Thursday Afternoon
JULY 29, 1993

California
Bar
Examination

Performance Test B

INSTRUCTIONS AND FILE

Xenophanes v . VectroveIThompson, et al.

INSTRUCTIONS

1. You will have three hours to complete this session of the examination. This performance test is designed to evaluate your ability to handle a select number of legal authorities in the context of a factual problem involving a client.

2. The problem is set in the fictional state of Columbia, one of the United States. Columbia is located within the fictional United States Court of Appeals for the Fifteenth Circuit.

3. You will have two sets of materials with which to work: A File and a Library. The File contains factual information about your case. The first document is a memorandum containing the instructions for the tasks you are to complete.

4. The Library contains the legal authorities need to complete the tasks. Any cases may be real, modified, or written solely for the purpose of this examination. If the cases appear familiar to you, do not assume that they are precisely the same as you have read before. Read them thoroughly, as if all were new to you. You should assume that cases were decided in the jurisdictions and on the dates shown. In citing cases from the Library, you may use abbreviations and omit citations.

5. Your response must be written in the answer book provided. In answering this performance test, you should concentrate on the materials provided, but you should also bring to bear on the problem your general knowledge of the law. What you have learned in law school and elsewhere provides the general background for analyzing the problem; the File and Library provide the specific materials with which you must work.

6. Although there are no restrictions on how you apportion your time, you should probably allocate at least 90 minutes to organizing and writing.

7. This performance test will be graded on your responsiveness to instructions and on the content, thoroughness, and organization of your response. In grading the answers to this question, the following, approximate weights will be assigned to each part:

A: 50%
B: 50%

COLUMBIA PRISON ASSISTANCE PROGRAM

An Equal Justice Project of the Columbia Bar Association

MEMORANDUM July 29, 1993

To: Applicant

From: Melissa Woodward, General Counsel

Re: Xenophanes v. Dr. George Vectrove. et al. and
Xenophanes v. James Thompson. Warden. et al.

Our severe budget crisis requires me to attend an emergency meeting of the Board of Directors. As a result, I need your help representing Xenophanes, an inmate at the Columbia Correctional Center (CCC)' in two federal court proceedings now in recess. Xenophanes (who refers to himself as "Xeno") was convicted of forgery (as a 3rd offender) under his "birth name," Bryson Hamilton, and is serving a ten to 20-year sentence.

While in prison, Xeno converted to an ancient polytheistic religion based ·on the teachings of the Oracle of Delos. One of the tenets of the religion is that a member of the faith must adopt a single Greek name, discarding forever any other non-religious names. Upon his conversion, Xeno took the name of an ancient Greek philosopher who taught that "all things are arisen from earth and water." Last year, we were assigned to represent him and succeeded, in an action entitled Xenophanes v. CCC, in getting the CCC to recognize Xenophanes as his "religious name," adding it to his "birth name" on all prison records and making it his "official" name. The facts that Xeno's religious beliefs are genuine and that the cult to which he belongs is legitimately established were adjudicated in his favor in last year's action and are, therefore, res judicata.

The first of Xeno's present lawsuits is a § 1983 civil rights action against Dr. George Vectrove and others at the Columbia State Hospital for violating his First Amendment right to religious freedom. Xeno was taken from the CCC to the hospital for diagnosis of recurring severe back pain. Because all of Xeno's earlier medical records were under his birth name, the Hospital staff insisted that Xeno wear an identification bracelet with the name "Bryson Hamilton" on it. When Xeno refused to wear the bracelet because to do so violated his religious principles, he was denied treatment and returned to CCC.

U.S. District Court Judge Harry Gebippe has decided, based on the allegations in Xeno's complaint and the affidavit of the doctor (see File), that there is no material factual dispute and, therefore, the matter can be resolved on cross motions for summary judgment.

In Xeno's second case, testimony concluded earlier today and I must make my closing argument tomorrow. In this matter, Xeno's § 1983 suit charges the warden and others with violating the "cruel and unusual punishment" provision of the Eighth Amendment by denying him access to out-of-cell physical exercise for several months, and he seeks an order requiring them to grant him such access at a minimum of three days per week, one hour per day. CCC officials respond that administrative and other reasons justified keeping Xeno in his cell during this period. The transcript of this very short trial proceeding is in the File.

Please do the following:

1. In the first action concerning the State's refusal to use Xeno's religious name, I want you to write a persuasive memo in support of our motion for summary judgment arguing that Dr. Vectrove and other Hospital personnel violated Xeno's religious freedom rights. Included in the Library are the most recent cases in the 15th Circuit on these issues, Ali v. Dixon and Sosebee v. Murphy.

2. In the second action concerning the Eighth Amendment violation, I want you to draft my closing argument to the jury. Judge Gebippe, before whom this action is also pending, pursuant to federal rule 39(c), empaneled an advisory jury and has said he will adopt the jury's finding on whether Xeno's constitutional rights have been violated. He has also told us at the conclusion of the testimony that he intends to base his instructions to the jury on two opinions of the Court of Appeals. I have included those opinions, Hall v. Williams and Mitchell v. Rice, in the Library. Neither these opinions nor the trial transcript have any bearing on Xeno's claim that his religious freedom rights have been violated.

Both of these tasks must be completed when I return later in the day from my meeting with the Board. I have attached office policy memoranda that describe the appropriate formats for these tasks. Many thanks for your assistance.

COLUMBIA PRISON ASSISTANCE PROGRAM
An Equal Justice Project of the Columbia Bar Association

MEMORANDUM August 1, 1992

To: To All Lawyers

From: Director of Litigation

Re: Persuasive Briefs

To clarify the expectations of the program and to provide guidance to lawyers, all persuasive briefs, including Briefs in Support of Motions (also called Memoranda of Points and Authorities), whether directed to an appellate court, trial court, or administrative officer, shall conform to the following guidelines. All briefs shall include a concise statement of the jurisdictional (i.e., statutory or other) basis for the case and a Statement of Facts. Select carefully the facts that are pertinent to the legal arguments. The facts must be stated accurately, although emphasis is not improper. The aim of the Statement of Facts is to persuade the tribunal that the facts support our client's position.

The program follows the practice of writing carefully crafted subject headings which illustrate the arguments they cover. The argument heading should succinctly summarize the reasons the tribunal should take the position you are advocating. A heading should be a specific application of a rule of law to the facts of the case and not a bare legal or factual conclusion or a statement of an abstract principle. For example, Improper: THE PRISONER'S RIGHTS WERE VIOLATED. Proper: REQUIRING THE PETITIONER TO TAKE PSYCHOTROPIC MEDICATION IN THE ABSENCE OF A HEARING ESTABLISHING VIOLENT BEHAVIOR CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT UNDER THE EIGHTH AMENDMENT.

The body of each argument should analyze applicable legal authority and persuasively argue how the facts and law support our client's position. Authority supportive of our client's position should be emphasized, but contrary authority also should generally be cited, addressed in the argument, and explained or distinguished. Do not reserve arguments for reply or supplemental briefs.

The lawyer should not prepare a table of contents, a table of cases, a summary of argument, or the index. These will be prepared, where required, after the draft is approved.

COLUMBIA PRISON ASSISTANCE PROGRAM
An Equal Justice Project of the Columbia Bar Association

MEMORANDUM April 10, 1991

To: All Lawyers

From: Director of Litigation

Re: Closing Arguments/Jury Trials

You should begin with an understanding of the legal principles that will be applied to the facts in the case. In some cases, you will be provided with jury instructions. In other cases, the instructions will not yet be drafted and you will have to rely upon an analysis of legal authority. The instructions or legal authority will give you the framework for your closing argument. However, the closing argument should not discuss or make reference to these authorities; a closing argument is not a legal brief or an essay. The argument must show how the evidence presented meets the legal standards which are or will be set forth in the jury instructions. The argument is based on the evidence presented, not histrionics or personal opinion. Write out your argument exactly as you plan to give it.

It's important that the argument be in your own words, but remember that you're communicating with a group of lay people. Your job is to help them understand how the law relates to the facts presented, and to persuade them that they have no choice but to find for your client. In doing that, you should consider the following:

- State explicitly the ultimate facts that the jurors must find in order for your client to prevail.
- Organize the evidence in support of the ultimate facts.
- Incorporate relevant legal principles or jury instructions into your argument.
- Discuss the sufficiency of the evidence and the credibility of witnesses.
- Draw reasonable inferences from the evidence to support positions you have taken.
- Anticipate opposing counsel's arguments and point out weaknesses in his case.
- Refer to equities or policy considerations that merit a finding for our client.

The most important factors are organization and persuasiveness; if you immerse the jury in a sea of unconnected details, they won't have a coherent point of view to discuss in the jury room. Never hold back any argument assuming that you will have a second opportunity to make it on rebuttal.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF COLUMBIA

Under Civil Rights Act 42 U.S.C. §1983

NAME: Xenophanes
PRISON NUMBER: 121530
CORRECTIONAL FACILITY: CCC
V.

Dr. George Vectrove	)	COMPLAINT AND AFFIDAVIT
Dr. W. Kell, all Doctors and	)	
Nurses at Columbia state	)	Case. No. 1119-93
Hospital	)	(Supplied by Court Clerk)

(Enter full name(s) DEFENDANT

A. Have you begun other actions in state or federal court dealing with the same facts involved in this action? __ Yes x No

B. If your answer to A is yes, describe the action on a separate piece of paper, indicating the name of the court and the status of the case.

C. STATEMENT OF CLAIM. State briefly the facts of your case and describe how each defendant is involved. Include dates and places. State what relief you seek from the Court. Do not give any legal arguments or cite cases or statutes. Attach extra pages if you need more space.

-See attached statement-

FORMA PAUPERIS AFFIDAVIT

I hereby apply to proceed without prepayment of fees or costs. In support of my application, I state under oath that the following facts are true. (1) I am the plaintiff in this matter and I believe I am entitled to redress; (2) I am unable to prepay the fees and costs because: I don't have enough money to pay $120 filing fee.

"I declare under penalty of perjury that the foregoing is true and correct." (NOTARIZED SIGNATURE NOT REQUIRED)

Xenophanes
(SIGNATURE OF PLAINTIFF)

"I hereby certify that the petitioner herein has the sum of $42.30 on account to his credit at the penal institution."

Eduardo Ansello
AUTHORIZED OFFICER OF PENAL INSTITUTION

By Zeus and the glorious Gods on Olympus, through their Holy Messenger, the Oracle of Delos, I bear Witness to the Truth!

In 1991, I was administered a laminectomy operation to remove a ruptured disc from my back at Columbia State Hospital where they moved me to from unlawful confinement at CCC in violation of my rights. The doctor at that time was Dr. Stanley Fink who didn't do a proper job (even though this Court later refused my claim for pain and suffering even though malpractice was done to me!) and it later caused pain and agony and another lower back attack when I was in administrative segregation on June 10.

At that time I had unbearable pain in my lower back. After complaining continuously to the CCC infirmary, they refused proper care, giving me only acetaminophen that caused nauseation and no relief. It was so bad I fell in my cell and regurgitated. I was removed to the infirmary and they knew it was serious and called in neurosurgeon, Dr. W. Kell, of Columbia State Hospital. Dr. Kell made me keep my left leg stiff and then raised it straight up, causing me intolerable bodily pain that made me pass out and then be revived. I was told the pain was caused by a twisted nerve or another ruptured disc (more likely it's from the earlier malpractice!).

Dr. Kell told me I needed tests at the Hospital to be sure what it was but that it was surgery again, for sure. On June 21, I was transported to Columbia State Hospital and seen by Dr. Kell and the head neurosurgeon, Dr. George Vectrove. They said I needed lots of tests (Xrays, myelograms, MRI, CAT-scans, etc., etc.) and then they would remove a disc or repair a nerve.

But the two doctors and other Hospital personnel would not do anything to help me in my pain because I did not agree to put on a plastic Hospital ID bracelet that had my discarded name from my earlier non-religious life (one Bryson Hamilton). When the Light from Olympus entered my life in January 1992, I turned from 32 years of Sin and became Xenophanes. I explained all this to the doctors and told them that the prison had accepted me as Xenophanes and had added my religious name to my prison files. Dr. Vectrove said the hospital would give me two bracelets, one with my true name on it and another with my discarded name. I pleaded it would be blasphemy for me to wear a bracelet with that filthy name, but they denied my right to the emergency care I needed by rejecting my free and independent religious choice to worship my Gods. I should be treated the same as other people who change their names, like married or divorced folks.

I was returned to CCC on June 23, to linger to this date without the correct and necessary medical treatment that I need. In great pain, I receive only acetaminophen that does not help, because I cannot do what the Gods

forbid. Therefore, I ask this Honorable Court to order the doctors to give me the medical treatment I am entitled to.

Xenophanes, The Plaintiff

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF COLUMBIA

Xenophanes,	)	
Plaintiff	)	
v.	)	Case No. 119-93
Dr. George Vectrove,)		
Dr. W. Kell, et al,.	)	UNDER CIVIL RIGHTS ACT
	)	42 U.S.C. §1983
Defendants	)	
________________________	)	

AFFIDAVIT OF GEORGE VECTROVE, M.D. IN SUPPORT OF
DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

1. I am the Chief of Neurosurgery at the Columbia State Hospital. I have been employed by the State of Columbia in this capacity for the past nine years.

2. On June 14, my colleague, Dr. Wenay Kell, informed me that a former patient, Bryson Hamilton (a.k.a. Xenophanes), an inmate at the Columbia Correctional Center, was experiencing a numbness in his left leg and severe pain radiating from his back into the left leg. Hamilton had been treated by CCC personnel for muscle spasms with mild relaxants and extended rest. Dr. Kell indicated, however, that Hamilton was likely suffering from a second herniated disc and would require another laminectomy. She pointed out that Dr. Stan Fink, then of the Hospital's Orthopedic Department, had removed one of Hamilton's spinal discs in 1991. Kell and I agreed that Hamilton needed to be brought from CCC to the Hospital for the usual tests (e.g., a myelogram and a CAT-scan) to confirm her diagnosis.

3. The earliest available date for the battery of tests we ordered was June 21. Hamilton was brought to the Hospital on that date and admitted for a detailed diagnostic examination. Two hours after his admission, I was summoned by Hospital staff to deal with Hamilton's refusal to wear his Hospital identification bracelet. When I arrived at the Special Care Unit, Hamilton told me that he "absolutely refuse(d)" to wear the ID because it was "blasphemy to identify myself or allow myself to be identified" by any name other than Xenophanes, the name he adopted when he converted to the religious teachings of someone called the "Oracle of Delos."

4. I told Hamilton that the Medical Practice Committee of the Hospital enforced insurance company regulations by requiring that all patients wear an ID bracelet. The patient claimed he could decline to wear the bracelet because the prison accepted the name Xenophanes as his official name. I informed the patient that the Hospital had its own rules. Even though I didn't know if this would be acceptable to the Hospital, I tried to persuade the patient either to wear two bracelets, each with one name, or one bracelet with both names. He adamantly refused to wear anything with his old name. However, because I did not want to cancel Hamilton's test schedule for fear I would be unable to make new appointments in the immediate future, I got some staff members to begin his tests while I conferred with the Medical Practice Committee.

5. I appeared before the Committee later on June 21 and asked for a waiver of the rule. I was informed on June 22 by Dr. Shelly Weiner, chair of the Committee that my request had been denied because the patient had multiple department records under the name Bryson Hamilton. I conveyed the Committee's judgment to Hamilton and he again refused to wear the bracelet. I told him that if he did not accept the bracelet, all testing and treatment would cease and he would be returned to the prison.
When he refused to wear the bracelet with the name Bryson Hamilton, he was transported back to CCC on June 23rd. At CCC, Hamilton continues to be treated with mild pain relievers and bed rest. He still needs further tests and, most likely, additional surgery.

6. The primary reason why we have insisted that Mr. Hamilton wear a bracelet with his birth name on it is to reduce the risk that a member of the Hospital staff would treat him in a counter-indicated manner and cause him injury. In the four years that Hamilton has been a CCC inmate, he has been admitted to the Hospital on six occasions for matters ranging from routine check-up and treatment of a minor nature to major surgery. Dozens of departments in our very large and busy Hospital have recorded important aspects of Mr. Hamilton's medical history. These records are stored in a number of different computer and hard copy databases. Information from any or all of these sources may be relevant to critical, even life and death, decisions during a future visit of the patient to the Hospital. A major operation, such as the likely laminectomy, is a classic event when such information may be demanded at a moment's notice. All of Mr. Hamilton's medical records are primarily and secondarily indexed and then cross-indexed to other sources by his birth name. Attempting to alter all of his patient records creates the substantial risk that some will be overlooked or mislabeled and that pathways to cross-indexed data will be distorted. In the end, critical information may be lost. This could lead to a life-threatening scenario for Mr. Hamilton. Moreover, because cross-indexing involves linkages to other patients (e.g . blood typing, organ donor registration and the like), distortion of computer pathways conceivably could endanger others.

7. To substitute a name would cost an estimated 87 person hours during a period when the Hospital is experiencing deep cuts in State appropriations (22.5% over the past three fiscal years). Even if the Hospital were to attempt a name substitution, there is no guarantee of complete success and there remain the medical risks cited above. Moreover, to accede to Mr. Hamilton's demands would create a dangerous and expensive precedent.

____

George Vectrove, M.D.

Sworn to and subscribed before me this 6th day of July 1993

____
Notary Republic

My Commission expires: February, 1994

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF COLUMBIA

Xenophanes,	)	
Plaintiff	)	
	)	Case No. 1119-93
v.	)	
	)	UNDER CIVIL RIGHTS ACT
James Thompson, Warden, et al.,	)	42 U.S.C. § 1983
Defendants	)	
	)	

PARTIAL TRANSCRIPT OF TRIAL PROCEEDINGS. JULY 29. 1993

COURT: Members of the jury, we are about to begin what I expect will be a very short trial. You've heard the opening remarks of counsel. What plaintiff Xenophanes seeks in this case is an order requiring the defendants to grant him certain exercise privileges. Ordinarily in equity cases like this, we don't have a jury. However, I've empaneled you as an advisory jury, and I will rely on you to make the basic factual finding on whether or not there has been a violation of plaintiff's constitutional rights, and I will make my final order accordingly. Now I want to read to you a statement stipulated to by the parties, one that you are to accept as given.

> The plaintiff, Xenophanes, an inmate at the Columbia Correctional Center, is confined to Cellhouse-C, a section in which certain prisoners are administratively segregated from the general population. Many inmates are in administrative segregation because they have violated prison regulations. Plaintiff,

however, was assigned to this section at his request and in an attempt to protect him from possible physical attack by other inmates.

Now we'll begin the testimony with the plaintiff.

THE PLAINTIFF, Xenophanes, WAS SWORN AND IDENTIFIED.

//

MS. WOODWARD: How long have you been incarcerated at Columbia Correctional Center?

XENOPHANES: A little more than four years.

Q: And how long have you been in administrative segregation?

A: Counting today it's 234 days, almost eight months.

Q: While you were living with the general population, did you have the opportunity to engage in physical exercise?

A: You bet, everyday.

Q: Describe your exercise program.

A: Well, I had rehabilitation exercises. You know, after my back operation in 1991. But that was only about six months. Before and after that I exercised just about every day, not because I had to but because I wanted to. We played ball indoors and out, depending on the season. And then there was jogging on the indoor and outdoor track. And weight lifting, too.

Q: How much time did you devote to exercise when you were in the general population?

A: At least an hour a day, sometimes more if the guards would let us.

Q: What impact did the exercises have on you?

A: It made me feel great. You know, alive and in good shape, my back getting better and all. That's important when you're locked up. Feeling like a human being gives you the strength to make it. And exercising and being fit made me feel like a human being.

Q: How about other men in the general prison population? Did they exercise on a regular basis?

A: Sure, there were lots of guys who worked as much as me, some a whole lot more. About ten of us followed the same basic program and so we did it together most of the time.

Q: Now, tell us the exercise opportunities available to you in administrative segregation.

A: Nothing, almost none at all. We hardly ever even get out of our cells, except to eat and twice a week showers. I've been outdoors not more than once a week in the last six months, I bet. And there's no indoor recreation allowed. So you can say that there's really no exercise opportunities in admin seg.

Q: Since you've been in administrative segregation, how many times have you played football, basketball or baseball?

A: Not more than ten times, for sure.

Q: How about jogging or running?

A: Another ten times or so, maybe.

Q: Weight lifting, how often since you've been in C-Block?

A: Zero. Haven't had any chance to lift weights.

Q: What effect has the reduction in exercise had on you?

A: Terrible. I get headaches all the time, my muscles are stiff and they're getting flabby, I seem to have a cold or the sniffles constantly. I was in great shape, now I'm in terrible shape. And most of all, I'm having trouble with my back again and I can't do the proper exercises they told me to do after the operation.

Q: Has it had any impact on you mentally, your morale?

A: Sure. I'm always depressed and upset, you know, feeling defeated. And I think it's caused me to get written up more often for disciplinary infractions.

Q: Have you asked for more exercise opportunities?

A: All the time, all the time.

Q: Have you filed a formal grievance with prison officials?

A: Three or four.

Q: What results?

A: Turned down cold. No resources, no staff. They don't care.

MS. WOODWARD: Nothing further.

COURT: You may inquire, Mr. Metzger.

MR. METZGER: Thank you, Your Honor. Mr. Xenophanes, you ...

XENOPHANES: It's just Xenophanes.

Q: Pardon me?

A: It's just Xenophanes. No mister.

Q: Oh. Sorry. You've been in administrative segregation for about eight months?

A: Correct.

Q: For almost six of those eight months you've complained of severe back pain, haven't you?

A: Probably not that long.

Q: Didn't you write up an infirmary slip on ... let's see, on January 26, in which you said, Quote, "I am having bad lower back pain'" unquote?

A: Yeah, I suppose that was the date.

Q: And that was the first of 23 such complaints of back pain that you filed in the CCC infirmary, isn't that so?

A: If you say so.

Q: No, sir. What do you say?

A: Yeah, I guess that's right.

Q: And on two occasions you were issued crutches, the first time for three days and the second time for five days. Is that correct?

A: (INAUDIBLE)

Q: What was that?

A: I said, yes.

Q: Thank you. And on three other occasions, infirmary staff ordered complete bed rest for two days at a time. Right?

A: Right.

Q: And you're on medically ordered bed rest right now, aren't you?

A: Yeah, but I can get around.

Q: Now you've testified that there is a significant difference between the exercise opportunities in administrative seg and that available to the general population.

A: You bet there is. It's like night and day.

Q: And you think the exercise options in admin seg are inadequate, right?

A: Totally and absolutely inadequate. No doubt.

Q: And the exercise opportunities given to the general prison population, that's okay. Is that correct?

A: Well, I wouldn't go quite that far. They could still give us the chance to do more things and to use the athletic facilities even more time. But other than that, I don't have any real complaints.

Q: Sir, on April 6, you were offered the opportunity by CCC officials to return to the general population, weren't you?

A: Well, you see ...

Q: Sir, that question can be answered yes or no.

MS. WOODWARD: Objection, Your Honor. The witness is entitled an opportunity to explain the answer.

MR. METZGER: Any explanation to such a simple question can be obtained during redirect.

COURT: Well, he's entitled to an explanation. But it's a simple issue, if he wants to explain he can do it on your examination, Ms. Woodward. Overruled.

MR. METZGER: You were provided the chance to return to the general population. Correct? Just yes or no, please.

XENOPHANES: Yes.

Q: I have no further questions of this witness.

MS. WOODWARD: Just a few questions, Xenophanes. Except those days when you were on crutches or confined to bed, could you have exercised if you had been given the opportunity?

XENOPHANES: Sure. And on some of those bed and crutch days I could've done something, like at least walk around in the fresh air, if they'd given me a chance.

Q: Okay. Now tell us what you tried to say about the supposed offer to return to the general population.
A: That wasn't a real offer, they just wanted me to shut up about exercising. The warden knew that if I left C-Block I was as good as dead. There were numerous threats on me before I was transferred to admin seg. And then, because I tried to assert my rights based on guidance from the Gods on Olympus, prison staff has recruited inmates to carry out my execution. So if I leave Cellhouse-C, I'm history. Period. I'm not signing my own death warrant, no way.

MS. WOODWARD: That's it. Nothing further and the plaintiff rests, Your Honor.

COURT: See, members of the jury. I told you it would be a short trial. Mr. Metzger, what's your pleasure?

MR. METZGER: The State calls Warden James Thompson.

THE DEFENDANT, James Thompson, WAS SWORN AND IDENTIFIED.

MR. METZGER: Warden Thompson, how long have you been at CCC?

MR. THOMPSON: Almost 13 years. Seven as a Correctional Officer, including Supervising Captain, and the last six years as Warden of CCC.

Q: Your educational background, Warden?

A: My undergraduate degree in Criminal Justice was earned at Columbia State University and I have a masters in Penology from Johns Hopkins.

Q: Are you acquainted with the plaintiff, Xenophanes?

A: I certainly am. Of course, I knew him originally as Bryson Hamilton, the name under which he was admitted to CCC. That was before his conversion and adoption of his religious name.

Q: Please give us some idea of the nature of the administrative segregation unit at CCC.

A: Administrative segregation is a section of the institution where we house inmates who have violated prison regulations, ones with special needs or those that require special protection. It's not for the dangerous individuals like those who've tried to kill an inmate or guard; they're placed in solitary confinement in the isolation unit. Admin seg is for inmates who committed minor violations of the rules or for those accused of more serious violations who are awaiting disciplinary hearings.

Q: How about the ones with special needs and protection?

A: Well, there are some medical cases, recuperation and the like, where admin seg provides reduced activity levels and more constant observation. Special protection cases, like Xenophanes', are those where the inmate or-our supervision personnel believe that other inmates may harm him if he remains in the general population.

Q: Okay. Do you have standards for inmate exercise for those in administrative segregation?

A: Well, they're not written down but there are standards known to all personnel and most inmates.

Q: What are those standards?

A: Inmates in administrative segregation are to have outside exercise opportunities three days per week for at least one hour unless there are circumstances that prevent such activity.

Q: What are the circumstances that would prevent exercise?

A: Inclement weather, absence of sufficient personnel because of sickness, etc., prison disturbance or lockdown situation, those kind of things.

Q: Have those exercise standards been in operation during the past year?

A: Yes, sir.

Q: Have those exercise standards been followed by supervisory personnel during the past year?

A: Yes sir, to the best of my knowledge.

Q: Thank you. Nothing further.

COURT: Ms. Woodward?

MS. WOODWARD: Warden Thompson, the exercise standards for the general population are quite different, aren't they?

JAMES THOMPSON: Well, I wouldn't call them major differences. For the general population we have out-of-cell exercise one hour per day with the same special exceptions.

Q: So inmates in the general population have more than twice the exercise time of those in administrative seg, right?

A: That's true. But the differences are due primarily to staffing needs and resources.

Q: Oh, that means you don't have enough guards assigned to administrative segregation to allow those persons the same amount of exercise?

A: Well, that's not exactly it. Administrative segregation requires a much higher ratio of guards because of discipline and security needs and because those with medical problems require more observation and attention. So you see, we have more guards per inmate in administrative seg than in the general population.

Q: But not enough to allow those inmates exercise every day?

A: No, not enough for that. You've got to remember that the State's fiscal crisis resulted in a 28% cut in the Corrections Department budget over the last couple of years. That's made it even harder to arrange adequate supervision.

Q: That hasn't stopped the general population from exercising every day, has it?

A: Well, I know they haven't exercised quite every day.

Q: When you say discipline needs, you mean that because most inmates in administrative seg are there because they've violated some rule that they require more guards per inmate than the general population, right?

A: That's correct.

Q: And when you say medical needs, you mean that because some of them are sick and might have an emergency or need attention that they too require more guards than the general population?

A: Yes.

Q: You stated on direct that the exercise regulations for admin seg have been followed "to the best of your knowledge." That means you don't have personal knowledge of whether that's true.

A: Well, I'm not actually there in administrative segregation.

Q: So you're relying on staff reports, right?

A: Of course. That's all I have.

Q: Are you aware that Xenophanes has filed several grievances claiming that his exercise opportunities average only one day per week?

A: Ms. Woodward, there are 1,375 inmates at CCC and we average 131 grievances a week. That means almost one prisoner in ten grieves us each week.

Q: That's interesting, Warden, but not responsive. Are you aware of Xenophanes' grievances about exercise?

A: Yes. They were reviewed and dismissed.

Q: Were his allegations about the number of exercise times accurate?

A: No, my staff reported they were understated.

Q: But inmates in administrative segregation did not have three exercise opportunities per week the last six months, did they?

A: They did, except on those occasions because of staff needs or otherwise, like inclement weather, when they couldn't go out.

Q: How many times was that?

A: I don't know exactly.

Q: So it could be that prisoners in admin seg only got out of their cells for exercise one day a week?

A: I don't think so, no.

Q: Let's talk about cells. Warden, Xenophanes' cell is nine feet by seven and one-half feet, right?

A: Yes, just like all single person cells in C-Block.

Q: But that's smaller than the general population cells?

A: Yes, the basic cell at CCC is 9' by 11', slightly larger.

Q: And in Xenophanes' cell there is a bunk, a washstand and a toilet, correct?
A: That is so.

Q: CCC has a gymnasium, doesn't it Warden?

A: Yes, it does.

Q: And that gym has exercise equipment, tumbling mats, half-court basketball and a small elevated track, right?

A: True.

Q: But you don't permit administrative segregation inmates to use the gym, do you?

A: We can't usually. With 1,300 men in the general population, the gym is booked solid from 7 a.m. to 9 p.m. We can't mix the 50 or so from admin seg with the general prisoners for security reasons. Sound penological theory precludes such mingling. That's why we have administrative segregation. Occasionally, a slot opens up and we get some of the men from admin seg into the gym.

Q: I have nothing more. Thank you.

COURT: Mr. Metzger.

MR. METZGER: Call Officer Biaggi.

THE WITNESS, Michael Biaggi, WAS SWORN AND IDENTIFIED.

MR. METZGER: How long have you been a Correctional Officer at CCC?

MR. BIAGGI: Fifteen years, next month.

Q: Your specific assignment is?

A: Senior officer in charge of Cellhouse-C, administrative segregation.

Q: Summarize your duties, please.

A: Overall supervision of Corrections staff in the Cellhouse. I apply and adjust general institution rules in the block, post all shift assignments, monitor leaves, review performance, pass on inmate grievances. I run the block essentially.

Q: Are you acquainted with the plaintiff?

A: Xenophanes? Yes, sir. He's been assigned to C-Block for the better part of the last year.

Q: Directing your attention to the exercise policy, what are the rules for administrative segregation?

A: Three times per week, one hour, except for circumstances that interfere and would cause disruption to the integrity and operation of the block.

Q: What kind of circumstances?

A: Inclement weather, staff shortages, unit or institution disturbance, lockdown and other…
Q: What's a lockdown?

A: That's where the population is confined to their cells during a search for weapons or contraband or in the aftermath of a disturbance where we're trying to bring calm and order back.

Q: Now, during the time that the plaintiff has been in C-Block has an exercise period been cancelled for any reason other than those circumstances you've just mentioned?

A: No, sir, not according to my personal knowledge and reports I've received from my staff.

Q: Please characterize the exercise policy followed in C-Block in the period of plaintiff's assignment there.

A: We've followed the standard established by the Warden for administrative segregation, that is, three exercise periods per week unless stated circumstances exist.

Q: Nothing further.

COURT: Cross examination.

MS. WOODWARD: Thank you, Your Honor. Officer Biaggi, let's see if I have the exercise exceptions down correctly. One, staff shortages; two, inclement weather; three, disturbances, including lockdowns. Is that it?

MR. BIAGGI: That's basically it, yes.

Q: How about punishment?

A: Pardon me?

Q: Isn't it true, Officer Biaggi, that withdrawal of exercise is a form of punishment for the men in C-Block if one or more of them does something to irritate or annoy the guards?

A: Absolutely not. The Department and the Warden have forbidden retaliation like that. If there's a problem with an inmate, he has to be written up for a violation on an individual basis. Maybe that stuff went on in the old, old days, but not now.

Q: Let's focus on staff shortages. That means if a guard calls in sick then exercise for that day is cancelled, right?

A: Well, not always. One guard off during the 8 to 4 shift won't usually cause a cancel except at those times of the month, around the first and fifteenth, when reports are due. Most times we're a go with only one off.

Q: Okay, but if two call in sick, it's a cancel, isn't it?

A: Yeah, we have to cancel then. With the budget reductions, we're pretty shorthanded as it is.

Q: And staff earn one day of sick leave each month and they can accumulate up to a total of 36 days, right?

A: Right.

Q: And Correctional Department personnel take off an average of seven sick days a year, isn't that so?

A: I think that's right, about there.

Q: And C-Block operates with four guards per shift, right?

A: Three on midnight to eight, four on the other two. That's down from five before the budget cuts, sometimes six.

Q: How many days have you cancelled exercise because of staff shortages, let's say in the past six months?

A: I'm not sure. We don't keep any kind of exercise log or nothing. We've got so many other records we have to maintain. I'd estimate six to ten maybe, somewhere in there.

Q: Thank you. And you cancel exercise for inclement weather?

A: Right. Rain, snow, hail, cold. Like that.

Q: And you make that decision, right? You don't check with anyone, do you?

A: The senior officer on duty makes a weather decision, me or someone else who's on. But we don't check with anyone.

Q: And any precipitation causes a cancellation, right?

A: Sure, I can't have guards standing around in the rain or snow and most inmates don't want to be outside then.

Q: And the rule you follow is that there's no exercise if the temperature falls below 26 degrees, correct.

A: Right, we cancel at freezing.

Q: How many days have you cancelled exercise because of weather in the last six months?

A: I'm not sure. I'd say half a dozen or so at the most. Some of those could've been when staff was short too.

Q: And how many exercise days have been lost in the last six months because of disturbances or lockdown?

A: Well, we had an institutional lockdown for five days in February after a general disturbance. And I can recall three or four days when we had a weapon or contraband lockdown in C-Block in the past few months. Not very much, really.

Q: Isn't it true, Officer Biaggi, that in the last six to eight months the inmates in Cellhouse-C, administrative segregation, have had only about one day per week of exercise?

A: It's more than that, I'm sure.

Q: Officer Biaggi, you have no records to substantiate that estimate, do you?

A: No, but based on my experience I'm confident we're closer to the three a week standard.

Q: But it's not three a week in the last six months or so given the cancellations you've identified, right?

A: That's probably so. We've had to cancel some.

Q: So actual exercise in C-Block has been, according to your estimate, above once but less than three times per week, right?

A: Close to three a week.

Q: I have no more questions.

MR. METZGER: Defendants rest, Your Honor.

COURT: Excellent. Ladies and gentlemen, I've arranged with counsel in this case to recess at this stage and have us all come back tomorrow for their closing arguments, my instructions to you and your deliberations. That will allow me to deal with another emergency issue. Let me remind you that you are not to discuss this matter among yourselves or with anyone else, including your family. Save any discussion until tomorrow when you'll decide this case. Any questions? We're adjourned until 9:30 a.m. Counsel, remain a moment, please.

JURY REMOVED FROM COURTROOM

COURT: Counsel, I intend to give the standard instructions on the basics, preponderance of the evidence, burden of proof, role of judge and jury, and the like. On the critical question of the alleged Eighth Amendment violation, I'm going to fashion my instructions based on the two 15th Circuit cases you both have cited, Hall v. Williams and Mitchell v. Rice. Of course, I'll be covering the totality-of-the-circumstances test, reasonable alternatives, if any, available to prison officials, and whether there was deliberate indifference. That should be of some guidance to you in developing your closing arguments. Nothing further? Okay, we're adjourned till tomorrow.

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THURSDAY AFTERNOON
JULY 29, 1993

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Examination
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Rule 39. Trial by Jury or by the Court

* * *

(c) Advisory Jury and Trial by Consent. In all actions not triable of right by a jury the court upon motion or its own initiative may try any issue with an advisory jury, or except in actions against the United States when a statute of the United States provides for trial without a jury, the court, with the consent of both parties, may order a trial with a jury whose verdict has the same effect as if trial by jury had been a matter of right.

Ali v. Dixon
United States Court of Appeals for the Fifteenth Circuit (1990)

Rabah Muhammad Ali, a Muslim prison inmate, alleges certain prison practices violate his free exercise of religion rights under the First Amendment. [1] Ali converted to Islam after he began serving his sentence at Columbia Central Prison. Upon his conversion, Ali adopted his new name as a replacement for Robert Thacker, the name under which he had been committed. By his adoption, the name change is official under Columbia law. At the time of Ali's conversion, Central Prison maintained all records pertaining to Ali under his former, committed name. In response to Ali's name change, Central Prison placed a notice of name change in Ali's official prison file and processed modifications to his visitors list under both his religious and committed names.

Ali alleges that officials refused to add his religious name to his prison trust fund account. The absence of his new name on the account requires him to use his former name when collecting trust fund benefits to which he is entitled. Furthermore, Ali alleges that the prison uses his former name in corresponding with him and the prison staff refuses to address him by his new name.

The defendant, Warden Gary Dixon, filed a motion for summary judgment and an affidavit in support of that motion. The affidavit claimed an "administrative nightmare" would result from adding Ali's new name to his old name on the prison trust account. As to Ali's complaint that the prison staff addresses him by his former name, Dixon's affidavit asserted that addressing Ali by his committed name is penologically justified. Dixon referred to the "absolute priority for all correctional staff to know as many of the inmates by name as possible," and opined with certainty that "the staff finds it easier to recall the name under which the plaintiff was sentenced, convicted, and committed to the custody of the Department of Correction." Finally, Dixon's affidavit conceded that the prison corresponds with Ali under his former name because, "if official correspondence were addressed to plaintiff under the name 'Rabah Muhammad Ali', it is quite likely that it would not be properly filed." The district court subsequently entered summary judgment for the defendant and Ali appealed.

The Supreme Court has summarized the general principles that guide the analysis of a prisoner's claim that a prison policy violates the free exercise clause of the First Amendment. First, convicted prisoners do not forfeit all constitutional protections by reason of their confinement in prison. Inmates retain the protection of the First Amendment against laws that prohibit the free exercise of religion. Second, incarceration brings about the withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system. The limitations on the exercise of constitutional rights arise both from the fact of incarceration and from valid penological objectives - including deterrence of crime, rehabilitation of prisoners, and institutional security. O'Lone v. Estate of Shabazz (1987).

The Court also has held that "when a prison regulation impinges on an inmate's constitutional rights, the regulation is valid if, in the considered judgment of prison administrators, it is reasonably related to legitimate penological interests." Turner v. Safley (1987). The Court identified four factors to be considered when assessing whether a considered judgment has been made by prison administrators. First, there must be a valid, rational connection between the prison regulation and the legitimate governmental interest put forward to justify it. A second factor is whether there are alternative means of exercising the claimed constitutional rights that remain open to prison inmates.

[1] Ali is proceeding pursuant to 42 U.S.C. § 1983: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States, or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

A third consideration is the impact accommodation of the asserted constitutional right will have on guards and other inmates and on the allocation of prison resources generally. Finally, the absence of ready alternatives available to the prison administrators is evidence of the reasonableness of a prison regulation. By the same token, the existence of obvious, easy alternatives may be evidence that the regulation is not reasonable, but is an exaggerated response to prison concerns.

Implicit in the Turner approach is the principle that the four-factor analysis applies only after it is determined that the policy impinges on a First Amendment right. Thus, for each of Ali's claims we must determine whether the prison action impinges on a free exercise right and, if so, whether the prison action is "reasonably related to legitimate penological interests."

We have observed that "the mere fact that prison authorities maintain an inmate's records in the name he used when convicted implicates no constitutional right. How prison records are organized is quintessentially an administrative matter in which the courts should not intervene." Barrett v. Columbia (15th Cir. 1989). Ali, however, claims more than mere offense at the absence of his new name from his prison file. He claims that the absence of his name from his trust fund account requires him to use his old, religiously offensive, name when drawing on the funds to which he is entitled. We have observed: "Because the First Amendment protects an inmate's right to legal recognition of an adopted religious name, correctional authorities may not properly condition the receipt of services or benefits upon his waiving such a right." Barrett. Thus, to the extent that Ali has been forced to use his religiously offensive name to receive the funds to which he is entitled, the prison's refusal to add his new name to his record impinges on his First Amendment rights.

Because the prison policy impinges on Ali's free exercise rights, it may be upheld only if it meets the Turner standard. In his affidavit, the defendant has failed to advance sufficient penological justification for refusing to add Ali's new name to his prison trust account. A mere assertion of an "administrative nightmare" is insufficient. Therefore, we reverse the district court's grant of summary judgment for the defendant on Ali's objection to the refusal to add his new name to his prison trust account. On remand, the district court should consider Ali's allegation that he can receive benefits only by using his old name. If the court concludes that Ali's claim is factually correct, it should order addition of Ali's new name to the trust account.

Ali also objects to the fact that prison officers address him by his committed name and that he is obligated to respond when addressed in this offensive manner. This conduct impinges on Ali's free exercise rights and necessitates analysis under the Turner standard.

However, unlike the failure to add Ali's name to his prison trust account, here the defendant's affidavit does assert valid penological interests supporting the prison's position. As noted above, Warden Dixon claims that it is important for the staff to know the prisoners by name and that continued use of a prisoner's committed name facilitates the desired familiarity. There are obvious difficulties present if prison staff must memorize a second name after having made the effort to learn the first. Accordingly, giving due deference to the expert opinion of Warden Dixon, we find that Ali's claim fails under Turner because the regulation is "reasonably related to legitimate penological interests" and affirm the summary judgment in this regard.

Finally, Ali challenges the prison's refusal to use his new name when it corresponds with him. So interacting with Ali in writing impinges on his free exercise rights and, therefore, must be subjected to a Turner analysis.

In his affidavit, Warden Dixon explains that correspondence with Ali under his new name would create the risk of improper filing of the correspondence. We find Warden Dixon's defense of prison policy to be insufficient to support summary judgment in the defendants' favor. There is no testimony as to whether a risk of administrative misfilings would remain if Ali's new name is simply added to his prison record. The commitment name would not be deleted.

Accordingly, we reverse the summary judgment for the defendants on the issue of the prison's failure to include Ali's new name in its correspondence with him. On remand, the district court should demand greater specificity from the defendants on their claim of administrative burden.

<u>Sosebee v. Murphy</u>
United States Court of Appeals for the Fifteenth Circuit (1986)

Plaintiff Betty Land Sosebee, Administratrix of the Estate of Gary Land decedent, brought an action under 42 U.S.C. § 1983 as a result of the death of decedent while he was incarcerated at the Maximum Security Center in Centerville, Columbia. The district court granted summary judgment on behalf of defendants, the guards on duty at the time of Land's death. Plaintiff appeals that judgment. [1]

On Wednesday, May 6, 1981, decedent Land ate an evening meal which included steak. Thereafter, he complained of pain in the neck and chest area. The next morning, Thursday, May 7, Land was examined by Dr. Neal, a prison doctor. Dr. Neal diagnosed probable gastritis and prescribed Maalox and Donnatal.

Two days later on Saturday, May 9, Dr. Neal was called by a medical technician and told that Land continued to complain of chest pains. Dr. Neal continued to rely upon his original diagnosis and directed that additional medications be provided.

The following day, Sunday, May 10, at 8:30 a.m., decedent was transported from his cell to the infirmary with the same complaints of chest pain. Examined by a medical technician, Land was given Visteril and was scheduled to be checked again on Tuesday, May 1 2. Land was found dead in his cell on Monday, May 11, at 7:20 a.m. A pathological report found that the cause of death was a steak bone piercing the esophagus with infection in the neck structures.

Affidavits from five prisoners who were in cells near to Land during the time of his sickness state that after Land returned from the infirmary on Sunday he became increasingly ill and called for medical attention. When no one responded, the other inmates created a commotion. The defendant guards responded to the effect that Land had been seen by a doctor and that nothing more would be done for him until Monday morning. The defendants threatened the inmates with solitary confinement if the commotion did not cease.

Apparently Land was deathly ill on Sunday. Dr. Neal, in a deposition, stated that for at least ten hours preceding death Land would have· been very pale, sweating profusely, feverish, suffering from severe chest pain, and unable to swallow.

Plaintiff argues that the defendant correctional officers acted with deliberate indifference toward Land's medical condition, thereby giving rise to a § 1983 claim. Specifically, plaintiff contends that had a doctor examined Land subsequent to his Sunday morning visit to the infirmary, certain observable symptoms would have necessarily alerted a doctor to Land's life threatening condition. Plaintiff contends further that the defendant guards prevented Land from receiving timely medical attention.

[1] Grants or denials of summary judgment are subject to de novo review. Summary judgment is to be rendered when "there is no genuine issue as to any material fact and... the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). When considering summary judgment, we must view the facts in the light most favorable to the non-moving party and draw all justifiable inferences in that party's favor. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). A court must exercise great care in granting summary judgment when a party's motives or intentions are at issue. "[A] determination of someone's state of mind usually entails the drawing of factual inferences as to which reasonable men might differ - a function traditionally left to the jury .... " 10A Wright, Federal Practice and Procedure (1983).

Defendants respond by calling for affirmance of the district court's grant of summary judgment because there is no genuine issue of fact on the § 1983 claim and because there is no legal theory on which plaintiff could prevail. We reject this assertion and reverse the granting of summary judgment to defendants.

The apparent seriousness of Land's condition during his last hours of life raises issues of material fact. If the prison guards on duty at that time were aware of Land's physical status but refrained from obtaining medical assistance, an inference of deliberate indifference would arise. The United States Supreme Court has concluded that deliberate indifference to a prisoner's serious illness or injury states a cause of action under § 1983. Estelle v. Gamble (1976). We applied that rule in Loe v. Armistead (15th Cir. 1978), holding that an eleven hour delay by prison officials in seeking a doctor's care for a prisoner's obvious broken arm was a deliberate indifference to the prisoner's medical needs.

The record is replete with evidence from which a jury could rationally find that the guards on duty were aware of Land's serious condition and intentionally abstained from seeking medical help. Taken together, the five affidavits from prisoners who were in nearby cells assert that the guards intentionally ignored the decedent's life-threatening situation and refused to seek medical assistance. Such facts provide a reasonable basis for finding a deliberate indifference to Land's medical needs.

Defendants assert that the absence of doctors in residence at the prison on a Sunday is an unusual circumstance that excuses any obligation they had to obtain that high a level of medical assistance. If that is a fact, it can be argued at the trial level. However, without more information, we cannot affirm the grant of summary judgment.

Hall v. Williams

United States Court of Appeals for the Fifteenth Circuit (1992)

Plaintiff Carl Edward Hall appeals the grant of summary judgment in favor of defendants, who are officers and employees of the Columbia Department of Corrections. Hall was confined at Powhatan Correctional Center, a maximum security facility, when there was a prison riot. The entire facility was put on "Lockdown" status, which confines inmates to their cells.

Hall and other inmates in cellblock C-2 were on lockdown from the date of the riot, November 26, 1989, until they were allowed to return to the mess hall and out-of-cell exercise on April 16, 1990. Hall brought this action under 42 U.S.C. § 1983 alleging violation of the Eighth Amendment because of the confinement to his cell for a period of four and one-half months with no out-of-cell exercise. The district court found that the selection of appropriate security measures is left to the discretion of prison officials and that the decision to lock down C-2 was within the discretion of the defendants and did not violate any of plaintiff's constitutional rights.

We hold that there are disputes as to material facts on the Eighth Amendment claim and that the granting of summary judgment at this stage was error. We reverse and remand for further proceedings on the Eighth Amendment claim.

The lockdown of Powhatan Correctional Center followed a riot or disturbance in its mess hall on November 26, 1989. The entire facility was locked down immediately after the mess hall riot. Six weeks later, all cell blocks were reopened except C-2, which remained locked down until the middle of April 1990.

Hall contends that he was in his cell when the mess hall disturbance occurred. The Institutional Classification Committee (ICC) received "confidential information from an informant that Hall had participated" in the disturbance. The ICC conducted a hearing on January 11, 1990, at which time Hall was cleared of the charge that he was involved in the riot. The ICC recommended that he be returned to the prison's general population, but the defendants contended that there was no bed space available, and Hall remained confined to C-2 and subject to the lockdown until mid-April 1990.

The defendants contend that the lockdown was monitored and evaluated daily and that limited activities and privileges were restored in each cell block as security concerns permitted. Under the facts surrounding this disturbance, the prison administrators determined that recreation was precluded because of security concerns.

Hall alleges that the defendants acted in bad faith in locking down all of C-2 when the warden knew that most of the prisoners in that block had nothing to do with the riot. He further claims that the lockdown was maintained as a retaliatory measure against the inmates of C-2 because of acts that occurred prior to and unconnected with the riot.

The warden denied that leaving Hall in C-2 was a retaliatory measure, but instead claimed that it was based upon security needs and the orderly operation of the institution. He asserted that Hall remained in C-2, after the ICC recommendation, because there was no other bed available.

In Wilson v. Seiter (1991), the Supreme Court adopted a two-part test for claims of Eighth Amendment challenges to conditions of confinement. The test consists of an objective component (was the deprivation sufficiently serious?), and a subjective component (were the prison officials deliberately indifferent to the conditions?).

In evaluating the objective component, we note that it is not disputed that Hall was denied any out-of-cell exercise for almost five months, and he alleges that his cell was too small for exercise. Our analysis begins with Wilson's observation that physical exercise is an "identifiable human need."
But even prior to Wilson, the law was clear that prisoners had a constitutional right to out-of-cell exercise. In Clay v. Miller (15th Cir. 1980)' we held that restricting an inmate's opportunity for physical exercise could rise to the level of cruel and unusual punishment, and that courts must look to the totality of the circumstances in deciding this issue.

The duration of the exercise deprivation is an essential element in determining if there is a constitutional violation. It is clear that complete deprivation of exercise for an extended period of time can violate the Eighth Amendment. Courts have considered duration in terms of days or weeks when setting a constitutional limit, but we have found no case holding that complete exercise denial for as long as four and one-half months is constitutionally insignificant. Hall's allegations make out a prima facie case (complete deprivation of exercise for four and one-half months) as to the objective component, subject of course to the defendants' rebuttal.

The subjective component defined in Wilson v. Seiter is the intent of the responsible prison officials. An inquiry into a prison official's state of mind is required when it is claimed that the official has inflicted cruel and unusual punishment. The subjective element mandates proof of deliberate indifference by prison officials to the plaintiff's basic need for regular exercise.

In Eighth Amendment cases involving conditions of confinement, deliberate indifference may be shown when prison authorities were aware of the objectively cruel conditions and failed to remedy them. The long duration of a cruel prison condition may make it easier to establish knowledge and hence some form of intent.

The affidavits of Hall and Warden Williams create factual issues on the question of intent. There is a dispute as to the reason the warden kept all C-2 inmates on lockdown for almost five months, Hall contending that it was the warden's intent to punish all of the inmates in C-2 for reasons unrelated to the mess hall disturbance. There were 140 inmates in C-2 and even the warden admits that only 41 were charged with offenses arising out of the riot. Keeping all 140 inmates locked down with no effort to segregate those not involved could be viewed as evidence of retaliation. There is a factual dispute as to whether arrangements could reasonably have been made to allow Hall, and the other 98 non-offenders, to exercise out of their cells on a regular basis.

Since there are disputes as to genuine issues of material fact, summary judgment was inappropriate and this case must be remanded for further proceedings.

<u>Mitchell v. Rice</u>
United States Court of Appeals for the Fifteenth Circuit (1989)

In December 1973, James Calvin Mitchell began serving a thirty-year sentence for second degree murder and armed robbery. He was incarcerated at Central Prison in Mission, Columbia. While confined from 1973 to 1983, Mitchell was convicted of three separate incidents of assault with deadly weapons with intent to kill. His prison term was extended for another twenty years as a result of these convictions. Additionally, from 1973 to 1986 Mitchell incurred over seventy prison rule infractions, many of which were violent in nature.

As a result of his July 1983 assaults, prison officials ordered Mitchell shackled in full restraints (hand and leg cuffs) any time he was outside his cell. Despite these physical restraints, Mitchell's menacing behavior persisted. In September 1983, while outside his cell in full restraints, Mitchell attacked the window of a Control Station with a broom handle. This episode led to Mitchell being confined to his cell except for showers twice weekly, and, even then, in full restraints. In accordance with regulations, prison officials provided Mitchell with an exercise manual demonstrating in-cell exercises. In February 1984, seven months after the imposition of full out-of-cell restrictions, Mitchell was allowed to leave his cell for regular exercise, however, still in full restraints.

One year after full restrictions were relaxed, Mitchell's assaultive behavior resumed. In February 1985, Mitchell, in arm and leg restraints, again attacked the Control Station with a mop wringer after refusing to return to his cell. As a result, full out-of-cell restrictions were again imposed.

In March 1986, after eleven months of full restrictions, Mitchell filed a pro se complaint charging various prison officials under 42 U.S.C. § 1983 with numerous Eighth Amendment violations. In total, Mitchell had been subjected to out-of-cell arm and leg restraints for a period of two years and eight months. For eighteen of those months, he was confined to a seventy-two square foot cell without any regular opportunity to exercise outside his cell or any regular exposure to different surroundings, fresh air or sunshine. The district court granted defendant's motion for summary judgment.

It may generally be considered that complete deprivation of exercise for an extended period of time violates Eighth Amendment prohibitions against cruel and unusual punishment. However, there can be exceptional circumstances where the general rule does not apply. This Court has repeatedly stated that when reviewing Eighth Amendment claims, courts must consider the totality of the circumstances. In considering the totality of conditions, elements including the overall duration of incarceration, the length of time for which prisoners are locked in their cells each day, and the practical opportunities for the institution to provide prisoners with

increased exercise opportunities must be considered. Thus, confinement conditions imposed under one set of circumstances may constitute an Eighth Amendment violation; yet the same conditions, imposed under different circumstances, would not.

By adopting a totality of the circumstances test, we have never held that denial of out-of-cell exercise opportunities is per se unconstitutional cruel and unusual punishment. However, our decisions at the time of the incidents in this case indicated that generally a prisoner should be permitted some regular out-of-cell exercise.

Although the cases in this area have generally established the necessity for some out-of-cell exercise, courts concede that penological considerations may, in certain circumstances, justify restrictions. The one court to specifically address justifications for exercise restrictions limited them to "unusual circumstances," or circumstances where "disciplinary needs made [outdoor exercise) impossible." Spain v. Procunier (9th Cir. 1979). In that case, the court did not accept the state's justification that outdoor exercise was withheld to prevent attacks on prison staff and other inmates. It agreed on the necessity of segregating violent inmates from the population in general, but questioned why" other exercise arrangements were not made." Further, it would not allow cost to excuse constitutional violations. It seems to us proper to require a similar showing of infeasibility of alternatives.

Having set forth the applicable law, we now consider the actions of the prison officials in this case. We find that a reasonable official should have known that in most circumstances withholding all exercise opportunities from a prisoner over an extended period of time, such as seven or eleven months, violates the Eighth Amendment. Without additional evidence, these conditions could be said to violate our evolving constitutional standards of decency for penal confinement.

Prison officials contend, however, that even if regular exercise opportunities are constitutionally required for prisoners as a general matter, their actions in this case were not unconstitutional. They claim that Mitchell's incorrigibly assaultive nature demanded the imposed restrictions. The officials further claim that the in-cell exercise manual provided Mitchell a meaningful substitute to out-of-cell exercise.

Mitchell's unmanageable, violent nature may present exceptional circumstances, justifying the deprivation. The facts on the record, however, are inadequate for such a determination. We are not penologists and, without more than the record before us, cannot properly judge the necessity or adequacy of officials' actions. But a mere assertion of necessity cannot relieve prison officials of Eighth Amendment requirements. A detailed review of the feasibility of alternatives in this case, such as solitary out-of-cell exercise periods or the adequacy of in-cell exercise, would need to precede a final judgment.

Because the record does not adequately address all the issues necessary to determine whether prison officials violated clearly established law, we cannot affirm a grant of summary judgment. We remand this case for further findings of fact in order to determine whether prison officials' conduct in this case constituted cruel and unusual punishment under the principles stated.