow the prison's own policies, procedures, and regulations does not constitute a violation of due process if constitutional minima are nevertheless met); *Giovanni v. Lynn*, 48 F.3d 908, 912 (5th Cir.1995), *cert. denied*, 516 U.S. 860, 116 S.Ct. 167, 133 L.Ed.2d 109 (1995), (holding that a mere failure to accord procedural protection called for by state law or regulation does not of itself amount to a denial of due process); *Murphy v. Collins*, 26 F.3d 541, 543 (5th Cir.1994), (holding that a state's failure to follow its own procedural regulations does not constitute a violation of due process if constitutional minima are met); *Murray v. Mississippi Department of Corrections*, 911 F.2d 1167, 1168 (5th Cir.1990), *cert. denied*, 498 U.S. 1050, 111 S.Ct. 760, 112 L.Ed.2d 779 (1991), (holding that alleged violations of a state statute did not give rise to federal constitutional claims); *Jackson v. Cain*, 864 F.2d 1235, 1251 (5th Cir.1989): ("A state's failure to follow its own procedural regulations does not establish a violation of due process, because 'constitutional minima may nevertheless have been met.'"); and *Brown v. Texas A & M University*, 804 F.2d 327, 335 (5th Cir.1986), (holding that a state agency's violations of its own internal regulations did not establish a Due Process violation or otherwise give rise to a constitutional claim).

#### **J. Jail Suicide**

Prison and jail officials have a duty to protect prisoners prone to suicide from self destruction. *Lewis v. Terrebonne*, 894 F.2d 142, rehearing denied, 901 F.2d 1110 (5th Cir. 1990).

Failure to provide a pre-trial detainee with adequate protection from his or her known suicidal impulses is actionable under 42 U.S.C. Section 1983. *Evans*, 986 F.2d 104.

A county's failure to provide continuous observation of a known suicidal pre-trial detainee did not constitute a deliberately indifferent method of conducting suicide watches, as there was no evidence that periodic checks on suicidal inmates every ten minutes was obviously inadequate. *Rhyne v. Henderson County*, 973 F. 2d 386 (5th Cir. 1992).

Additionally, the county's failure to obtain a commitment order for a suicidal pre-trial detainee, and instead relying on the county mental health agency to deliver the necessary emergency warrant for a commitment, was not "deliberate indifference," so as to subject



the county to Section 1983 liability. *Id.* No evidence was presented that the mental health agency had ever failed to deliver commitment orders when needed in the past or that any prisoner had ever committed suicide in jail because he could not properly be moved to the state hospital. *Id.* For a pre-trial detainee to establish a claim for denial of medical care by a jailer, he must show denial of reasonable medical care not reasonably related to a legitimate governmental objective. *Thomas v. Kippermann*, 846 F.2d 1009 (5th Cir. 1988).

A police officer's violation of departmental policy in failing to remove the belt of a prisoner who later hung himself, did not rise to a level of "constitutional deprivation" that might support a Section 1983 claim, as there was nothing in the prisoner's behavior to alert the officer to the prisoner's suicidal tendency. *Gagne v. City of Galveston*, 671 F. Supp. 1130 (S.D. Tex. 1987), affirmed, 851 F.2d 359 (5th Cir. 1989).

In *Martin v. Harrison County Jail*, 975 F.2d 192 (5th Cir. 1992), a guard's assault on a prisoner who was cutting his wrist in a suicide attempt did not involve unconstitutionally excessive force, where the prisoner did not allege how many times he was struck, whether the blows were significant, or how many people hit him. Guards are obligated to prevent a prisoner from committing suicide, and some force was called for in that case. *Id.*

## **K. Freedom Of Religion**

### **1. General Rule**

It is axiomatic that inmates may not be deprived of their right to worship as they so choose, given reasonable and necessary governmental reasons to the contrary. Consequently, for any religion recognized as such, an inmate may worship as he sees fit. However, the Courts have drawn the line at smoking "gonja," dancing with snakes, and other unreasonable actions.

### **2. Designation of Affiliation**

Consequently, it has been held that if prison or jail regulations require inmates to designate themselves members of a particular religious group, such as Muslim inmates, the prison or jail may seize and discard religious paraphernalia. *Caffey v. Johnson*, 883 F. Supp. 128 (E.D. Tex. 1995). Indeed, in *Caffey*, since the inmate did not designate himself as a Muslim in accordance with prison regulation stating that only those prisoners who designate themselves with particular religious groups may possess religious paraphernalia, the inmate's handkerchief with his Islamic prayer on it and Islamic papers were contraband and it was not unreasonable for a prison officer to seize and discard these items, and, therefore, the officer was entitled to qualified immunity for purposes of inmate's Section 1983 action. *Id.*

### **3. Grooming Policy**

Inmates have challenged TDCJ's grooming policies on the ground that they violated their free expression of religion as guaranteed under the Free Exercise Clause of the First

Amendment. Specifically, they have argued that jail policies are unconstitutional if they do not allow beards. Wearing beards is an accepted means of expressing religious devotion for Muslims, and the Fifth Circuit dealt with the issue of prisoners wearing beards on a number of occasions. Most notably, in *Powell v. Estelle*, 959 F.2d 22 (5th Cir.1992), we rejected a challenge to a prison policy forbidding long hair and beards, finding the policy to fall within the discretion granted to prison officials for legitimate penological reasons. *Green v. Polunsky*, 229 F.3d 486, 489 (5th Cir. 2000). We have not yet addressed the specific issue of short beards, raised here by Khidar, but other Circuits have done so. *Id.* Every Circuit that has considered the issue of short beards under similar circumstances has upheld the prison grooming policies – and the Fifth Circuit joined them, convinced by the logic of their opinions. *Id.*, see, e.g., *Hines v. South Carolina Dep't of Corrections*, 148 F.3d 353, 358 (4th Cir.1998); *Harris v. Chapman*, 97 F.3d 499, 504 (11th Cir.1996); *Friedman v. Arizona*, 912 F.2d 328, 332 (9th Cir.1990).

#### **L. First Amendment - Publications and Mail**

Subject to certain reasonable and necessary limitations, inmates may read what they wish to read. Along these lines, a county jail's "publisher only" rule, requiring that all magazines and books received by inmates must be sent directly from the publisher's authorized distributor, does not violate a prisoner's civil rights. *Wagner v. Thomas*, 608 F. Supp. 1095 (E.D. Tex. 1985). Allowing an inmate's family or friends to provide reading materials is a good way for the inmate to smuggle contraband and also takes up a tremendous amount of time for corrections officials to search. A microdot of L.S.D. ("acid") can easily be hidden in a magazine or other publication.

Additionally, it has been held that state prison officials do not act outside the scope of their qualified immunity from an inmate's federal civil rights action for allegedly violating free speech rights by suppressing distribution of a revolutionary publication within the prison system by failing to extricate the portions found threatening to prison security and allowing the remainder to be distributed. *Hernandez v. Estelle*, 788 F.2d 1154, rehearing denied, 793 F.2d 1287 (5th Cir. 1986).

The First Amendment rights afforded pretrial detainees are the same as those afforded convicted inmates. *Oladipupo*, 104 F.Supp.2d 626; See *Bell*, 441 U.S. at 545, 99 S.Ct. at 1877. Before a prison may infringe on the First Amendment rights of its inmates, it must show that any restriction on prisoners first amendment rights is reasonably related to a legitimate penological interest. *Oladipupo*, 104 F.Supp.2d 626; see *Turner v. Safley*, 482 U.S. 78, 84, 107 S.Ct. 2254, 96 L.Ed.2d 64 (1987). To determine whether the jail's policy of excluding sexually explicit material "is reasonably related to legitimate penological interests," and therefore valid, the Courts must consider four factors: (1) whether there is a valid, rational connection between the policy and the legitimate governmental interest put forward to justify it; (2) whether there are alternative means of exercising the right; (3) whether the impact of accommodating the asserted constitutional right will have a significant negative impact on prison guards, other inmates and the allocation of prison resources generally; and (4) whether the policy is an "exaggerated

response” to the jail’s concerns. *Oladipupo*, 104 F.Supp.2d 626; see *id.* at 89-90, 482 U.S. 78, 107 S.Ct. 2254, 96 L.Ed.2d 64.

Under the Fifth Circuit’s law, enunciated in *Guajardo*, 580 F.2d at 762, before delivery of a publication may be refused, prison administrators must review the particular issue of the publication in question and make a specific, factual determination that the publication is detrimental to prisoner rehabilitation because it would encourage deviate, criminal sexual behavior. *Montana*, 659 F.2d at 20-23. Censorship may not proceed according to the whims of the prison administrators. *Id.*

## **1. Censorship of Mail**

A pretrial detainee’s first amendment rights may be violated when incoming or outgoing mail to licensed attorneys, courts, and court officials is searched or censored. *Montana*, 659 F.2d at 20-23; *Guajardo*, 580 F.2d at 758-59. Non-legal outgoing and incoming mail may be searched for contraband and censored for legitimate penological reasons. Incoming or outgoing legal mail may be opened and viewed in the presence of the inmate if the jail has specific articulate facts to believe that the legal mail is a “sham,” is being used to smuggle contraband, or for other specified legitimate penological purposes.

## **M. Cause Of Action For State Created Danger**

A Plaintiff seeking to recover based on a theory of “state created danger” must show that the State actor’s increased the danger to the Plaintiff and that the State actors acted with deliberate indifference. *Piotrowski v. City of Houston*, 51 F.3d 512 (5th Cir. 1995).

The Fifth Circuit has clearly stated that this court has neither adopted nor rejected the state-created danger theory. *Priester v. Lowndes*, 354 F.3d 414, 422-23 (5th Cir. 2004); *McKinney v. Irving Ind. Sch. Dist.*, 309 F.3d 308 (5th Cir.2002); *McClendon v. City of Columbia*, 285 F.3d 1078 (5th Cir.2002). Under the state-created danger theory, under which a state actor who knowingly places a citizen in danger may be accountable for the foreseeable injuries that result, we assume that section 1983 liability may arise when: (1) the state actors created or increased the danger to the plaintiff; and (2) the state actors acted with deliberate indifference. *Priester*, 354 F.3d at 422-23; *McKinney*, 309 F.3d 308; see also *Piotrowski*, 51 F.3d 512.

In order for Section 1983 liability to be imposed on a theory of State created danger, the environment created by the State actor must be dangerous, he or she must know it is dangerous, and he or she must have used their authority to create an opportunity that would not otherwise have existed for a third party’s crime to occur, ie, Defendants must have been at least deliberately indifferent to the plight of the Plaintiff. *Johnson v. Dallas Independent School District*, 38 F. 3d 198 (5th Cir. 1994).

## **N. Claims for Sex in Jail**

The Fifth Circuit's Opinion in *Scott v. Moore*, 114 F.3d 51, 54-55 (5th Cir. 1997), makes clear that to prove an underlying constitutional violation in an individual or episodic acts case, including sex with an inmate, a pre-trial detainee must establish that an official acted with *subjective* deliberate indifference. *Id.* Once a detainee has met this burden, he or she has proved a violation of her rights under the Due Process Clause. *Id.* To succeed in holding a municipality accountable for that due process violation, however, the detainee must show that the municipal employee's act resulted from a municipal policy or custom adopted or maintained with *objective* deliberate indifference to the detainee's constitutional rights. *Id.*; see *Farmer v. Brennan*, 511 U.S. 825, 841, 114 S.Ct. 1970, 1981, 128 L.Ed.2d 811 (1994) ("It would be hard to describe the *Canton v. Harris*, 489 U.S. 378, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989) understanding of deliberate indifference, permitting liability to be premised on obviousness or constructive notice, as anything but objective."). In the case of a sexual assault or even admitted sex between a jailer and an inmate, there is never any doubt that the constitutional violation complained of was committed with *subjective* deliberate indifference to that detainee's constitutional rights. *Scott*, 114 F.3d at 54-55. The next determination is whether the governmental entity can be held accountable. *Scott*, 114 F.3d at 54-55. Under *Hare*, as the Fifth Circuit has stated, this latter burden may be met by putting forth facts sufficient to demonstrate that the predicate episodic act or omission resulted from a municipal custom, rule, or policy adopted or maintained with *objective* deliberate indifference to the detainee's constitutional rights. *Scott*, 114 F.3d at 54-55; see *Grabowski*, 79 F.3d at 479 (citing *Hare*, 74 F.3d at 649 n. 4). Most recently, the Supreme Court has reminded us that for purposes of liability under § 1983, " 'deliberate indifference' is a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action." *Board of County Comm'rs v. Brown*, 520 U.S. 397, 117 S.Ct. 1382, 1391, 137 L.Ed.2d 626 (1997).

## **O. Female Guards Supervising Male Inmates**

In *Oliver v. Scott*, 276 F.3d 736, 746-47 (5th Cir. 2002), the Fifth Circuit noted that the Fifth Circuit, in an unpublished but precedential opinion,<sup>3</sup> and several other courts of

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<sup>3</sup> *Barnett v. Collins*, 940 F.2d 1530 (5th Cir.1991) (table) (unpublished) (upholding use of female guards in guard towers giving full view of male inmates taking showers).

appeals have reached the same conclusion regarding cross-sex surveillance,<sup>4</sup> i.e., that female guards can view male inmates in shower type situations.

In *Letcher v. Turner*, 968 F.2d 508 (5th Cir.1992), the Fifth Circuit held that the mere presence of female officers during a strip search of prisoners during *emergency circumstances* did not violate the Fourth Amendment. See *id.* at 510 (emphasis added); *Moore v. Carwell*, 168 F.3d 234, 236-37 (5th Cir. 1999). “A prisoner’s rights are diminished by the needs and exigencies of the institution in which he is incarcerated. He thus loses those rights that are necessarily sacrificed to legitimate penological needs.” *Elliott v. Lynn*, 38 F.3d 188, 190-91 (5th Cir.1994); *Moore*, 168 F.3d at 236-37. However, “searches and seizures conducted of prisoners must be reasonable under all the facts and circumstances in which they are performed.” *United States v. Lilly*, 576 F.2d 1240, 1244 (5th Cir.1978); *Moore*, 168 F.3d at 236-37. We must balance the need for the particular search against the invasion of the prisoner’s personal rights caused by the search. See *Elliott*, 38 F.3d at 191 (citing *Bell*, 441 U.S. at 558); *Moore*, 168 F.3d at 236-37. We must consider the “scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted.” *Bell*, 441 U.S. at 559; *Moore*, 168 F.3d at 236-37.

#### **P. Retaliation**

It is well established that prison officials may not retaliate against an inmate because that inmate exercised his right of access to the courts. *McDonald*, 132 F.3d at 230-31; *Woods v. Smith*, 60 F.3d 1161, 1164 (5th Cir.1995), *cert. denied*, 516 U.S. 1084, 116 S.Ct. 800, 133 L.Ed.2d 747 (1996). To prevail on a claim of retaliation, a prisoner must establish: (1) a specific constitutional right; (2) the defendant’s intent to retaliate against the prisoner for his or her exercise of that right; (3) a retaliatory adverse act; and (4) causation. Causation requires a showing that “but for the retaliatory motive the complained of incident ... would not have occurred.” *McDonald*, 132 F.3d at 230-31; *Johnson*, 110 F.3d at 310 (quoting *Woods*, 60 F.3d at 1166), *cert. denied*, 522 U.S. 995, 118 S.Ct. 559, 139 L.Ed.2d 400 (1997).

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<sup>4</sup> *Johnson*, 69 F.3d at 147 (Easterbrook, J.) (“If only men can monitor showers, then female guards are less useful to the prison; if female guards can’t perform this task, the prison must have more guards on hand to cover for them.”); *Timm v. Gunter*, 917 F.2d 1093, 1101-02 (8th Cir.1990) (explaining that constant visual surveillance by guards of both sexes is a reasonable and necessary measure to promote inmate security); *Michenfelder v. Sumner*, 860 F.2d 328, 334 (9th Cir.1988) (stating that episodic and casual observation of male prisoners by female guards is justified by security concerns); *Grummett v. Rushen*, 779 F.2d 491, 496 (9th Cir.1985) (stating that “[t]o restrict female guards from ... occasional viewing of the inmates would necessitate a tremendous rearrangement of work schedules, and possibly produce a risk to both internal security needs and equal employment opportunities”). Many courts have identified protecting female prison guards’ constitutional and statutory rights to equal employment opportunities as a legitimate penological objective. E.g., *Johnson*, 69 F.3d at 147-48; *Timm*, 917 F.2d at 1102; *Forts v. Ward*, 621 F.2d 1210, 1217 (2d Cir.1980). We do not need to reach the issue, because we conclude that the policy furthers the jail’s interest in promoting security.

**Q. Trustee Status, Lack of Education/Work Opportunities**

The Constitution does not mandate educational, rehabilitative, or vocational programs. *Oladipupo*, 104 F.Supp.2d 626; see *Beck v. Lynaugh*, 842 F.2d 759, 762 (5th Cir.1988) (citing *Newman v. State of Alabama*, 559 F.2d 283, 292 (5th Cir.1977), *rev'd in part on other grounds sub nom., Alabama v. Pugh*, 438 U.S. 781, 98 S.Ct. 3057, 57 L.Ed.2d 1114 (1978)). Further, a plaintiff has no right to a job in the prison or to any particular job assignment. *Oladipupo*, 104 F.Supp.2d 626; see *Ingram v. Papalia*, 804 F.2d 595, 596 (10th Cir.1986); *Garza v. Miller*, 688 F.2d 480, 485 (7th Cir.1982); *Fuller v. Rich*, 925 F.Supp. 459, 462 (E.D.Tex.1995).

**R. Arbitrary Punishments Of A Complete Cellblock**

If the punishment of everyone for the violation of one is “arbitrary or purposeless” or “not reasonably related to a legitimate goal,” it may be unconstitutional. *Montana*, 659 F.2d at 20-23.

**S. Radio and Television Access**

Claims relating to the usage of radio and television have all been properly dismissed as frivolous. These claims do not pertain to federal constitutional rights. *Montana*, 659 F.2d at 20-23; See *Lovern v. Cox*, 374 F.Supp. 32, 34 (W.D.Va.1974).

**T. Telephone Access**

The Fifth Circuit and district courts in the Fifth Circuit have guarded against unreasonable restrictions on telephone use. *Montana*, 659 F.2d at 20-23; see *Feeley v. Sampson*, 570 F.2d at 374, and cases cited therein.

**IV. THERE IS NO STATE LAW COUNTERPART TO 42 U.S.C. § 1983**

There is no Texas counterpart to § 1983, and there is no cognizable state law action for damages for the alleged violation of rights guaranteed under the Texas Constitution. *Bagg v. University of Texas Medical Branch at Galveston*, 726 S.W.2d 582, 584 n.1 (Tex. App. -- Houston [1st Dist] 1987, writ ref'd n.r.e.); *Gillum v. City of Kerrville*, 3 F.3d 117 (5th Cir. 1993), cert. denied, 114 S. Ct. 881 (1994). Consequently, while some Plaintiffs may attempt to assert claims that sound under the Texas Constitution in Texas Courts, claims for damages are not actionable under the Texas Constitution, because there is no enabling statute under Texas law equivalent to Section 1983.

**V. THE PRISON LITIGATION REFORM ACT**

The Congress of the United States adopted the Prison Litigation Reform Act specifically to address the overwhelming number of frivolous inmate lawsuits which are inundating the Federal Court. The primary portion of the Act requires that inmates show that they are truly in forma pauperis before they will be allowed to file their pleadings at

either the District or Appellate Court level. Under the Prison Litigation Reform Act, inmates filing a civil appeal *in forma pauperis* must file an affidavit listing all assets, as well as submit a certified copy of his or her prison trust fund account statement for the preceding six month period. *Jackson v. Stinett*, No. 96-20720 (December 11, 1996), 1996 W.L. 714352. Further, the inmate must pay a filing fee upon the filing of his appeal. *Id.* The Prison Litigation Reform Act's amended requirements for *in forma pauperis* certification applies to each case as it was pending on the effective date of the PLRA. *Auo v. Bathey*, No. 96-30020 (Feb. 10, 1997) 1997 W.L. 52200. If the inmate fails to comply with this requirement, his suit will not be accepted for filing or will be dismissed. If the inmate is not truly a pauper, the inmate is now required to file filing fees.

Absent in the definition of "physical injury" in the Prison Litigation Reform Act, which requires a prisoner to make a prior showing of physical injury before bringing any federal civil action, the Fifth Circuit will be guided by Eighth Amendment standards in determining whether a prisoner has sustained a necessary physical injury to support a claim for mental or emotional suffering. Thus, an injury must be more than diminutive, but need not be significant. *Siglar v. Hightower*, No. 96-11096 (May 8, 1997), 1997 W.L. 197320.