INCARCERATION IN WYOMING

2013 Report on Prison & Jail Complaints

ACLU
AMERICAN CIVIL LIBERTIES UNION of WYOMING

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May 2014

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INCARCERATION IN WYOMING

INTRODUCTION

The American Civil Liberties Union (ACLU) is a nationwide nonprofit organization that works to protect civil liberties. The ACLU is dedicated to ensuring that our nation's prison, jails, juvenile facilities and immigration detention centers comply with the Constitution, state and federal law, and international human rights principles. Through litigation, public education and advocacy, the ACLU works to ensure that conditions of confinement are constitutional and consistent with health, safety and human dignity.

Promoting safe and humane conditions in jails and prisons in Wyoming remain among our highest priorities. This is our third annual report based on complaints we have received about jail and prison conditions in the state of Wyoming. In 2013, there were notable increases in requests by prisoners in Wyoming Department of Corrections facilities for assistance on criminal cases, and complaints of conditions in jails, and decreases in medical complaints.

OVERINCARCERATION

The Cost of Overincarceration

More Americans are imprisoned than ever before at great cost to taxpayers, with limited benefits to public safety. The United States is the world's largest incarcerator, both by sheer numbers and by percentage of the population.[1] By 2008, more than 1 in 100 adults were in prison or jail in America,[2] and 1 in 31 adults were under some form of correctional control (incarcerated or under community supervision).[3] And though crime rates have been falling, prison populations continue to grow, and taxpayers spend more money each year on incarceration. Wyoming does not buck these trends.

Wyoming's crime rate is 22% lower than the national average, but we incarcerate our citizens at a rate only about 4% lower than the national average.[4] Mirroring the rest of the country, Wyoming's crime rate has steadily declined, but our prison population has continued to grow.

Between 2007 and 2012, the number of crimes in Wyoming dropped by nearly 3,000, but our prison population increased by more than 100. The biennial budget for the Wyoming Department of Corrections grew from $217 million to $296 million, and rose to over $300 million in 2013-14. On average, it costs between $35,000-$53,000 per prisoner per year to keep people in prison in Wyoming.[5]

Locking people up is a costly business. While how much a state spends on its prisons is important, we must recognize that prison officials are responsible for ensuring their prisons are safe, secure, and humane – a necessarily expensive undertaking.

Year	Crimes	Inmates	Probation & Parole	Biennial Budget
2007	22,249	2,052	6,674	2007-08 $217,498,918
2008	21,731	2,017	6,966	
2009	21,014	2,033	7,488	2009-10 $243,872,664
2010	20,567	2,058	6,322	
2011	19,390	2,115	6,318	2011-12 $296,113,155
2012	19,348	2,166	6,388	
2013				2013-14 $312,195,810

Sources:
Wyoming Department of Corrections Annual Reports 2007, 2008, 2009, 2010, 211, 2012, *available at* corrections.wy.gov/about/annual_report.html.

Crime in Wyoming 2012. DCI Uniform Crime Report, 2012, p.11 *available at* docs.google.com/a/wyo.gov/viewer?a=v&pid=sites&srcid=d3lvLmdvdnxkY2ktLS1wdWJsaWN8Z3g6Mzg2NjFiNmQ3MWU2NjBiZQ.

Wyoming Department of Administration and Finance, Biennium Agency Budgets, Wyoming Fiscal Year Budgets (2007-08, 2009-10, 2011-12, 2013-14), *available at* https://sites.google.com/a/wyo.gov/ai/budget-division/budget-fiscal-years.

The Causes of Overincarceration

The U.S. prison population has grown not because of an increase in crime, but because changes in sentencing policy and prosecution priorities put people behind bars more often, where they stay for longer periods of time.[6] The war on drugs, along with the adoption of mandatory minimums, truth in sentencing, three strikes and other "tough on crime" policies have resulted in an explosion of the numbers of people in prison, on parole, and on probation.[7]

There are 2.3 million people behind bars in this country; that's more than either China or Russia.[8] America's prisons are populated not only with violent offenders, but with nonviolent offenders, the mentally ill, the elderly, people in need of drug treatment, and children charged as adults. Over a million people are sitting in a cell not based on any dangerous behavior, but for nonviolent crimes.[9]

> As I've been telling anybody who will listen for the last ten years, let's use our prison beds for people we're afraid of. Let's not use them for people we're mad at.
> --Robert Lampert, Director of Wyoming Department of Corrections.[10]

In Wyoming, less than one tenth of crimes are considered violent – property crimes alone constitute approximately 91% of the crimes in the state.[11]

A quarter of those incarcerated in America are locked up for drug offenses.[12] In 2010, at least 67% all drug arrests in Wyoming were for marijuana possession alone.[13] And Wyoming ranks fifth in the country in per capita expenditures on enforcement of marijuana laws,[14] to the tune of $9.1 million in 2010.[15]

Many people who are incarcerated pose no threat to public safety, but will be locked away for years because of extreme sentencing laws and selective prosecution. Our government wastes precious taxpayer dollars when it incarcerates non-violent offenders whose actions would be better addressed through alternatives that hold them accountable at less cost to taxpayers. At a certain point, increases in incarceration have diminishing returns in making communities safer, and costs our communities in other ways.

Community Costs of Overincarceration

In the current fiscal climate, states are increasingly forced to do more with less and make difficult decisions about competing priorities. Spending large amounts on incarceration leaves less funding for other key initiatives, like education and healthcare. In addition, removing so many people from the community means there are fewer people contributing to the economy, further destabilizing already struggling neighborhoods. Moreover, children with parents in prison are more likely to be involved in the criminal justice system themselves, to suffer from mental illness, to abuse drugs, to do poorly in school, and to have a harder time maintaining gainful employment.[16] Research indicates there are better ways to reduce crime than putting record numbers of people behind bars.

How to Reduce Overincarceration

Policy makers can reduce spending without jeopardizing public safety – such as modifying sentence and release policies, strengthening strategies to reduce recidivism, and boosting operating efficiency. For example, we can:

- Expand the use of deferred adjudication and expungement of criminal records for low-level offenders
- Reduce reliance on pre-trial detention
- Increase use of alternatives to incarceration, such as community sentencing
- Institute a review process to consider modification of sentence after a period of years
- Expand time credits for good behavior
- Legalize or decriminalize marijuana use and possession

Studies have shown that prison does not deter crime. In addition to keeping communities safe and treating people fairly, our criminal justice system should be cost effective – using taxpayer dollars and public resources wisely. We can reduce the amount we spend on corrections – not by slashing budgets and forcing prison officials to take shortcuts and cut rehabilitative programming, but by reconsidering who we send to prison in the first place. Applying fiscal responsibility, accountability, and evidence-based practices, states around the nation are adopting bipartisan criminal justice reforms. Wyoming lawmakers can do the same.[17]

SNAPSHOT OF INCARCERATION IN WYOMING

Jails

Wyoming has 23 counties. There is a jail in each county, and some additional limited holding facilities [see County Jails, page 18]. According to the last jail census taken by the U.S Department of Justice, there were 1,585 prisoners in county jails.[18] Wyoming still lacks statewide standards or inspection programs of jails.[19]

Prisons & Probation/Parole

The Wyoming Department of Corrections Division of Prisons operates five state-run adult facilities, and three private adult community corrections centers [see Wyoming Department of Corrections, page 9]. The average daily prison inmate population in 2012 was 2,166.[20] The Division of Field Services supervised an average daily count of 6,388 probationers and parolees through 25 field offices.[21]

HOW THE ACLU COMPLAINT PROCESS WORKS

The Wyoming ACLU receives complaints about prison conditions and other legal claims from prisoners and their attorneys, friends, and concerned family members. We only accept a small percentage of complaints that we receive for investigation, advocacy, and/or litigation, generally limited to issues that have the potential to affect large numbers of prisoners. Except in cases of emergency, we encourage prisoners to work with jail and prison officials to resolve complaints through administrative grievance

processes before we consider contacting officials on their behalf.[22] We also provide Know Your Rights publications to increase prisoners' awareness of their constitutional rights so they can advocate on their own behalf (see Know Your Rights, page 38). We do not assist prisoners with their criminal cases.

COMPLAINTS

In 2013, there were notable increases in requests by prisoners in Wyoming Department of Corrections facilities for assistance on criminal cases, and complaints of conditions in jails. There was also a significant decrease in complaints of inadequate medical care. We are encouraged by the reduction, however, due to the nature of the complaints we receive, we believe that medical care remains a serious problem for prisoners.[23]

We are unable to determine whether each complaint is colorable because we lack the resources to investigate every complaint. When we investigate, we find that many are. The actual number of complaints is not necessarily representative of the number of problems at a facility. A facility may have a high number of complaints, but the facility promptly addresses complaints. On the other hand, prisoners may decide not to bother writing because a facility is so indifferent to the needs of prisoners.

We have included a series of graphs in this report to illustrate the types of complaints we receive.[24] The total number of complaints does not correspond to the number of letters we receive; sometimes one prisoner complains about more than one issue, and other times we receive multiple letters from one prisoner about one issue. This latter scenario only results in the counting of one complaint.

Complaint	Prisons 2012	Prisons 2013	*Change 2012-13*	Jails 2012	Jails 2013	*Change 2012-13*
Medical[25]	30.0%	14.8%	*-15.2%*	27.2%	24.2%	*-3.0%*
Personal Safety[26]	6.5%	10.9%	*+4.4%*	8.4%	5.5%	*-2.9%*
Civil Liberties[27]	14.7%	16.4%	*+1.7%*	15.5%	15.9%	*+0.4%*
Conditions[28]	8.3%	9.3%	*+1.0%*	6.7%	12.8%	*+6.1%*
Due Process[29]	15.9%	13.1%	*-2.8%*	7.5%	6.9%	*-0.6%*
Criminal Cases[30]	6.5%	14.8%	*+8.3%*	18.4%	20.1%	*+1.7%*
Other[31]	18.3%	15.3%	*-3.0%*	16.3%	14.5%	*-1.8%*

CONCLUSION

The ACLU will continue to work to reduce incarceration in America and in Wyoming; for those who remain incarcerated, we will advocate on their behalf for safe and humane conditions in jails and prisons.

For more information, please visit www.aclu-wy.org, or contact us:
ACLU of Wyoming
P.O. Box 20706
Cheyenne, WY 82003

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[1] *One in 100: Behind Bars in America*. The Pew Center on the States, February 2008, p.5, available at www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/sentencing_and_corrections/one_in_100.pf.
[2] *One in 100*, p.5.
[3] *One in 31: The Long Reach of American Corrections*. The Pew Center on the States, March 2009, p.1, available at http://www.pewstates.org/uploadedFiles/PCS_Assets/2009/PSPP_1in31_report_FINAL_WEB_3-26-09.pdf.
[4] National Institute of Corrections, U.S. Department of Justice, *Corrections Statistics for the State of Wyoming*, available at http://nicic.gov/StateStats/?st=wy#footwrap. Wyoming incarcerates its citizens at a rate of 385 per 100,000 people.
[5] Robert Lampert, Director of WDOC, Letter to Joint Appropriation Interim Committee, November 29, 2010, available at http://legisweb.state.wy.us/ReportsDue/2010/Report%20ID%20685.pdf.
[6] *One in* 100, p.3.
[7] *One in* 100, p.3.
[8] *One in* 100, p.5.
[9] Harry Belafonte, *We Must Stop Throwing People Away*, Blog of Rights, American Civil Liberties Union, March 6, 2014, available at https://www.aclu.org/blog/criminal-law-reform/we-must-stop-throwing-people-away.
[10] Greg Nickerson, *Wyoming budget keeps cuts, boosts salaries and local government,* Wyofile, February 11, 2014, available at http://wyofile.com/gregory_nickerson/wyoming-budget-keeps-cuts-boost-salaries-local-government.
[11] *Corrections Statistics for the State of Wyoming*.
[12] *Drug Sentencing and Penalties*, American Civil Liberties Union, https://www.aclu.org/criminal-law-reform/drug-sentencing-and-penalties.
[13] *The War on Marijuana in Black and White*. American Civil Liberties Union, June 2013, p.14, available at https://www.aclu.org/files/assets/1114413-mj-report-rfs-rel1.pdf.
[14] *The War on Marijuana in Black and White*. p.23, 78.
[15] *The War on Marijuana in Black and White*. p.185.
[16] *Unlocking America: Why and How to Reduce America's Prison Population*. The JFA Institute, November 2007, p.14, available at http://www.jfa-associates.com/publications/srs/UnlockingAmerica.pdf.
[17] For more recommendations on reforming pre-trial, sentencing, parole, and probation systems, see *Smart Reform is Possible*. American Civil Liberties Union, August 2011, available at www.aclu.org/criminal-law-reform/smart-reform-possible-states-reducing-incarceration-rates-and-costs-while.
[18] Bureau of Justice Statistics, Office of Justice Programs, Department of Justice, *2006 Census of Jail Facilities* 17 (2006), available at http://bjs.ojp.usdoj.gov/content/pub/pdf/cjf06.pdf.
[19] National Institute of Corrections, U.S. Department of Justice, *Corrections Statistics for the State of Wyoming*, 2011 Crime, available at http://nicic.gov/StateStats/?st=wy#footwrap.
[20] WDOC Annual Report 2012.
[21] WDOC Annual Report 2012.

[22] This is in part due to the Prisoner Litigation Reform Act which requires prisoners to exhaust the administrative prior to filing a federal lawsuit. Title VIII of Pub. L. 104-134, 110 Stat. 1321.
[23] Willow Belden, *Inmates Say Jails and Prisons Ignore Medical Needs*, Open Spaces, Wyoming Public Media, April 25, 2014, available at http://wyomingpublicmedia.org/post/inmates-say-jails-and-prisons-ignore-medical-needs.
[24] There are no individual graphs for institutions with fewer than five complaints.
[25] *Medical* includes medical care, mental health, dental health, and women's health.
[26] *Personal safety* includes excessive force by guards, inmate assaults, and sexual assaults.
[27] *Civil liberties* include access to courts, religious freedom and expression, correspondence, disability accommodations, personal property, privacy, access to publications, visitation, and phones.
[28] *Conditions of confinement* include excessive heat or cold, sanitation, lighting, furnishings, laundry, food, clothing, and exercise.
[29] *Due process* includes classification, segregations, disciplinary matters, and retaliation.
[30] *Criminal* includes request for assistance on trials, appeals, probation and parole, and collateral sentencing matters.
[31] *Other* includes general requests for information and other miscellaneous complaints.

WYOMING DEPARTMENT OF CORRECTIONS
-LIST OF INSTITUTIONS-

Wyoming Department of Corrections

1934 Wyott Drive, Suite 100
Cheyenne, WY 82002
Main: 307-777-7208
http://corrections.wy.gov/doc/index.html

Wyoming State Penitentiary

2900 S. Higley Road/P.O. Box 400
Rawlins, WY 82301-0400
Warden: Eddie Wilson
Main: 307.328.1441
http://corrections.wy.gov/institutions/wsp/index.html

Wyoming Medium Correctional Institution

7076 Road 55F
Torrington, WY 82240
Warden: Steve Hargett
Main: 307.532.3198
http://corrections.wy.gov/institutions/wmci/index.html

Wyoming Honor Conservation Camp & Boot Camp

40 Pippen Road/P.O. Box 160
Newcastle, WY 82701-0160
Warden: Mike Murphy
Main: 307.746.4436
http://corrections.wy.gov/institutions/whcc/index.html

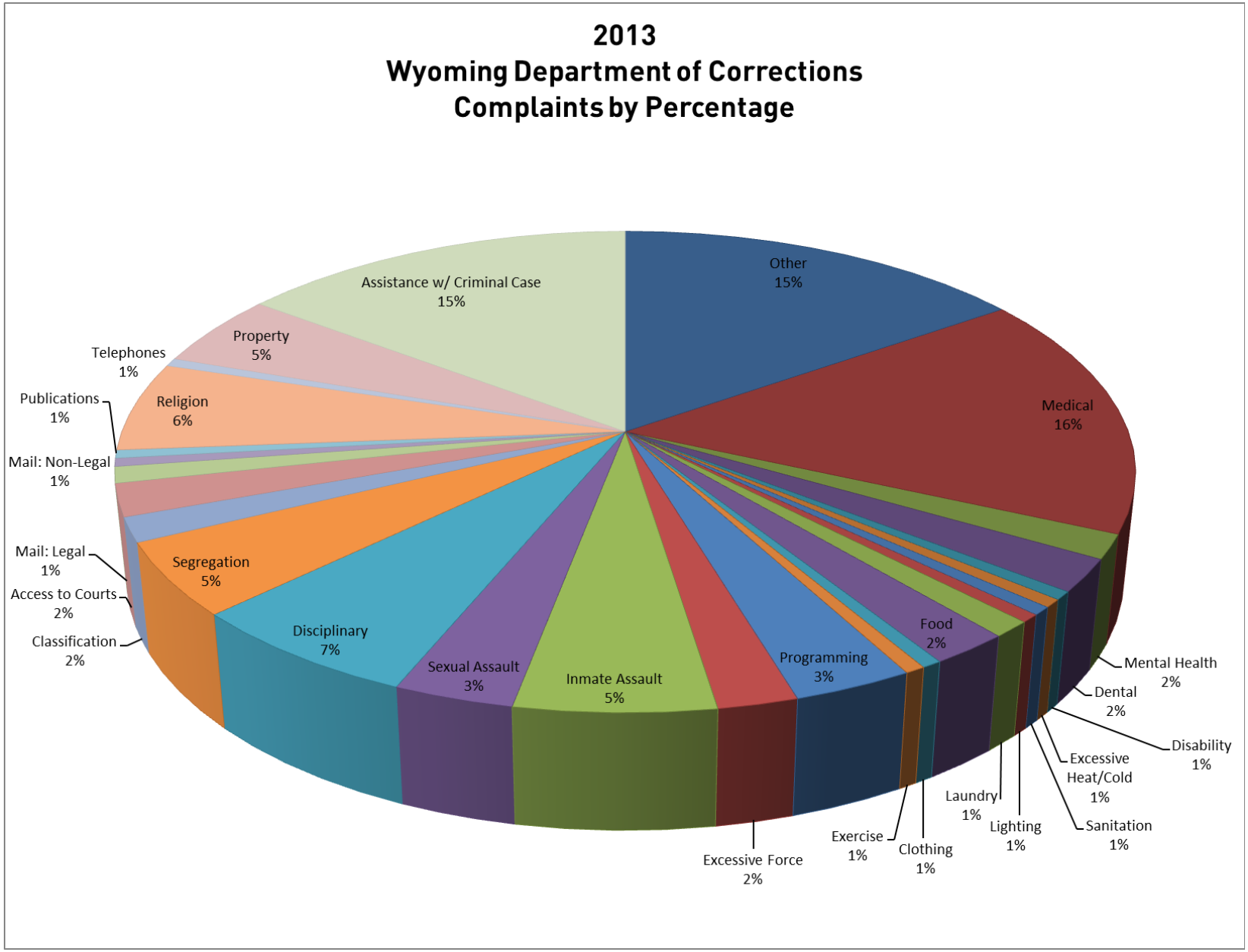
Wyoming Honor Farm

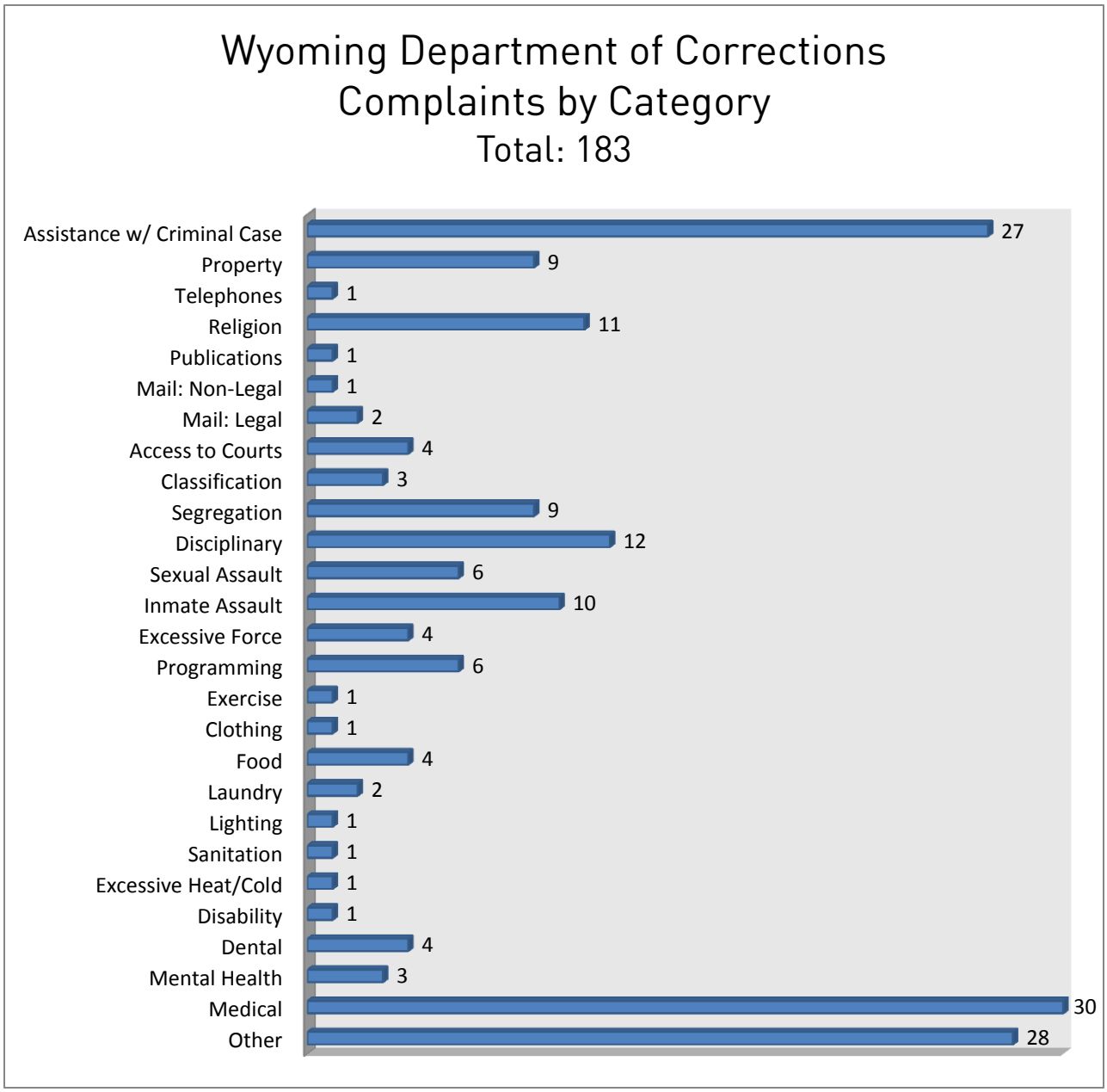
40 Honor Farm Road
Riverton, WY 82501-9411
Warden: Michael Pacheco
Main: 307.856.9578
http://corrections.wy.gov/institutions/whf/index.html

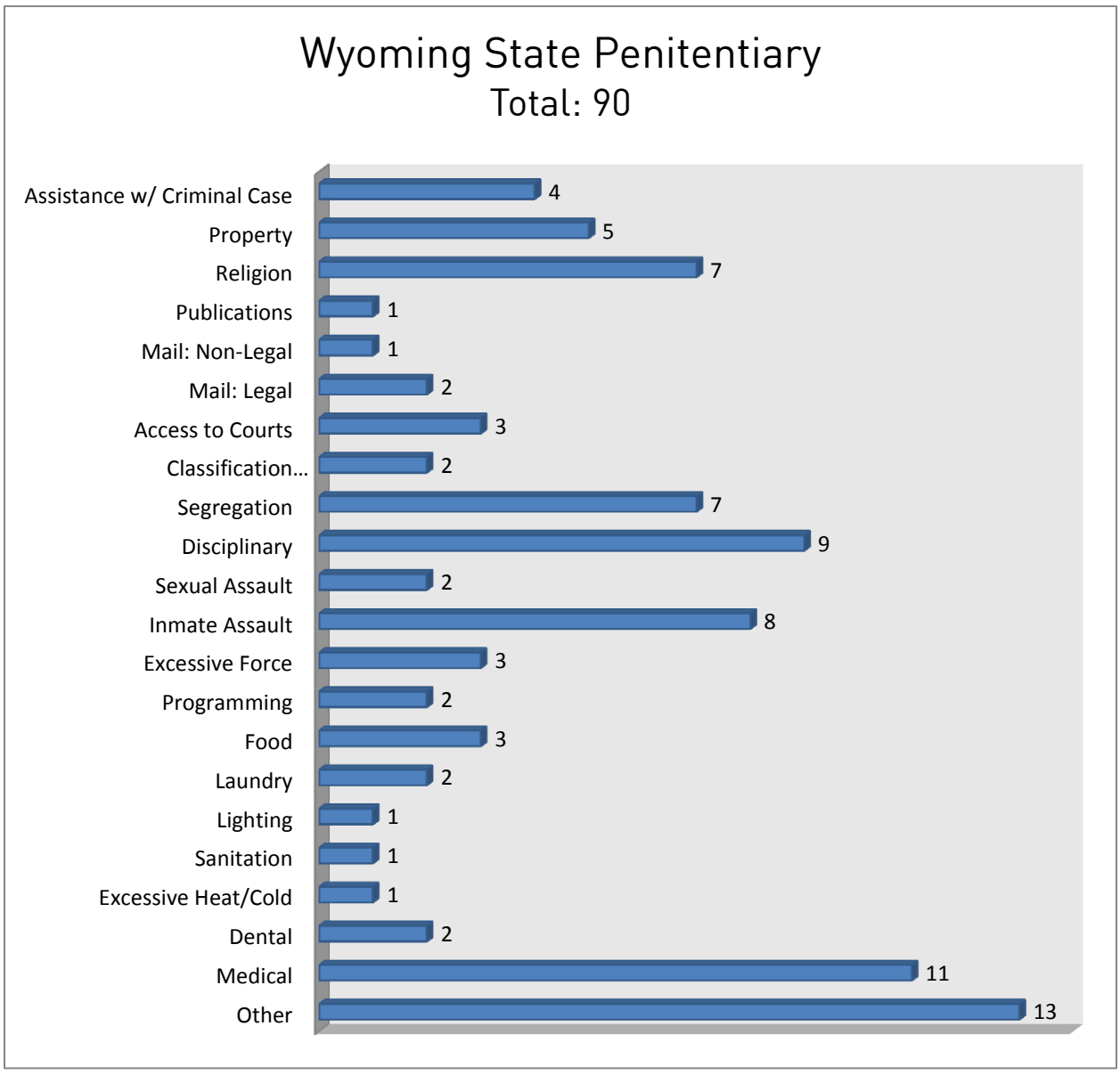
Wyoming Women's Center

1000 West Griffith/P.O. Box 300
Lusk, WY 82225
Warden: Phil Myer
Main: 307.334.3693
http://corrections.wy.gov/institutions/wwc/index.html

WYOMING DEPARTMENT OF CORRECTIONS
-COMPLAINTS-


2013
Wyoming Department of Corrections
Complaints by Percentage
Other 15%
Medical 16%
Mental Health 2%
Dental 2%
Disability 1%
Excessive Heat/Cold 1%
Sanitation 1%
Lighting 1%
Laundry 1%
Food 2%
Programming 3%
Exercise 1%
Clothing 1%
Excessive Force 2%
Inmate Assault 5%
Sexual Assault 3%
Disciplinary 7%
Segregation 5%
Classification 2%
Access to Courts 2%
Mail: Legal 1%
Mail: Non-Legal 1%
Publications 1%
Telephones 1%
Religion 6%
Property 5%
Assistance w/ Criminal Case 15%


Wyoming Department of Corrections
Complaints by Category
Total: 183
Assistance w/ Criminal Case 27
Property 9
Telephones 1
Religion 11
Publications 1
Mail: Non-Legal 1
Mail: Legal 2
Access to Courts 4
Classification 3
Segregation 9
Disciplinary 12
Sexual Assault 6
Inmate Assault 10
Excessive Force 4
Programming 6
Exercise 1
Clothing 1
Food 4
Laundry 2
Lighting 1
Sanitation 1
Excessive Heat/Cold 1
Disability 1
Dental 4
Mental Health 3
Medical 30
Other 28


Wyoming State Penitentiary
Total: 90
Assistance w/ Criminal Case
Property
Religion
Publications
Mail: Non-Legal
Mail: Legal
Access to Courts
Classification...
Segregation
Disciplinary
Sexual Assault
Inmate Assault
Excessive Force
Programming
Food
Laundry
Lighting
Sanitation
Excessive Heat/Cold
Dental
Medical
Other
4
5
7
1
1
2
3
2
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9
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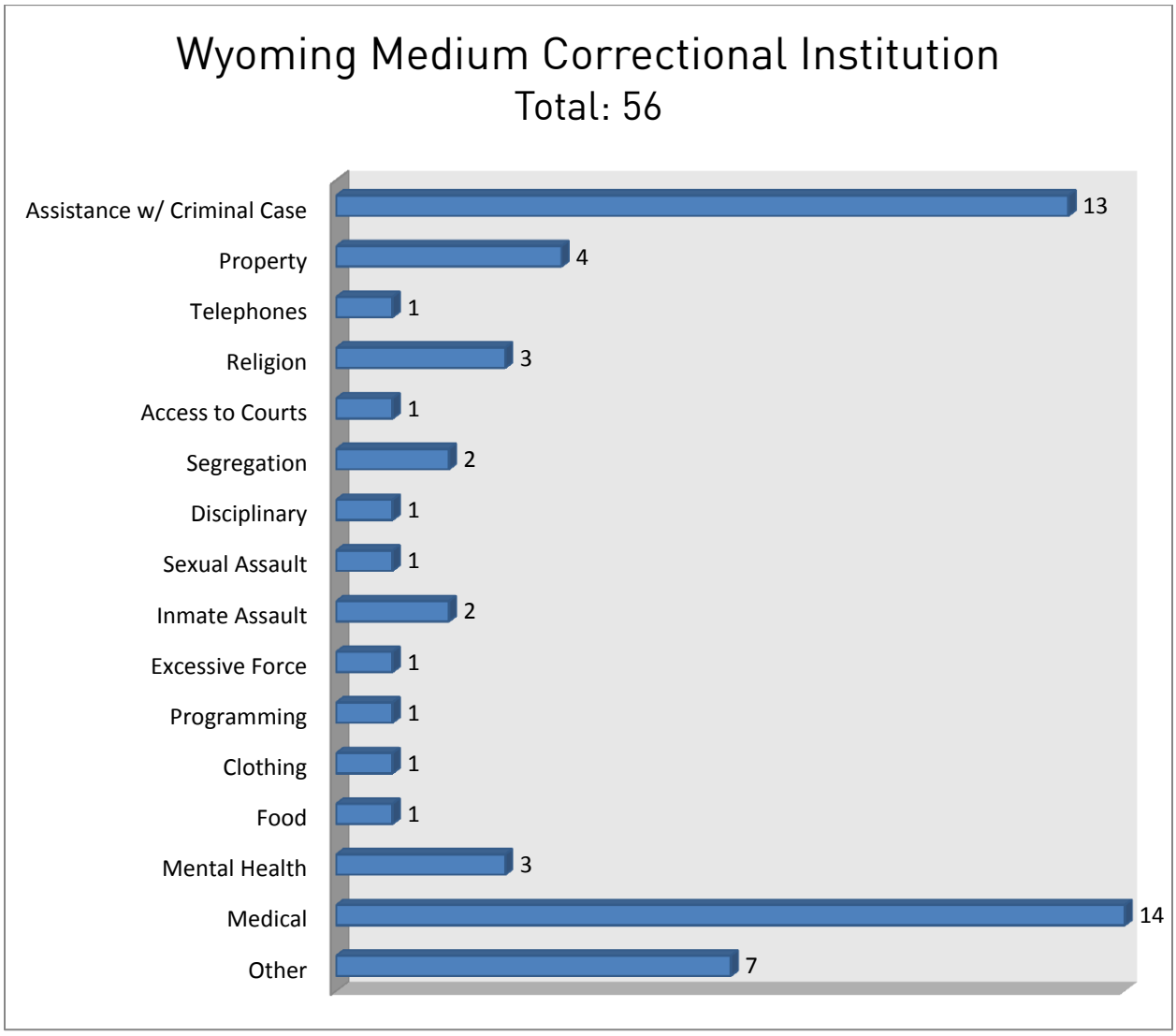
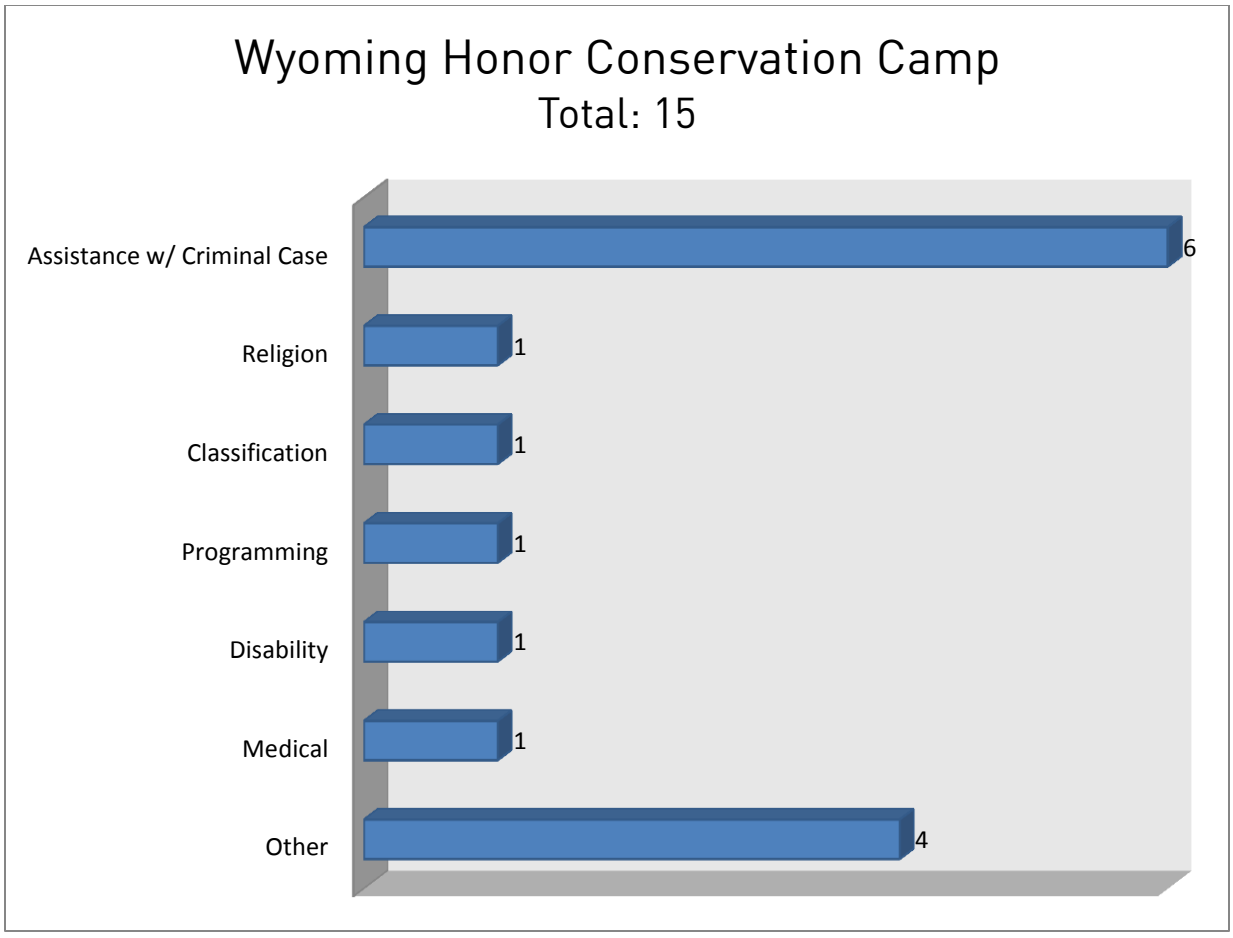
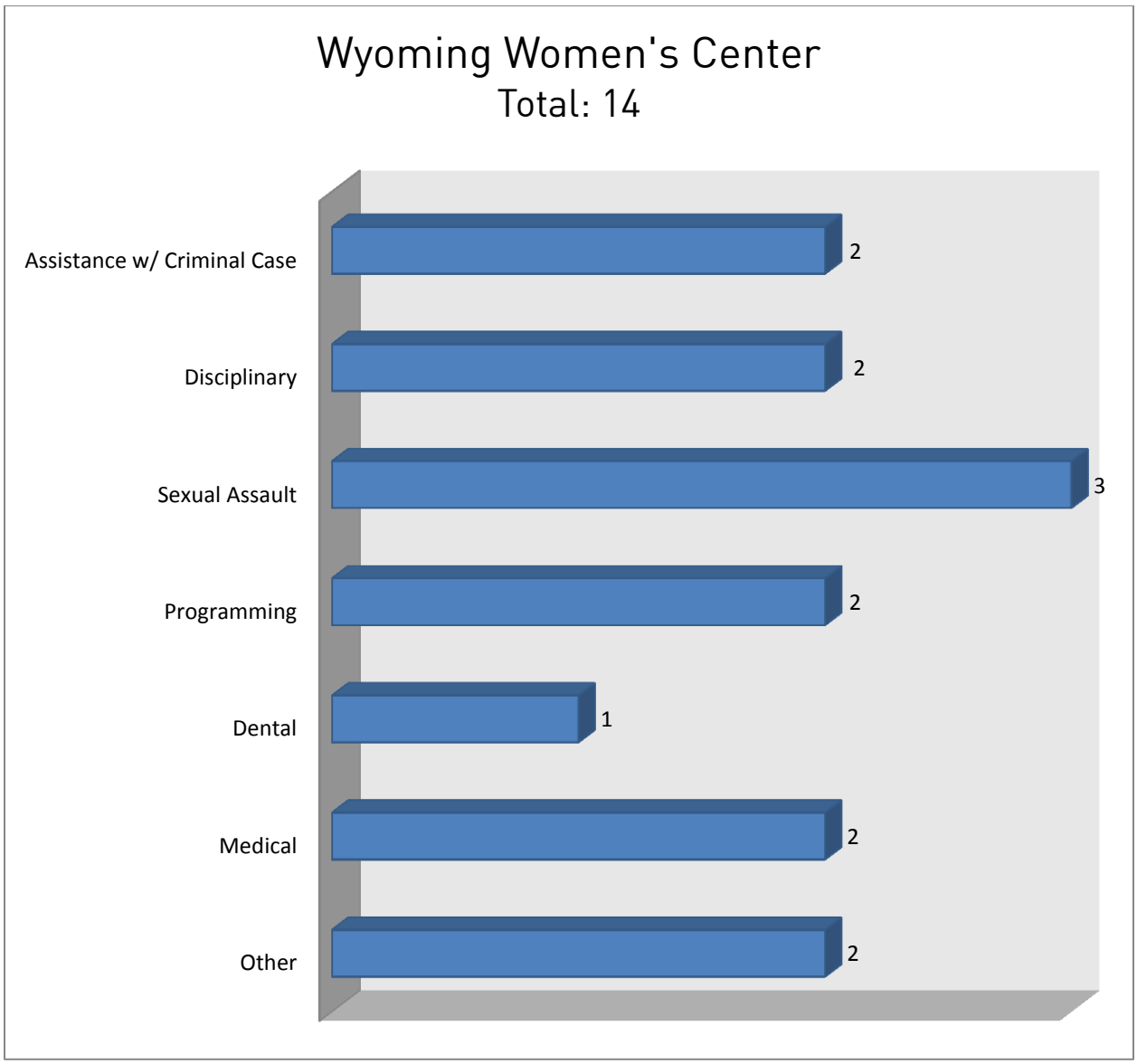
8
3
2
3
2
1
1
1
2
11
13


Wyoming Medium Correctional Institution
Total: 56
Assistance w/ Criminal Case
13
Property
4
Telephones
1
Religion
3
Access to Courts
1
Segregation
2
Disciplinary
1
Sexual Assault
1
Inmate Assault
2
Excessive Force
1
Programming
1
Clothing
1
Food
1
Mental Health
3
Medical
14
Other
7


Wyoming Honor Conservation Camp
Total: 15
Assistance w/ Criminal Case
Religion
Classification
Programming
Disability
Medical
Other
6
1
1
1
1
1
4


Wyoming Women's Center
Total: 14
Assistance w/ Criminal Case
2
Disciplinary
2
Sexual Assault
3
Programming
2
Dental
1
Medical
2
Other
2

COUNTY JAILS
-LIST OF COUNTY DETENTION CENTERS-

Albany County Detention Center

420 East Ivinson St
Laramie, WY 82070
(307) 721-5391
http://www.co.albany.wy.us/detention-center.aspx

Big Horn County Detention Center

355 East 5th Street
Lovell, WY 82431
(307) 548-6784
http://www.bighorncountywy.gov/dep-attorney-detention.htm

Campbell County Detention Center

600 West Boxelder Road
Gillette, WY 82716
(307) 687-6138
http://www.ccgov.net/departments/Sheriff/html/detention.html

Carbon County Detention Center

1302 East Daily/P.O. Box 190
Rawlins, WY 82301
(307) 328-7711
http://www.carbonwy.com/index.aspx?nid=950

Converse County Detention Center

107 North 5th Street
Douglas, WY 82633
(307) 358-4700
http://www.conversesheriff.info/detention-center/

Crook County Detention Center

309 Cleveland Avenue
Sundance, WY 82729
(307) 283-1225
http://www.crookcounty.wy.gov/elected_officials/sheriff_s_department/crook_county_detention_facility.php

Fremont County Detention Center

460 Railroad Street
Lander, WY 82520
(307) 857-3610
http://fremontcountywy.org/sheriff/

Goshen County Detention Center

2120 East B Street
Torrington, WY 82240
(307) 532-5917
http://goshensheriff.org/departments/detention

Hot Springs County Detention Center

417 Arapahoe
Thermopolis, WY 82443
(304) 864-3951
http://www.hscounty.com/departments/sheriff/default.aspx

Johnson County Detention Center

639 Fort Street
Buffalo, WY 82834
(307) 684-5581
http://www.johnsoncountywyoming.org/government/sheriff/detention.html

Laramie County Detention Center

1910 Pioneer Avenue
Cheyenne, WY 82001
(307) 633-4740
http://www.laramiecounty.com/_departments/_sheriff/inmate.asp

Lincoln County Detention Center

1032 Beech Street
Kemmerer, WY 83101
(307) 877-3971
http://www.lcwy.org/departments/sheriff/SheriffCorrections.php

Natrona County Detention Center

1100 Bruce Lane
Casper, WY 82604
(307) 234-3757
http://www.natrona.net/index.aspx?NID=121

Niobrara County Detention Center

416 South Elm Street/P.O. Box 1085
Lusk, WY 82225
(307) 334-2240
http://www.niobraracountysheriff.org/Detention.html

Park County Detention Center

1402 River View Drive
Cody, WY 82414
(307) 754-8761
http://www.parkcountysheriff.net/detention.htm

Platte County Detention Center

850 Maple Street/P.O. Box 1029
Wheatland, WY 82201
(307) 322-2331
http://www.plattecountywyoming.com/Sheriff/Detention.aspx

Sheridan County Detention Center

54 West 13th Street
Sheridan, WY 82801
(307) 672-5623
http://www.sheridancounty.com/sheriff/detentions.html

Sublette County Detention Center

312 Winkleman Avenue
Big Piney, WY 83113
(307) 276-5448
http://www.sublettewyo.com/index.aspx?nid=222

Sweetwater County Detention Center

50140 US 191
Rock Springs, WY 82901
(307) 352-4900
http://www.sweet.wy.us/index.aspx?NID=90

Teton County Detention Center

175 South Willow Street
Jackson, WY 83001
(307) 733-2331
http://www.tetonsheriff.org/detention.aspx

Uinta County Detention Center

77 County Road 109
Evanston, WY 82930
(307) 783-1000
http://www.tetonsheriff.org/detention.aspx

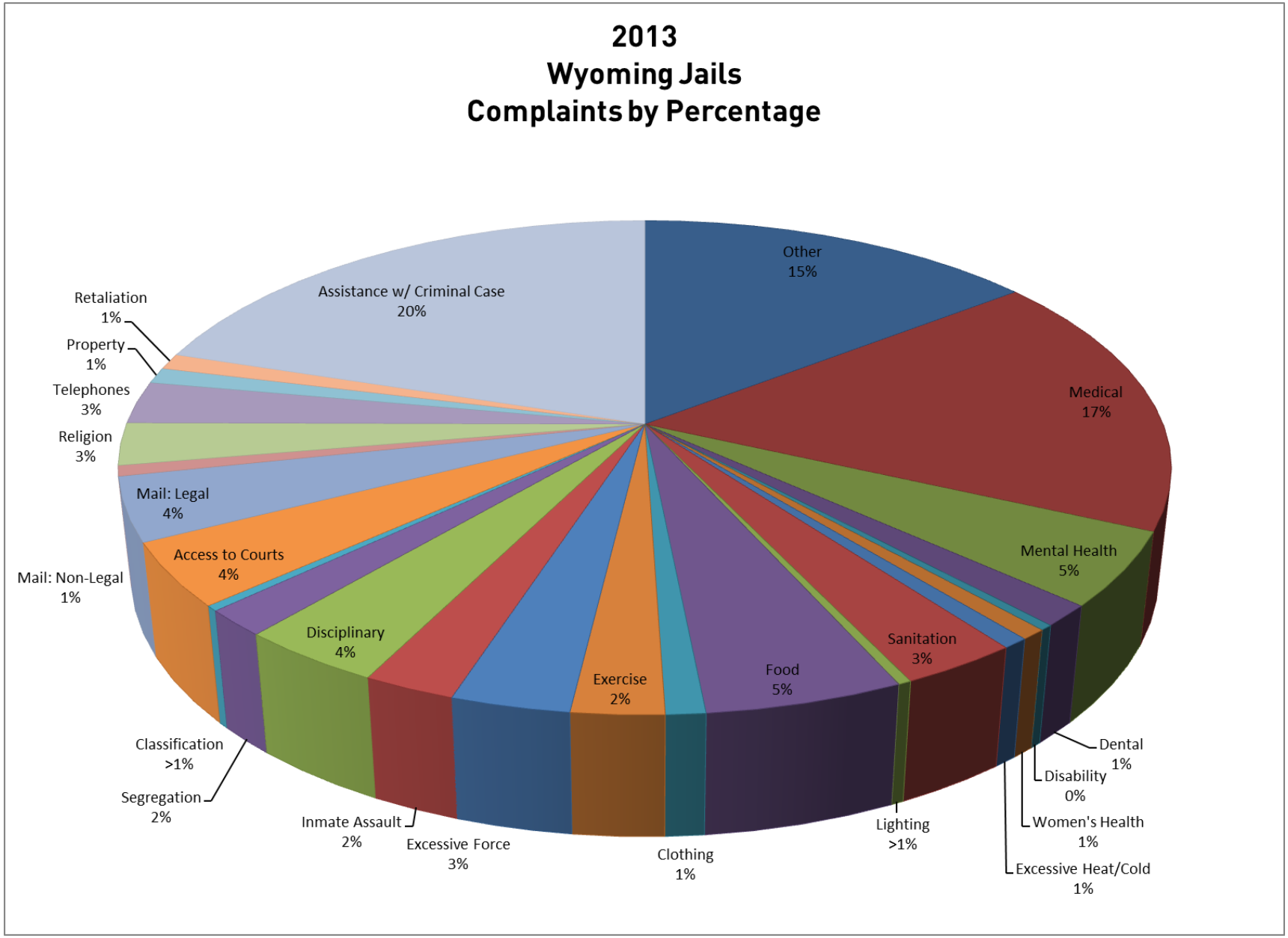
Washakie County Detention Center

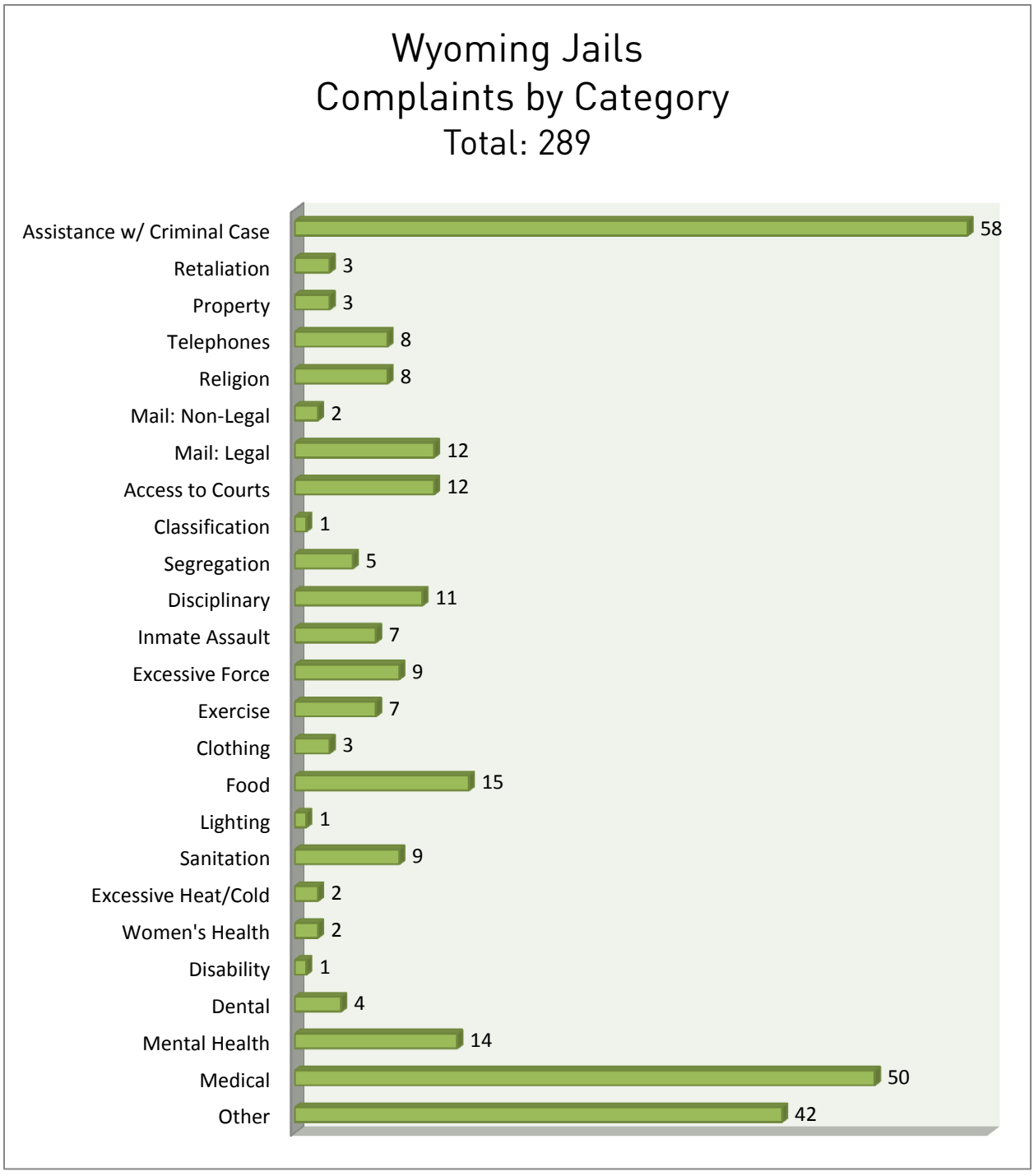
100 North 10th Street
Worland, WY 82401
(304) 347-4581
www.washakiecounty.net/sheriff

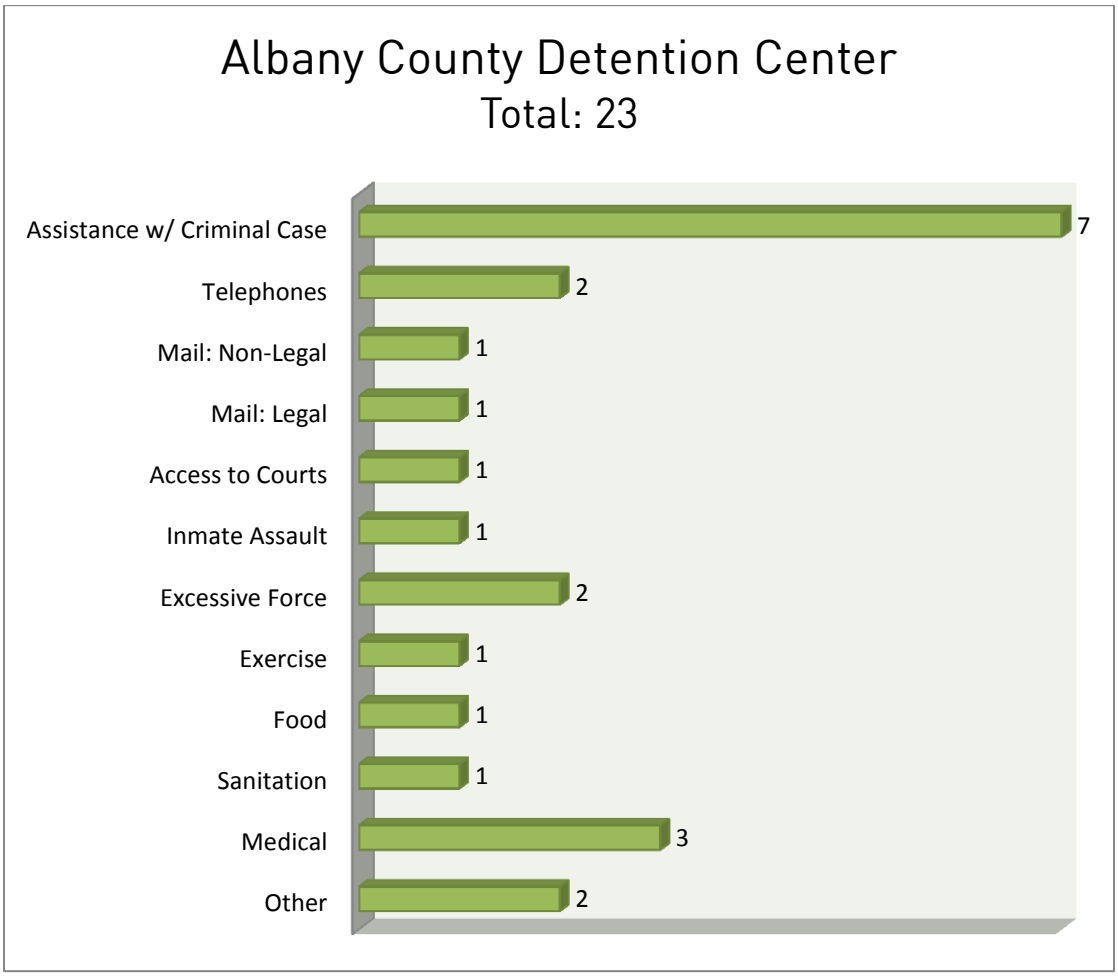
Weston County Detention Center

25 North Sumner Avenue
Newcastle, WY 82701
(307) 746-4441
http://www.westongov.com/_departments/_county_sheriff/detention_center.asp

COUNTY JAILS
-COMPLAINTS-


2013
Wyoming Jails
Complaints by Percentage
Other 15%
Medical 17%
Mental Health 5%
Sanitation 3%
Food 5%
Exercise 2%
Clothing 1%
Lighting >1%
Excessive Heat/Cold 1%
Women's Health 1%
Disability 0%
Dental 1%
Excessive Force 3%
Inmate Assault 2%
Segregation 2%
Classification >1%
Disciplinary 4%
Access to Courts 4%
Mail: Non-Legal 1%
Mail: Legal 4%
Religion 3%
Telephones 3%
Property 1%
Retaliation 1%
Assistance w/ Criminal Case 20%


Wyoming Jails
Complaints by Category
Total: 289
Assistance w/ Criminal Case 58
Retaliation 3
Property 3
Telephones 8
Religion 8
Mail: Non-Legal 2
Mail: Legal 12
Access to Courts 12
Classification 1
Segregation 5
Disciplinary 11
Inmate Assault 7
Excessive Force 9
Exercise 7
Clothing 3
Food 15
Lighting 1
Sanitation 9
Excessive Heat/Cold 2
Women's Health 2
Disability 1
Dental 4
Mental Health 14
Medical 50
Other 42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Assistance w/ Criminal Case
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Mail: Non-Legal
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Mail: Legal
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Inmate Assault
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Excessive Force
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Exercise
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Food
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Sanitation
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Medical
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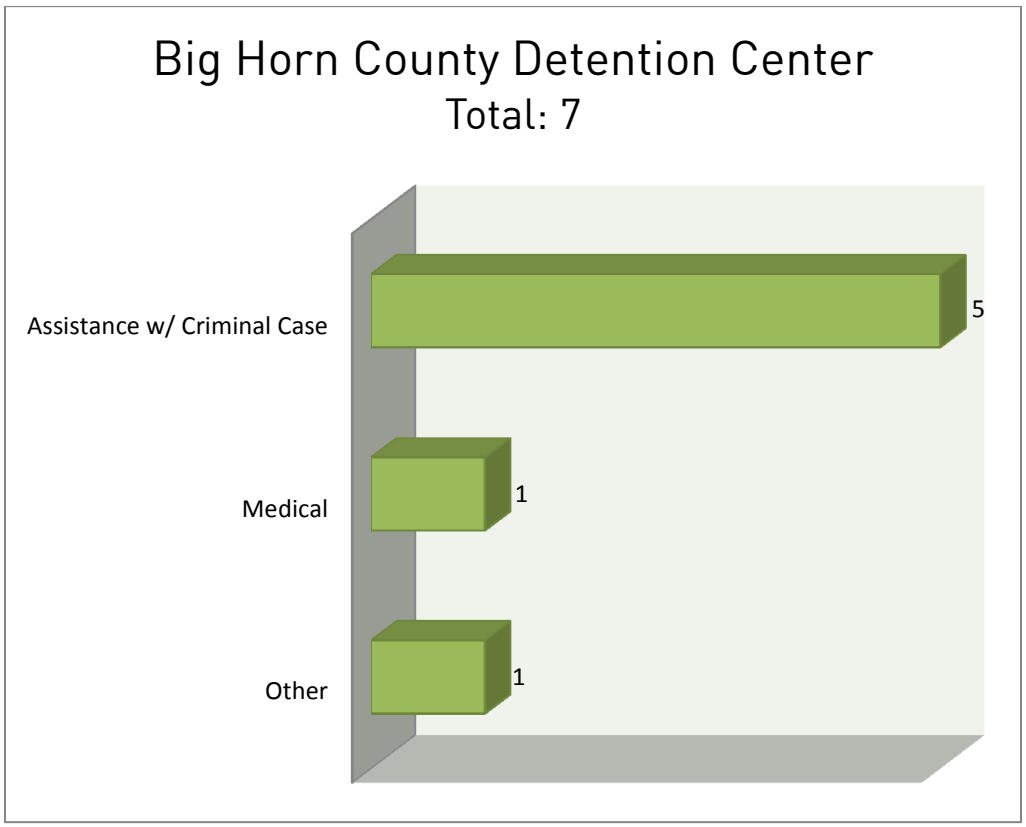
Other
2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Assistance w/ Criminal Case
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Medical
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Other
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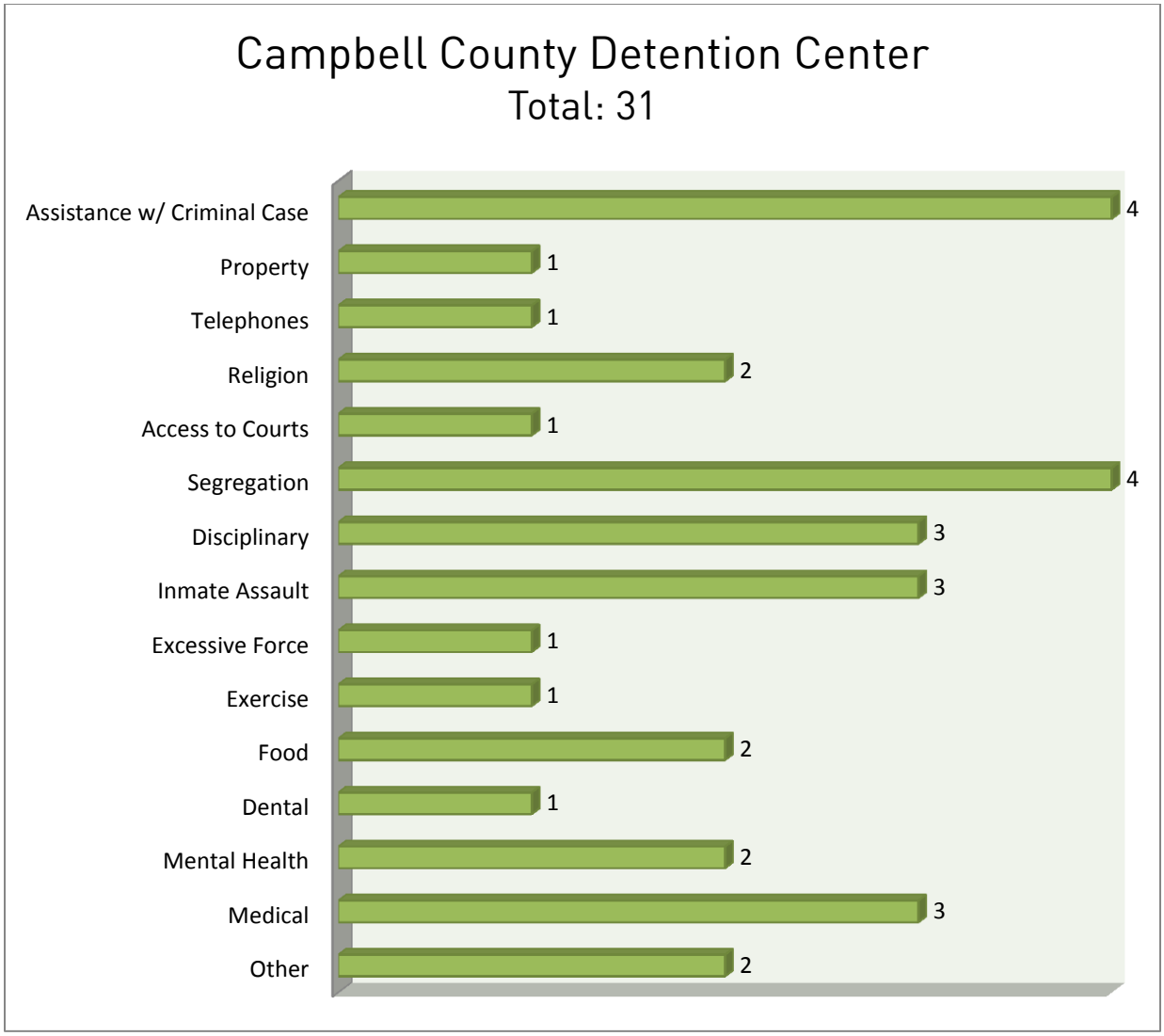
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Total: 31
Assistance w/ Criminal Case
4
Property
1
Telephones
1
Religion
2
Access to Courts
1
Segregation
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Disciplinary
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Inmate Assault
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Excessive Force
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Exercise
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Food
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Dental
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Mental Health
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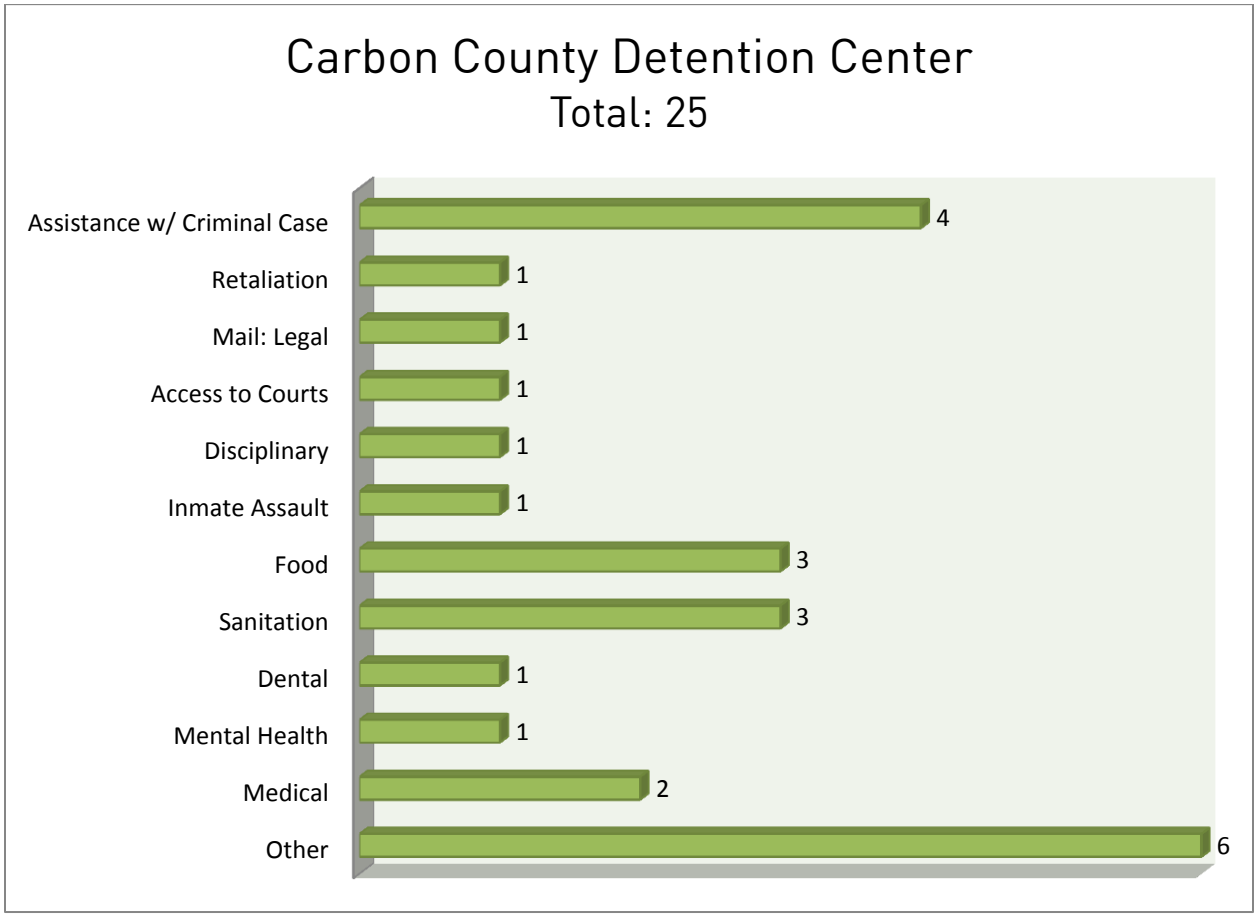
Medical
3
Other
2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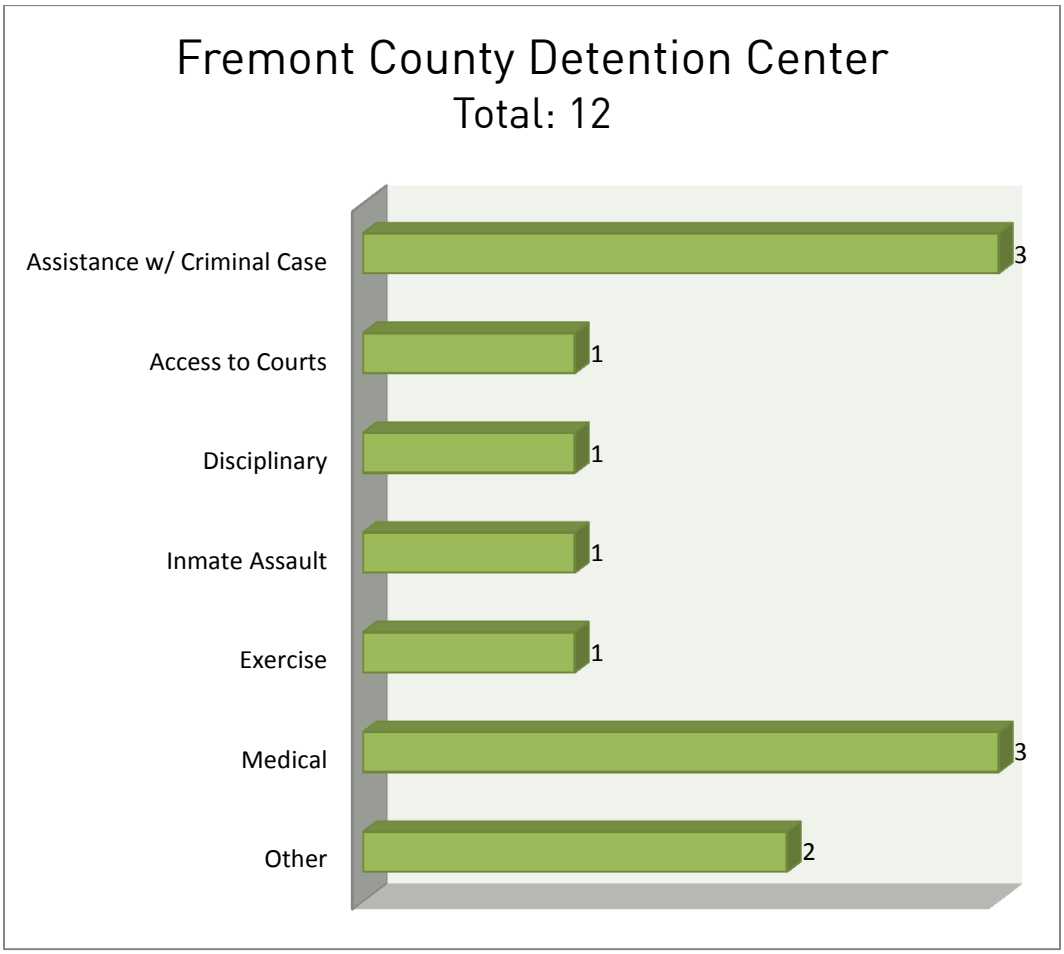
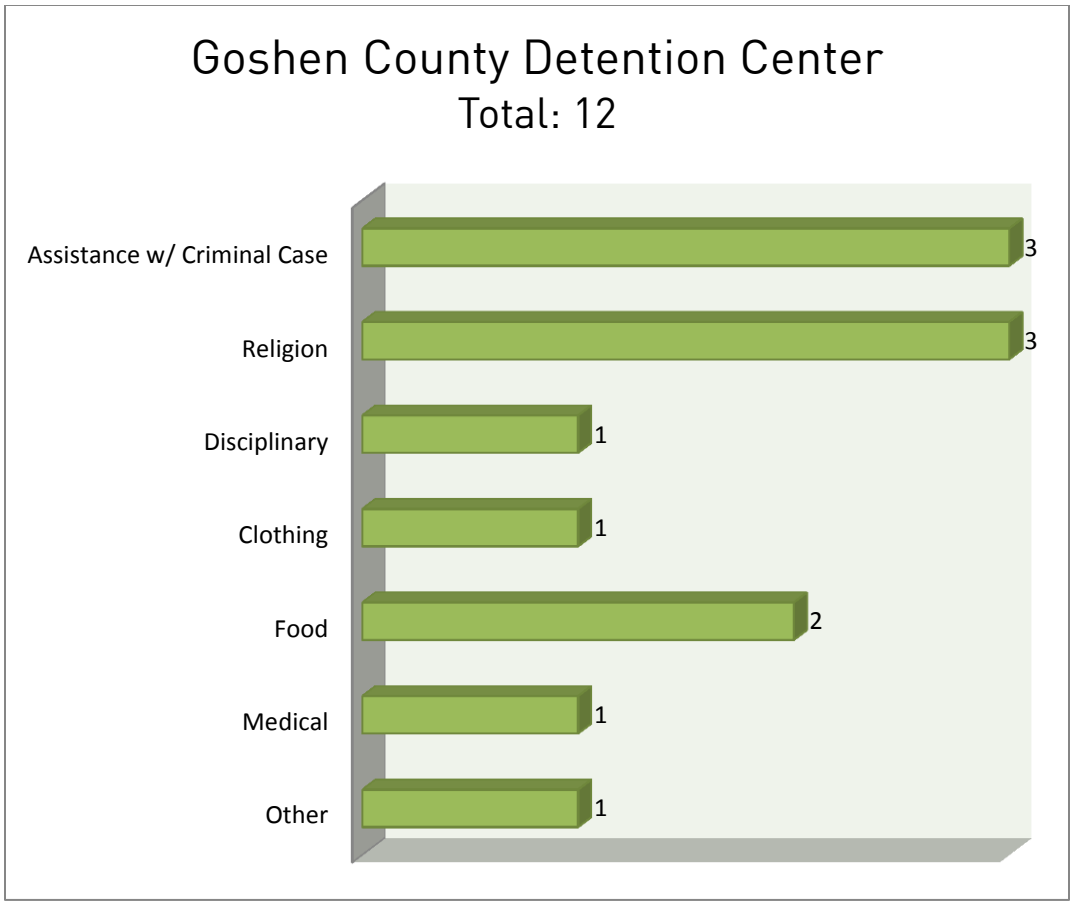
Assistance w/ Criminal Case
Retaliation
Mail: Legal
Access to Courts
Disciplinary
Inmate Assault
Food
Sanitation
Dental
Mental Health
Medical
Other
4
1
1
1
1
1
3
3
1
1
2
6


Fremont County Detention Center
Total: 12
Assistance w/ Criminal Case
3
Access to Courts
1
Disciplinary
1
Inmate Assault
1
Exercise
1
Medical
3
Other
2


Goshen County Detention Center
Total: 12
Assistance w/ Criminal Case
3
Religion
3
Disciplinary
1
Clothing
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Food
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Medical
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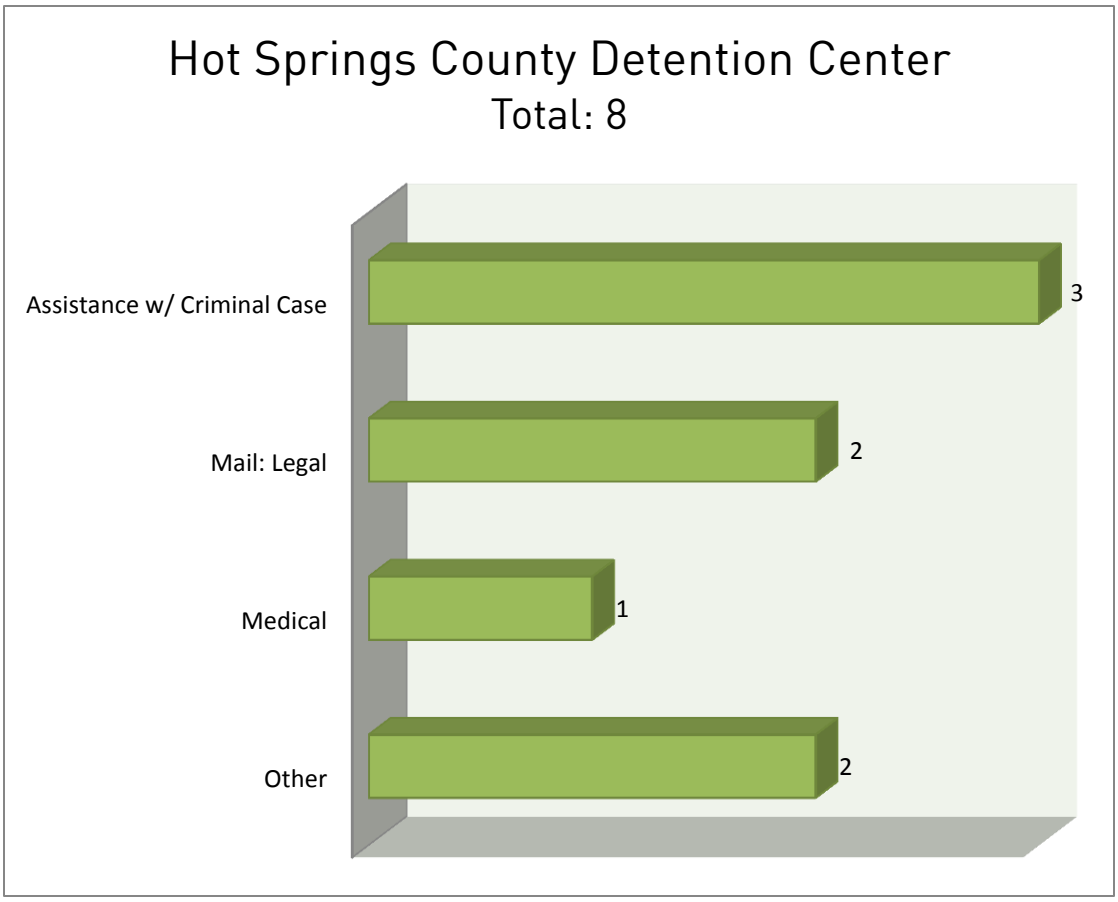
Other
1


Hot Springs County Detention Center
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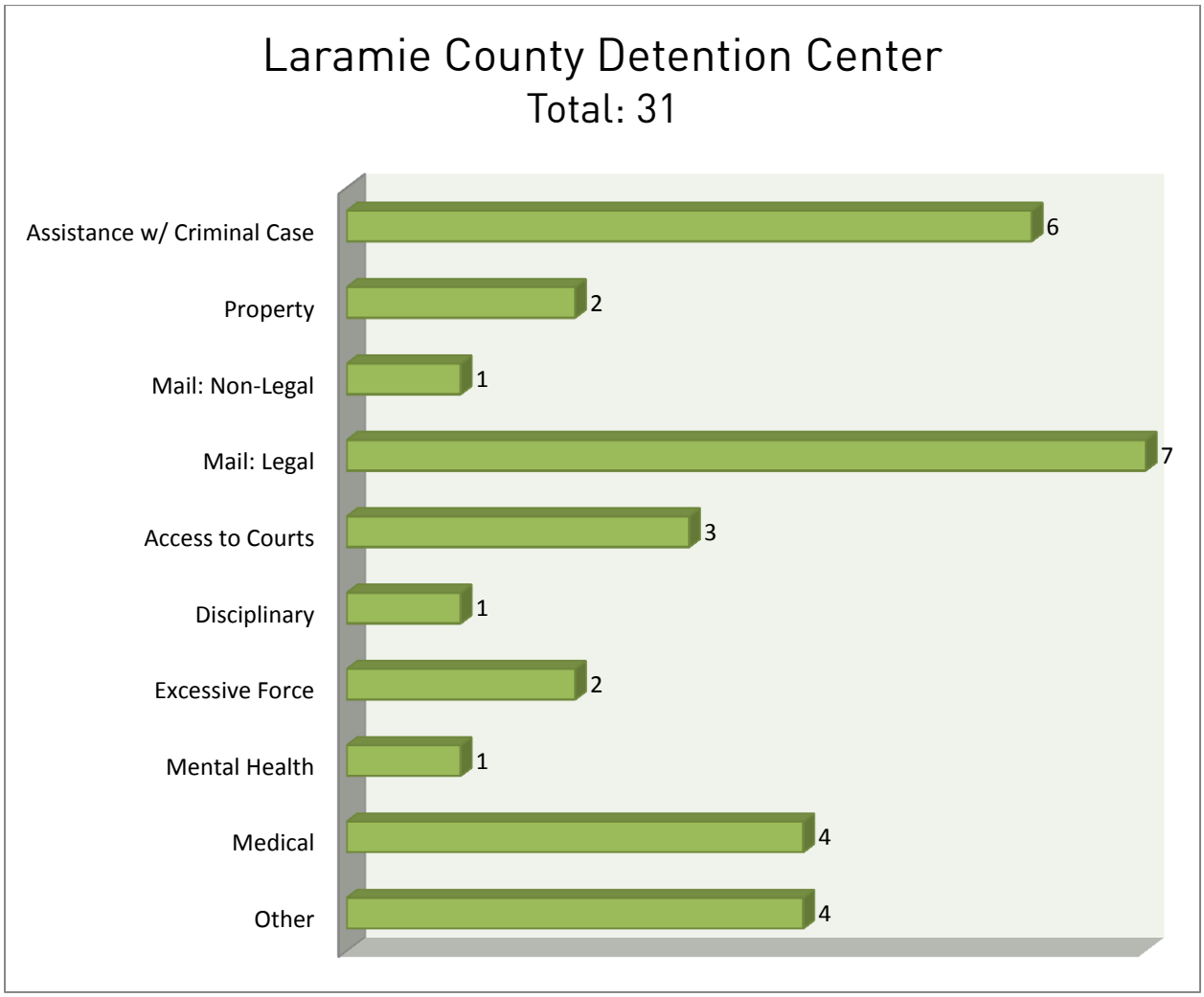
Assistance w/ Criminal Case
3
Mail: Legal
2
Medical
1
Other
2


Laramie County Detention Center
Total: 31
Assistance w/ Criminal Case
6
Property
2
Mail: Non-Legal
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Mail: Legal
7
Access to Courts
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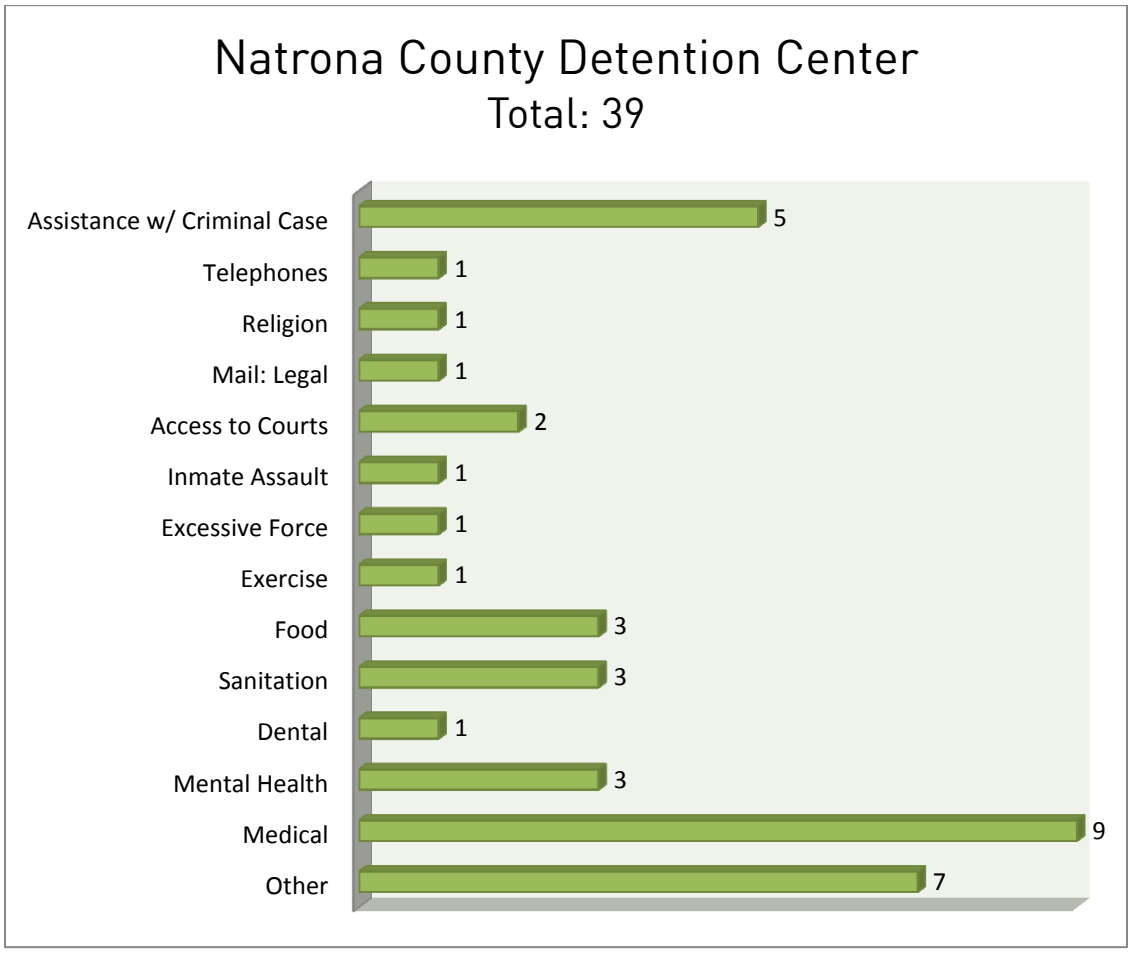
Disciplinary
1
Excessive Force
2
Mental Health
1
Medical
4
Other
4


Natrona County Detention Center
Total: 39
Assistance w/ Criminal Case
5
Telephones
1
Religion
1
Mail: Legal
1
Access to Courts
2
Inmate Assault
1
Excessive Force
1
Exercise
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Food
3
Sanitation
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Dental
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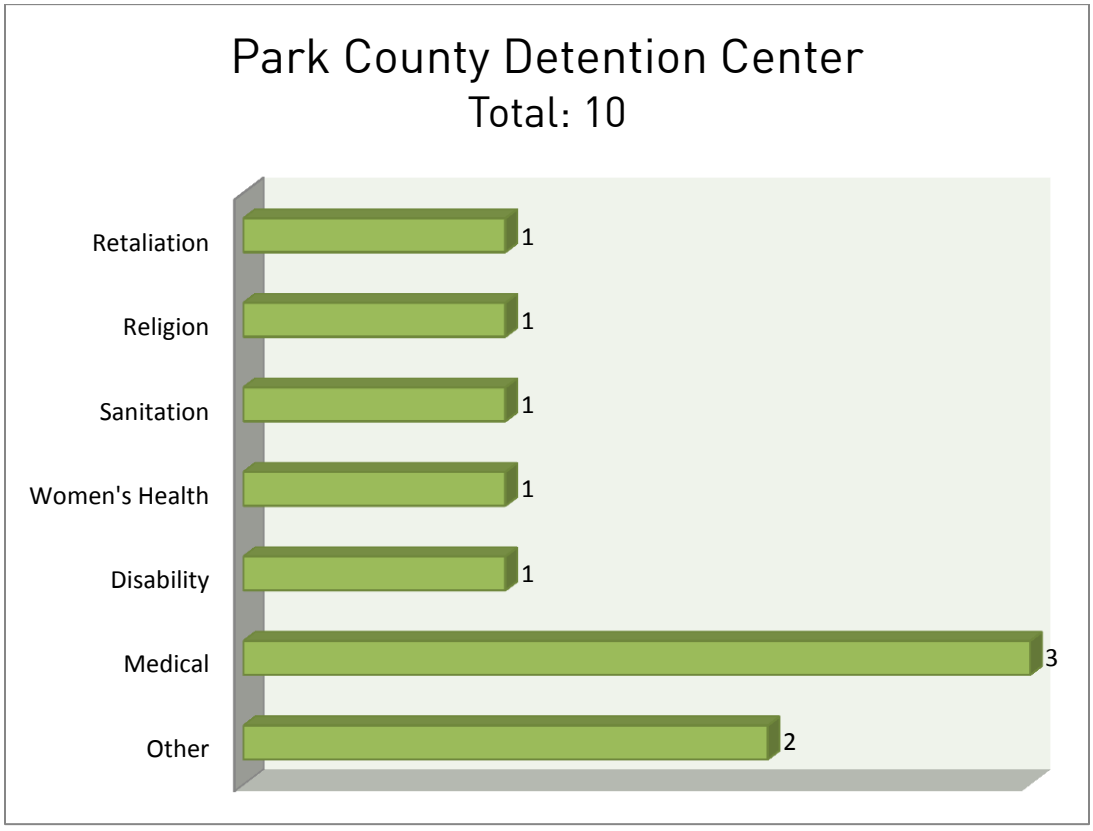
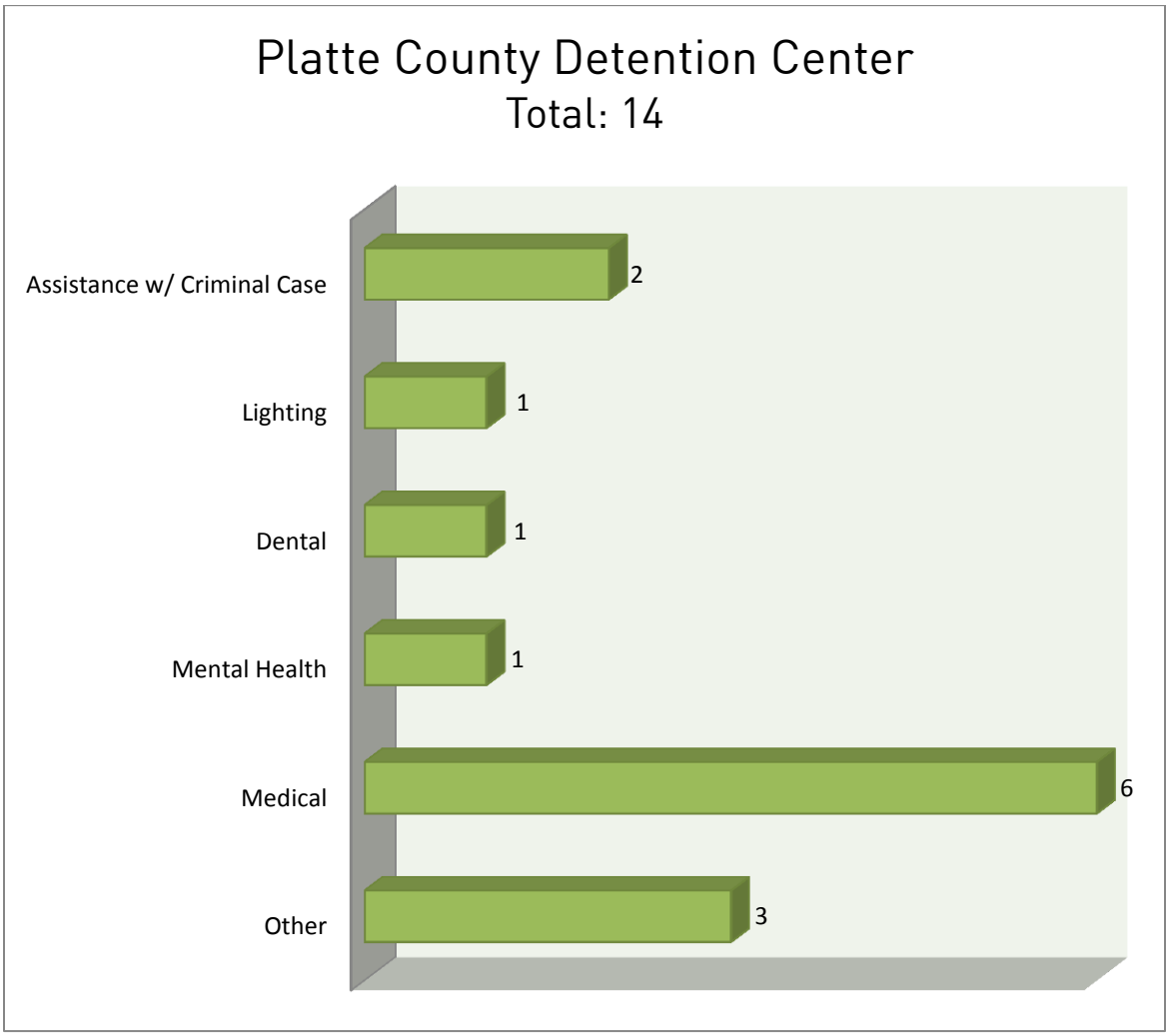
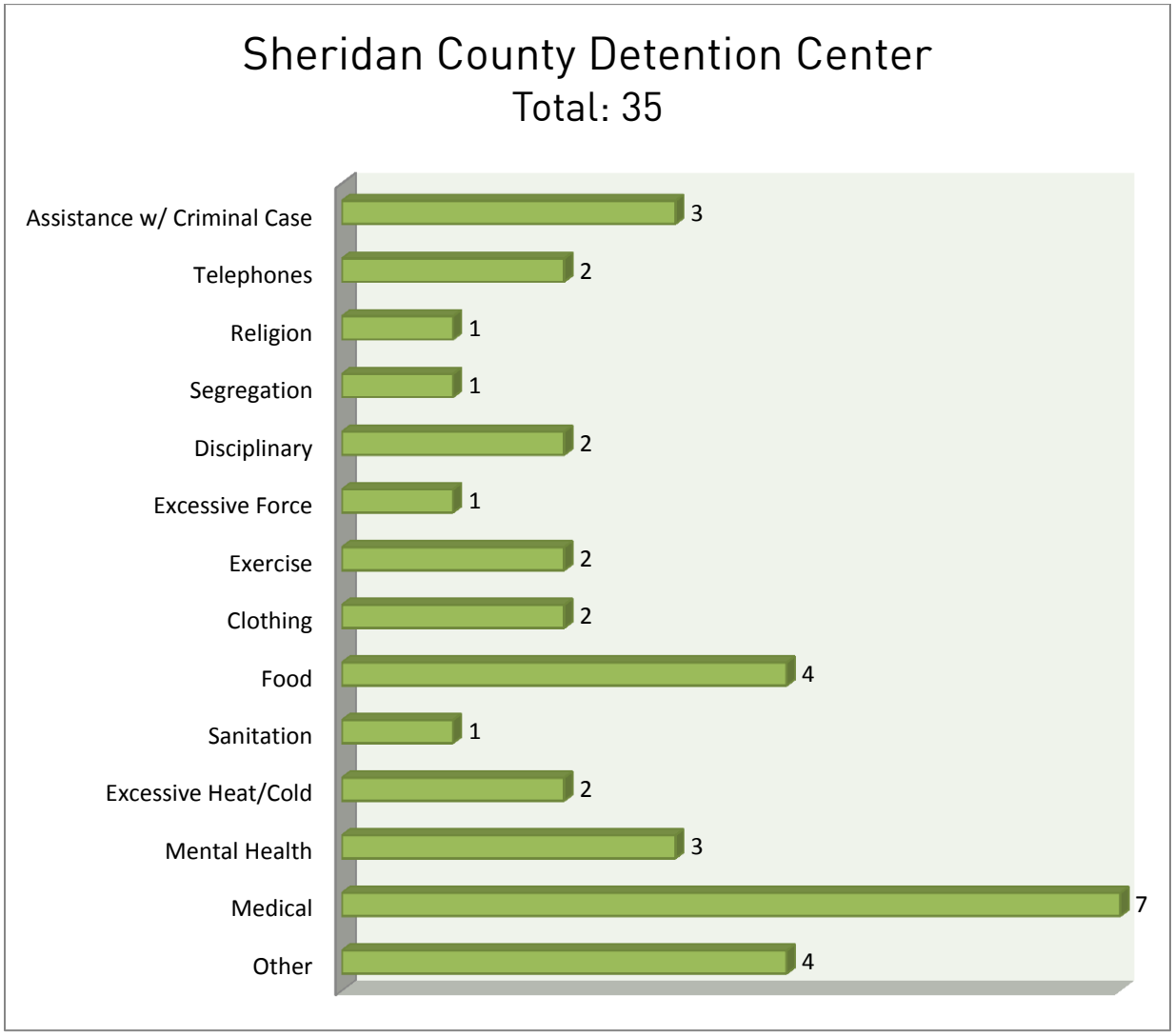
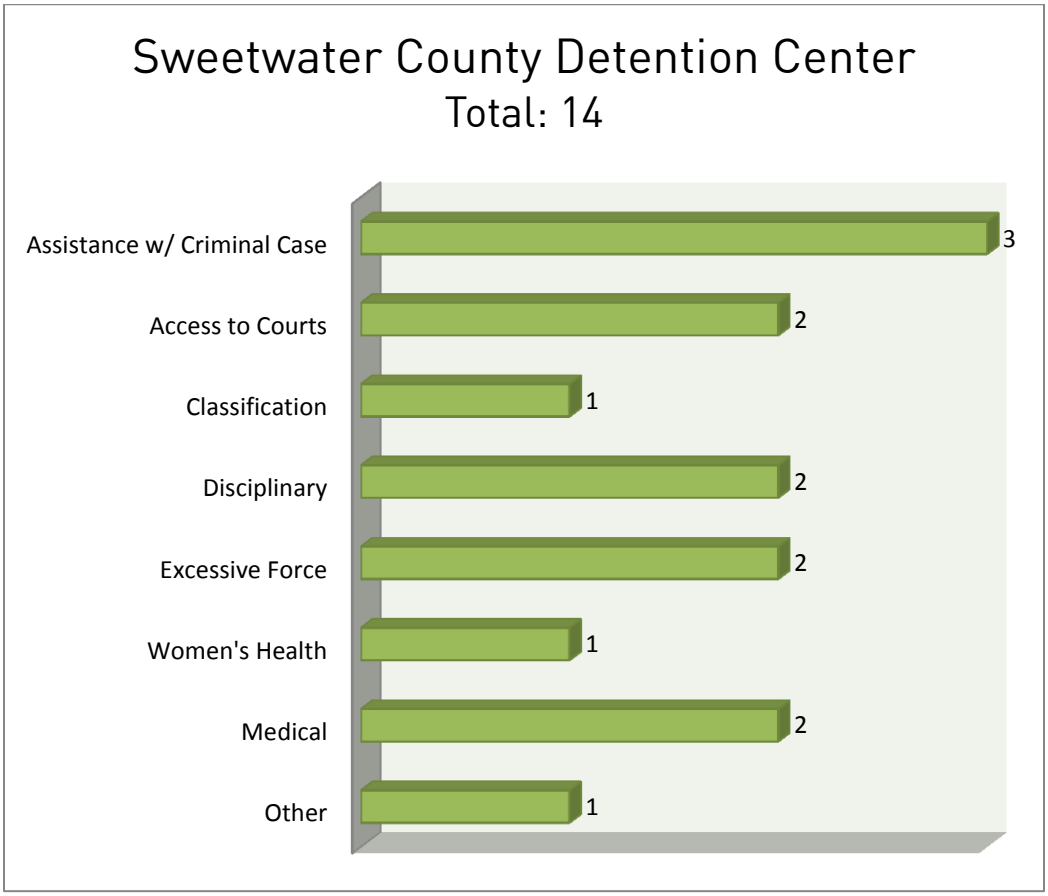
Mental Health
3
Medical
9
Other
7


Park County Detention Center
Total: 10
Retaliation
1
Religion
1
Sanitation
1
Women's Health
1
Disability
1
Medical
3
Other
2


Platte County Detention Center
Total: 14
Assistance w/ Criminal Case
2
Lighting
1
Dental
1
Mental Health
1
Medical
6
Other
3


Sheridan County Detention Center
Total: 35
Assistance w/ Criminal Case
3
Telephones
2
Religion
1
Segregation
1
Disciplinary
2
Excessive Force
1
Exercise
2
Clothing
2
Food
4
Sanitation
1
Excessive Heat/Cold
2
Mental Health
3
Medical
7
Other
4


Sweetwater County Detention Center
Total: 14
Assistance w/ Criminal Case
3
Access to Courts
2
Classification
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Disciplinary
2
Excessive Force
2
Women's Health
1
Medical
2
Other
1

KNOW YOUR RIGHTS

TIPS ON WRITING GRIEVANCES

Purpose of Grievance Process

- Informs officials about ongoing dangers to your health or safety
- Warns officials about other problems in the jail
- Tells officials what remedy you want
- Enables you to document your efforts to resolve your problems with officials

Learn About Your Grievance Process

- Get a copy of your facility's inmate handbook and grievance procedure.
- Learn the grievance process
    - the number of steps in the process
    - the deadlines for each step
    - how to obtain the necessary forms
    - how to submit the forms
    - the kinds of remedies that officials provide

Timing

- File grievances and appeals as soon as you can
- If you do not get a response in a reasonable amount of time, remind officials in another grievance
- If you missed the deadline, file the grievance anyway and explain why you missed it

Content

- Include a description of any past or ongoing violation of your rights
- Name all officials whom you believe are responsible for each violation
- List all witnesses to each violation
- Describe the exact remedy that you want (e.g. medical treatment, an investigation, change in classification or placement, increased staff supervision, etc.)

Proving Exhaustion of Administrative Remedies

- Document each step you took, every document you filed, and all responses you received Be sure to include the dates on which each of these occurred, and the names of people who were involved
- If there is no grievance process, document how you learned this and steps you took to voice your grievance
- If you are unable to obtain the forms you need, document what steps you took to try to get the forms, including names and dates

Grievance Samples

Medical Complaint

"I have a very painful toothache in the upper left part of my mouth. I have had this pain for three days now, and it has gotten worse every day. Every time I close my mouth all the way, the pain shoots up into my head. I cannot chew food at all. My cellmate took a look in my mouth and saw pus around my tooth. I think it is infected. It's very hard for me to sleep with this pain. Please let me see a doctor or dentist about it right away."

Exhaustion

"Plaintiff has exhausted all available remedies at the _____ Detention Center. On March 2, 2007, plaintiff submitted a grievance raising the matters stated in this complaint to Officer John Doe. On March 7, 2007, plaintiff received a response denying his grievance, signed by Grievance Coordinator Jane Smith. On March 9, 2007, plaintiff submitted an appeal to Sheriff Jones. The warden denied the appeal on March 15, 2007. Copies of these documents are attached to this complaint."

Inability to Get Forms

"Plaintiff has exhausted all available remedies at the _____ Detention Center. On March 2, 2007, plaintiff submitted a grievance raising the matters stated in this complaint to Officer John Doe. On March 7, 2007, plaintiff received a response denying his grievance, signed by Grievance Coordinator Jane Smith. Plaintiff immediately requested an appeal form from Officer Baker, but he told plaintiff that no form were available. Plaintiff requested the form several more times from Officer Baker and from the counselor, Mr. Armstrong, but did not receive a copy of the form until March 14. Plaintiff filed an appeal the next day, on March 15, but Sheriff Jones denied it in the ground that plaintiff had missed the 4-day deadline for filing administrative appeals. Copies of these documents are attached to this complaint; along with copies of three inmate requests form that plaintiff filed requesting the proper administrative appeal form."

This information was taken from Protecting Your Health & Safety: A Litigation Guide for Inmates, (1st ed. 2002, Southern Poverty Law Center) by Robert Toone.

PRISONER LITIGATION REFORM ACT (PLRA)

Before you file a federal lawsuit . . .

You should become familiar with the 1996 Prisoner Litigation Reform Act (PLRA), which makes it harder for prisoners to file lawsuits in federal courts. The PLRA has many parts, but the following five sections are the most important for you to understand.

Exhaustion of Administrative Remedies

Before you file a lawsuit, the PLRA requires you to try to resolve your complaint through a grievance procedure. Each prison and jail has its own procedure. Get a copy of your facility's inmate handbook and grievance policy and follow the process as closely as you can. This usually requires you to complete a written description of your complaint. File a separate grievance for each complaint. Be sure to include the names of any individuals about whom you are complaining. If the policy allows you to appeal, you must complete all of the appeals available. If you file a federal lawsuit before you have "exhausted" this procedure, your claim will likely be dismissed. Keep a copy of each grievance you file, the name of the person you gave it to, and the date you filed it. If you do not receive a response to your grievance, file a grievance explaining this. If you still do not receive a response, you should file another grievance addressed to the supervisor of the facility. Pay attention to deadlines for appeals.

Filing Fees

All prisoners must pay court filing fees in full. If you do not have the money up front, you can pay the filing fee over time though monthly installments from your prison commissary account, but the fee will not be waived.

Three Strikes

Each lawsuit that is dismissed because a judge decides it is frivolous, malicious, or fails to state a proper claim, counts as a "strike". After three strikes, you cannot file another lawsuit unless you pay the entire fee up front. The only exception to this rule is if you are at immediate risk of suffering serious physical Injury.

Physical Injury Requirement

You cannot file a lawsuit for emotional or mental injury unless you can first show physical injury.

Federal Good Time

If you are in a federal prison, you risk losing good time credit if a judge decides that your lawsuit was filed to harass the people you want to sue, that you lied, or that you presented false information.

Important Note: The law is always evolving. If you have access to a prison law library, it is a good idea to confirm that the cited cases and statutes are still good law. This information sheet was last updated in 2007.

KNOW YOUR RIGHTS:
ACCESS TO COURTS[1]

Prisoners have a constitutional right of access to the courts. States are required to assist prisoners in the preparation and filing of meaningful legal papers by providing either an adequate law library or adequate assistance from persons trained in the law.[2] The state can choose how it will fulfill its duty to provide access to the courts.

Elements of an Access to Courts Claim

1. ***Denial of access:*** You were denied access to a law library **or** assistance from a person trained in the law;[3] and
2. ***Actual injury:*** As a result of this denial, you suffered an actual injury – specifically, that you lost a non-frivolous legal claim;[4] and
3. ***Exhaustion of administrative remedies:*** You exhausted all of your administrative remedies, usually the grievance or appeals process.[5]

Who is Entitled to Access the Courts?

City, state and county prisoners, federal prisoners, prisoners in segregation, pretrial detainees, juveniles, and mental patients under commitment.

The right to access to courts with respect to the pending criminal case is satisfied when a criminal defendants is either represented by counsel or has been offered court appointed counsel, even if this offer has been rejected. In other words, if you have an attorney on your pending criminal case, the prison or jail is not required to provide additional access to a law library or paging system.

What Kinds of Claims are Covered?

Prisoners can file direct appeals, habeas corpus applications and civil rights claims, including challenges to their conditions of confinement.[6] Prisoners do not have a constitutional right to assistance in accessing the courts for other civil matters, such as divorce, custody, trusts, malpractice, and forfeitures.

What is a Meaningful, Non-frivolous Claim?

Your claim for relief must be arguable based on both the facts and the law. This does not mean that your case must be a clear winner, but that there is a factual *and* legal basis for your claim.

What Constitutes an Adequate Law Library?

There is no exact definition of what an adequate law library is, but some guidelines suggest a law library should at least include a law dictionary, federal and state reporters, U.S. Code Annotated, Federal Rules of Appellate Procedure, Federal Rules of Evidence, annotated state

statutes, books on constitutional rights, and a manual of criminal forms.[7] Some, but not all, courts have criticized "exact-cite" or paging systems that require prisoners to identify specific legal materials needed, but a paging system combined with legal assistance may suffice.

Prisons can regulate the time, place and manner of access to legal materials or legal assistance, as long as the regulations are not so restrictive that they frustrate the prisoner's right of access. Even a well-stocked law library may be inadequate if books are frequently missing or prisoners cannot use the library. If prisoners are functionally illiterate, blind, or non-English speaking, the prison may need to provide additional legal assistance.

What Constitutes Adequate Legal Assistance?

Prisoners are not guaranteed access to a lawyer, but if an individual provides assistance, s/he must have at least some training in the law. Sample alternatives to a law library include a law school clinic, paralegals and law students, part-time or volunteer attorneys, prison legal assistance programs, and prisoners trained as paralegals.

If the prison provides an adequate legal library or adequate legal assistance, there is no requirement that prisoners have access to a jailhouse lawyer. If jailhouse lawyers are allowed to provide assistance, a prison can place restrictions on assistance, such as requiring prior approval and banning collection of fee for legal services.

Legal Materials & Indigent Prisoners

Prisons are not required to provide free copies or access to a typewriter. However, prisons must provide a pen or pencil, paper, notary services, and stamps *to indigent prisoners*. The prison can impose reasonable regulations, such as limiting postage, or setting specific dates for notary services. You should also have access to your legal mail, including correspondence from your attorney or a legal organization, public officials and government agencies.

Important Note: The law is always evolving. If you have access to a prison law library, it is a good idea to confirm that the cited cases and statutes are still good law. This information sheet was last updated in 2008.

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[1] The majority of this information comes from *A Jailhouse Lawyer's Manual*, Columbia Human Rights Law Review (7th ed. 2007).

[2] *Bounds v. Smith*, 430 U.S. 817 (1977).

[3] *Bounds v. Smith*, 430 U.S. 817 (1977).

[4] *Lewis v. Casey*, 518 U.S. 343 (1996). For example, you might show that you filed a complaint, but it was dismissed for a technical violation you couldn't have known about because of insufficient legal assistance. You could also show that you couldn't even file a claim because the available legal materials and assistance were completely insufficient.

[5] The Prison Litigation Reform Act, enacted in 1995, requires *prisoners*, who are incarcerated at the time they file their complaint, to exhaust administrative remedies before filing a federal lawsuit.

[6] *See, e.g.*, *Lewis v. Casey*, 518 U.S. 343 (1996); *Thaddeus-X v. Blatter*, 175 F. 3d 378, 391 (6th Cir. 1999); *John L. v. Adams*, 969 F. 2d 228 (6th Cir. 1992).

[7] *A Jailhouse Lawyer's Manual*, Columbia Human Rights Law Review (7th ed. 2007).

KNOW YOUR RIGHTS:
ASSAULT AND EXCESSIVE FORCE

Protection from Assault

Prison officials have a legal duty to refrain from using excessive force and to protect prisoners from assault by other prisoners. "Being violently assaulted in prison is simply not part of the penalty that criminal offenders pay for their offenses against society." *See Farmer v. Brennan*, 511 U.S. 825, 833 (1994). However, prison officials are not automatically responsible for all assaults on prisoners, and a prison official's use of force does not automatically violate the Constitution. Courts apply different rules to decide whether the Eighth Amendment has been violated after an assault by a prisoner or a use of force by prison staff.

Assault by Other Prisoners

Prison officials may be held liable under the Eighth Amendment only if they act with "deliberate indifference" or "reckless disregard" for a prisoner's safety. *See id.* at 836-37. In other words, prison officials may be liable if they knew that a prisoner was at substantial risk of serious harm, but ignored that risk and failed to take reasonable steps to protect the prisoner. *See id.* at 847. Generally, courts have distinguished between a substantial risk of serious harm (or strong likelihood of injury) and the everyday risk of harm that comes from being in prison (or mere possibility of injury). *See, e.g., Purcell ex rel. Estate of Morgan v. Toombs County, Ga,* 400 F.3d 1313, 1319-20 (11th Cir. 2005); *Brown v. Hughes*, 894 F.2d 1533, 1537 (11th Cir. 1990). In addition, even when a prisoner is harmed, if prison officials responded reasonably to the risk, they are not held liable. *Farmer,* 511 U.S. at 844-45. Courts often dismiss isolated failures to protect as "mere negligence," even when prison officials had prior information about a threat to a prisoner, but failed to act on that information. *See Davidson v. Cannon,* 474 U.S. 344, 347-48 (1986).

There are two ways to show deliberate indifference in a prisoner assault case. One is to show that prison officials failed to respond or act reasonably in light of knowledge of a particular threat of danger to an individual prisoner. *See, e.g., Odom v. South Carolina Dep't of Corr.,* 349 F.3d 765, 772 (4th Cir. 2003) (plaintiff warned officer that other prisoners would try to kill him); *Scicluna v. Wells,* 345 F.3d 441, 445 (6th Cir. 2003) (plaintiff testified he had told unit manager of risk of assault by his co-defendant); *Cottone v. Jenne,* 326 F.3d 1352 (11th Cir. 2003) (failure to monitor prisoner known to be violent is deliberate indifference); *Peate v. McCann*, 294 F.3d 879 (7th Cir. 2002) (plaintiff attacked twice by the same prisoner); *Cantu v. Jones,* 293 F.3d 839 (5th Cir. 2002) (guards allowed prisoner out of his cell to attack another prisoner); *Horton v. Cockrell,* 70 F.3d 397 (5th Cir. 1995) (staff failed to protect prisoner from attack despite his grievances requesting protection); *Swofford v. Mandrell*, 969 F.2d 547, 549 (7th Cir. 1992) (guards put sex offender in unsupervised holding cell). The other is to show prison conditions or practices that create a dangerous situation for prisoners in general. *See, e.g., Marsh v. Butler County, Ala.,* 268 F.3d 1014, 1029 (11th Cir. 2001) (no segregation of nonviolent, pretrial detainees

from violent, convicted prisoners; overpopulation; understaffing; locks on cell doors that did not properly function; availability of homemade weapons; and no medical, mental health, or conflict screening at intake); *Butler v. Dowd,* 979 F.2d 661, 675 (8th Cir. 1992) (en banc) (random housing assignments of vulnerable prisoners and obstacles to admission to protective housing); *Skinner v. Uphoff,* 234 F. Supp. 2d 1208 (D. Wyo. 2002) (unwritten policy of failing to investigate assaults). Sometimes both theories apply to the same fact situation.

In addition to showing deliberate indifference, a prisoner must show that the actions or practices of prison officials actually caused the assault. There must be a connection between what prison officials did or failed to do and the harm that occurred. *See Best v. Essex County*, 986 F.2d 54, 56-57 (3d Cir. 1993). Thus, courts have imposed liability on line correctional officers who observed an assault or knew of a risk to a prisoner, but did nothing, *see, e.g., Ayala Serrano v. Lebron Gonzales*, 909 F.2d 8, 14 (1st Cir. 1990); on higher-level supervisors who made or failed to make polices, or failed to act on risks they knew about, *see, e.g. Redman v. County of San Diego,* 942 F.2d 1435, 1447-48 (9th Cir. 1991); and on city or county government when a prisoner's assault resulted from a governmental policy, *see, e.g., Berry v. City of Muskogee*, 900 F.2d 1489, 1497-99 (10th Cir. 1990). Courts require prisoners to show how individual named defendants are responsible for causing the assault. *Morales v. New York State Dep't of Corr.*, 842 F.2d 27, 29-30 (2d Cir. 1988) (explaining how several defendants were liable in the same incident).

Use of Excessive Force by Prison Staff

With respect to convicted prisoners, prison staff violate the Eighth Amendment when they use force "maliciously and sadistically for the very purpose of causing harm," but they are permitted to use force "in a good faith effort to maintain or restore discipline." *Hudson v. McMillian*, 503 U.S. 1, 6 (1992) (quoting *Whitley v. Albers,* 475 U.S. 312, 320-21 (1986)). Courts apply different legal standards to arrestees, pretrial detainees, and convicted prisoners; however, a prisoner generally must show that the force used was not justified by any legitimate law enforcement or prison management need, or was completely out of proportion to that need. *See Hudson,* 503 U.S. at 5-6 (convicted prisoners); *Graham v. Connor*, 490 U.S. 386, 397 (1989) (arrestees). Inflictions of pain that are "totally without penological justification" are necessarily "unnecessary and wanton" in violation of the Eighth Amendment. *Hope v. Pelzer,* 536 U.S. 730, 737 (2002) (quoting *Rhodes v. Chapman,* 452 U.S. 337, 346 (1981)).

The amount of force that courts consider excessive depends on the specific fact situation. As a general rule, however, the force used by prison staff must be more than *de minimis* (very small or insignificant) to violate the Eighth Amendment. *See Hudson*, 503 U.S. at 9-10. Courts disagree on what constitutes a *de minimis* use of force. *Compare Hudson*, 503 U.S. at 10 (kicks and punches resulting in bruises, swelling, loosened teeth and a cracked dental plate are not *de minimis*) *to Riley v. Dorton*, 115 F.3d 1159, 1168 (4th Cir. 1997) (sticking pen a quarter of an inch into a detainee's nose, threatening to rip it open and using medium force to slap his face is *de minimis*). If there is a legitimate need to use force and no intent to cause unnecessary harm, prison staff can use serious and even deadly force without violating the Constitution. *See, e.g., Whitley v. Albers,* 475 U.S. 312, 322-26 (1986) (use of shotgun in riot/hostage situation). However, when no such legitimate need exists, courts will be more likely to find an Eighth Amendment violation. *See, e.g., Treats v. Morgan,* 308 F.3d 868, 872 (8th Cir. 2002) (use of pepper spray on a prisoner who "had not jeopardized any person's safety or threatened prison security" provided valid basis for Eighth Amendment claim).

However, prisoners do not need to show a serious or permanent injury to establish an Eighth Amendment violation. The extent of the injury is simply one factor to consider in deciding whether staff acted maliciously and sadistically or in good faith. *See Hudson,* 503 U.S. at 7-9. Establishing malice does not require direct proof of what was in an officer's mind. Prison staff's actions alone, in light of the circumstances, may be sufficient to show malice. *See Fillmore v. Page*, 358 F.3d 496, 509 (7th Cir. 2004); *Thomas v. Stalter,* 20 F.3d 298, 302 (7th Cir. 1994). The official's state of mind may also be inferred "from the fact that the risk of harm is obvious." *Hope*, 536 U.S. at 738 (citing *Farmer*, 511 U.S. at 842). Moreover, sexual abuse or rape of a prisoner by staff is, by definition, a "malicious and sadistic" use of force. *Smith v. Cochran*, 339 F.3d 1205, 1212-13 (10th Cir. 2003).

Important Note: The law is always evolving. If you have access to a prison law library, it is a good idea to confirm that the cited cases and statutes are still good law. This information sheet was last updated in 2005. Much of the above information was taken from the Prisoners' Self-Help Litigation Manual (3d ed. 1995), by John Boston and Daniel Manville.

KNOW YOUR RIGHTS:
LEGAL RIGHTS OF DISABLED PRISONERS

Statutes Protecting Disabled Prisoners

Prisoners are protected by § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794(a), and by Title II of the Americans with Disabilities Act, 42 U.S.C. § 12131, *et seq*.[1] The Rehabilitation Act was created to apply to federal executive agencies, including the Bureau of Prisons, and to any program that receives federal funding. The ADA was created to regulate state and local government programs, even those that do not receive federal funding.

The Supreme Court recently held in *Goodman v. Georgia* that Title II of the ADA validly abrogates state sovereign immunity – as least insofar as it creates a private cause of action for damages for conduct that actually violates the Fourteenth Amendment.[2] In the prison context, this means that a disabled prisoner who is incarcerated in state prison may sue the state for monetary damages under the ADA based on conduct that independently violates the Due Process Clause of the Fourteenth Amendment (incorporating the Eighth Amendment's prohibition on cruel and unusual punishment). Thus, although the ADA arguably prohibits a broader swath of state conduct than what is barred by the Eighth Amendment, it remains an unsettled question whether disabled prisoners can seek damages for conduct that violates the ADA but not the Constitution.[3]

Applying These Statutes in the Prison Context

Courts analyze the ADA and Rehabilitation Act in basically the same way. If the ADA applies, it should be interpreted to give disabled people at least as many rights as the earlier Rehabilitation Act.[4] Thus, disabled prisoners may use cases about the Rehabilitation Act to help them interpret the ADA.

How Do You Define Disability?

The ADA defines "disability" as:

A. a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
B. a record of such an impairment; or
C. being regarded as having such an impairment.[5]

A "physical or mental impairment" could include hearing and vision problems, mental illness, physical disabilities, certain diseases, or many other conditions. "Major life activities" may include many private or public activities, such as seeing, hearing, reproduction, working, walking or movement.[6] For ADA purposes, a physical impairment substantially limits major life activities only if it prevents or severely restricts the individual from performing tasks of central importance to daily life.[7]

"Substantially limited" means that the person's participation in the activity is significantly restricted.[8] The restriction does not need to completely prevent the disabled person from participating in the activity, but it must do more than merely cause him or her to participate in a different manner.[9] If a disability is corrected to the point that it does not substantially limit a major life activity, it no longer counts as a disability under the ADA.[10]

Courts usually look at the facts of each lawsuit to decide if a person is disabled according to the ADA and Rehabilitation Act. For example, the Supreme Court has said that a person infected with HIV (human immunodeficiency virus), the virus that causes AIDS, may be disabled even if that person does not have any symptoms of the disease.[11] On the other hand, a person with impaired vision in one eye is disabled only if his vision substantially limits participation in a major life activity.[12]

Enforcing Your Legal Rights

Title II of the ADA states: "[N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.[13]

To bring a lawsuit under the ADA and/or the Rehabilitation Act, disabled prisoners must show: (1) that they are disabled within the meaning of the statutes, (2) that they are "qualified" to participate in the program, and (3) that they are excluded from, are not allowed to benefit from, or have been subjected to discrimination in the program because of their disability.[14] Under the Rehabilitation Act, prisoners must also show that the prison officials or the governmental agency named as defendants receive federal funding.[15]

Courts generally require factual evidence that shows the prisoners are qualified for the programs, sought participation, and were denied entry based upon their disabilities.[16] Disabled prisoners are "qualified" to participate in a program under the ADA and the Rehabilitation Act if they meet the program requirements.[17]

Which Rights Can be Enforced?

Disabled prisoners have sued to get equal access to facilities, programs and services. For example, inmates and arrestees have sued to be able to use prison showers and toilets and to be protected from injury or the risk of injury.[18]

Deaf and hearing-impaired prisoners have won cases to get sign language interpreters for disciplinary hearings, classification decisions, HIV-AIDS counseling, and educational and vocational programs.[19]

Disabled prisoners have challenged inadequate medical care and prison officials' failure to provide them with medical supplies or devices such as wheelchairs or canes.[20] These cases may combine ADA claims with arguments that prison officials have violated the Eighth Amendment of the U.S. Constitution by being deliberately indifferent to prisoners' serious medical needs.[21]

Disabled prisoners have challenged their confinement in isolation and segregation units under the ADA and the Rehabilitation Act.[22] In one case, for example, the Seventh Circuit ruled that prison officials discriminated against a quadriplegic prisoner in Indiana who was housed in an

infirmary unit for over one year and was thereby denied access to the dining hall, recreation area, visiting, church, work, transitional programs and the library.[23] However, some courts have upheld policies segregating HIV-positive prisoners because of the risk or perceived risk of transmission.[24]

Limitations on These Rights

Prison officials are not required to provide accommodations that impose "undue financial and administrative burdens" or require "a fundamental alteration in the nature of [the] program."[25] Prison officials are also allowed to discriminate if the disabled inmates' participation would pose "significant health and safety risks" or a "direct threat" to others.[26] Finally, some courts have said that prison officials can discriminate against disabled prisoners as long as the discriminatory policies serve "legitimate penological interests."[27]

Alternatives to the ADA and Rehabilitation Act

Disabled prisoners may make claims for relief based on the United States Constitution either in addition to, or instead of, ADA and Rehabilitation Act claims. The Eighth Amendment prohibits any form of cruel or unusual punishment. For example, federal or state prison officials violate the Eighth Amendment when staff members are deliberately indifferent to the serious medical needs of prisoners, including the special requirements of disabled inmates.[28]

The Fifth and Fourteenth Amendments prohibit government officials from depriving persons of life, liberty or property without "due process" of law, and the Fourteenth Amendment requires that all citizens receive the "equal protection" of the law.[29] Thus, prison officials may violate the Constitution if they discriminate against disabled inmates on the basis of their disabilities.[30] However, to win an equal protection claim, disabled persons must prove that there is no legitimate government reason for the discriminatory policy.[31] This is a very difficult standard for prisoners to meet because courts generally give prison officials wide discretion in administering correctional facilities.

Finally, the laws of some states may provide different or greater legal rights than the federal laws discussed in this information sheet. Disabled prisoners should investigate this possibility before bringing suit.

Important Note: The law is always evolving. If you have access to a prison law library, it is a good idea to confirm that the cited cases and statutes are still good law. This information sheet was last updated in 2005.

KNOW YOUR RIGHTS:
DISCIPLINARY SANCTIONS AND PUNISHMENT

Examples of Disciplinary Punishment

Examples of disciplinary punishment include: physical punishment, punitive segregation, losing visitation privileges, restricting visitation privileges, monetary restitution, water deprivation, reducing shower privileges and extending sentences. You may not have received a disciplinary hearing before receiving this type of punishment or, if you did, it may not have been a fair hearing.

Challenging the Nature of the Punishment You Received

Courts give deference to prison officials' decisions about disciplinary punishment. Punishments that fulfill legitimate penological interests (e.g., rehabilitation and crime prevention) are generally upheld. The Supreme Court has provided four factors to decide whether prison regulations violate the Constitution.[32] These factors are: (1) whether the regulation has a "valid, rational connection" to a legitimate governmental interest; (2) whether alternative means are open to inmates to exercise the asserted right; (3) what impact an accommodation of the right would have on guards and inmates and prison resources; and (4) whether there are "ready alternatives" to the regulation.[33]

For example, the Supreme Court has held that a prison administration's decision to restrict visitation for prisoners with two substance abuse violations served the legitimate goal of deterring drug and alcohol use within prison.[34] The Court found that the punishment fulfilled the four evaluation factors listed above although the ban on visits from people other than clergy and attorneys on official business lasted a minimum of two years.[35]

Monetary restitution for property damage or other offenses that cost the prison money is a permissible form of punishment.[36] Because many prisons have various "tiers" or "levels" of discipline, with different punishments for each, prisoners who commit the same violation may receive different punishments. However, disparities in punishment do not necessarily violate constitutional rights unless the challenged punishment can be proven to be arbitrary.[37]

Although courts would find most punishments with legitimate penological interests constitutional, they have found punishments that involve physical abuse or degrading conditions of punitive confinement unconstitutional.[38] Although courts are reluctant to interfere with the administration of prisons, they probably will dislike punishments that are disproportionate, or that offend idealistic concepts of dignity, civilized standards, humanity and decency.[39] However, courts rarely find prison punishments disproportionate.[40]

Challenging the Disciplinary Sanction Itself

Prisoners may challenge disciplinary sanctions imposed on them under the Due Process Clause of the Fourteenth Amendment.[41] The Supreme Court has said that inmates are not entitled to hearings (or other due process procedures) for disciplinary punishments unless (1) there is a state-created liberty interest in freedom from such punishment, and (2) the punishment imposes atypical and significant hardship.[42] The Supreme Court has not fully defined "atypical and significant hardship." Most circuits have found that administrative segregation without more does not rise to the level of an atypical and significant hardship.[43] However, in *Wilkinson v. Austin*, the Supreme Court concluded that being sent to a supermax facility with limited human contact for an indefinite sentence and with no opportunity for parole does satisfy the "atypical and significant hardship" test.[44]

Once a prisoner asserts that the discipline imposed is significant and atypical, he or she must still establish that the procedures in place were inadequate. To make this determination, a court must consider three factors: (1) the private interest involved; (2) the risk of an erroneous deprivation of such interest and the probable value, if any, of additional or substitute procedural safeguards; and (3) the government's interest, including the burdens that different or additional procedural requirements would entail.[45]

For example, although the Supreme Court concluded in *Wilkinson v. Austin* that being sent to a supermax facility could violate the Due Process clause, it ultimately concluded that the procedural safeguards were sufficient, and that there was no constitutional violation. In reaching this decision, the Court put much emphasis on the fact that the prisoner was given notice and an opportunity to be heard, and was provided with many opportunities to challenge an erroneous Supermax placement.[46]

The Supreme Court has held that prisoners cannot sue for monetary damages under 42 U.S.C. § 1983 for loss of good time until they get their disciplinary conviction set aside through the prison appeal system or in state court.[47]

Important Note: The law is always evolving. If you have access to a prison law library, it is a good idea to confirm that the cited cases and statutes are still good law. This information sheet was last updated in 2005.

[1] *See Pennsylvania Dep't of Corrections v. Yeskey*, 524 U.S. 206 (1998) (ADA); *Onishea v. Hopper*, 171 F.3d 1289 (11th Cir. 1999) (Rehabilitation Act); *Bonner v. Lewis*, 857 F.2d 559 (9th Cir. 1988) (Rehabilitation Act).
[2] 126 S.Ct. 877 (2006).
[3] *See id.* at 882.
[4] *Bragdon v. Abbott*, 524 U.S. 624, 632 (1998).
[5] 42 U.S.C. § 12102(2).
[6] *See, e.g., Bragdon* at 639 (finding no basis for "confining major life activities to those with a public, economic, or daily aspect").
[7] *Toyota Motor Mfg. Ky. Inc. v. Williams*, 534 U.S. 184 (2002) (finding that a woman with carpal tunnel syndrome was not necessarily disabled just because she could not perform certain manual tasks on her assembly line job).
[8] *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555, 563 (1999).
[9] *Bragdon* at 641.
[10] *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 482 (1999); *see also* Murphy v. United Parcel Serv., 527 U.S. 516 (1999).
[11] *Bragdon* at 641.
[12] *Kirkingburg* at 566.
[13] 42 U.S.C. § 12132.
[14] 42 U.S.C.§ 12132; 29 U.S.C. § 794(a).
[15] 29 U.S.C. § 794(a).
[16] *See, e.g., Lue v. Moore*, 43 F.3d 1203, 1205, 1206 (8th Cir. 1994) (blind inmate denied access to vocational training programs may bring claim for damages and affirmative relief under Rehabilitation Act, but denying relief because inmate failed to prove he had applied to programs or requested accommodations).
[17] *Southeastern Community College v. Davis*, 442 U.S. 397, 406(1979) ("An otherwise qualified person is one who is able to meet all of a program's requirements in spite of his handicap.").
[18] *Gorman v. Easley*, 257 F.3d 738 (8th Cir. 2001) (injury during transportation by police in vehicle without wheelchair restraints); *rev'd on other grounds*, *Barnes v. Gorman*, 536 US 181 (2002); *Kaufman v. Carter*, 952 F.Supp. 520, 523-24 (W.D. Mich. 1996) (failure to provide access to bathrooms and showers).
[19] *Bonner v. Lewis*, 857 F.2d 559 (9th Cir. 1988); *Duffy v. Riveland*, 98 F.3d 447 (9th Cir. 1996); *Clarkson v. Coughlin*, 898 F.Supp. 1019, 1027-32 (S.D.N.Y. 1995).
[20] *Saunders v. Horn*, 960 F. Supp. 893 (E.D. Pa. 1997) (failure to provide orthopedic shoes and cane); *Herndon v. Johnson*, 970 F.Supp. 703 (E.D. Ark. 1997).
[21] *See, e.g., Kaufman*, 952 F.Supp. 520.
[22] *Carty v. Farrelly*, 957 F.Supp. 727, 741 (D.V.I. 1997) (prison officials violated ADA by housing inmate not suffering from mental illness with mentally ill prisoners because his cane was considered security threat).
[23] *Love v. Westville Correctional Center*, 103 F.3d 558 (7th Cir. 1996).
[24] *See, e.g., Harris v. Thigpen*, 941 F.2d 1495 (11th Cir. 1991), *appeal after remand*, *Onishea v. Hopper*, 126 F.3d 1323 (11th Cir. 1997), rev'd, 171 F.3d 1289 (11th Cir. 1999) (upholding policy of segregation and exclusion from programs of HIV-positive prisoners in Alabama under Rehabilitation Act).
[25] *Southeastern Community College*, 442 U.S. at 406.
[26] *School Bd. of Nassau County v. Arline*, 480 U.S. 273, 287 (1987) (holding that a person who poses a significant risk to others is not "otherwise qualified" for the activity, establishing a four-part test for determining whether contagious disease constitutes such a risk); 42 U.S.C. § 12182(b)(3).
[27] *Gates v. Rowland*, 39 F.3d 1439, 1446-47 (9th Cir.1994) (upholding discriminatory policy on security grounds based on unsubstantiated fears of other prisoners); *compare Yeskey v. Penn. Dep't of Corrections*, 118 F.3d 168, 174-75 (3rd Cir. 1997).
[28] *Estelle v. Gamble*, 429 U.S. 97 (1976) (deliberate indifference to prisoners' serious medical needs constitutes cruel and unusual punishment); *LaFaut v. Smith*, 834 F.2d 389 (4th Cir. 1987) (prison officials violated Eighth Amendment by failing to provide disabled inmate with needed physical therapy and adequate access to facilities).
[29] The Fourteenth Amendment governs actions by state governments and the Fifth Amendment governs actions by the federal government.

[30] *See, e.g., Williams v. Meese*, 926 F.2d 994, 998 (10th Cir. 1991) (federal inmate could not bring employment discrimination claim under Rehabilitation Act but could do so under Fifth Amendment).
[31] *Contractors Ass'n of E. Pa., Inc. v. City of Philadelphia*, 6 F.3d 990, 1001 (3rd Cir.1993).
[32] *See Turner v. Safley*, 482 U.S. 78, 89-91 (1987).
[33] *Id.*
[34] *Overton v. Bazzetta*, 539 U.S. 126 (2003).
[35] *Id.*
[36] *Longmire v. Guste*, 921 F.2d 620, 623-24 (5th Cir. 1991).
[37] *Phillips v. Gathright*, 603 F.2d 219 (4th Cir. 1979).
[38] *Jackson v. Bishop*, 404 F.2d 571, 579 (8th Cir. 1968) (Eighth Circuit enjoined the use of the strap until proper regulations and safeguards against abuse were implemented).
[39] *Id.*
[40] *See, e.g., Savage v. Snow*, 575 F.Supp. 828, 836 (S.D.N.Y. 1983) (upholding 90 days loss of good time and confinement in segregation for abuse of correspondence).
[41] Prisoners may also base their challenges on state law grounds, citing state prison regulations or statutes. State prisoners seeking to invalidate an unlawful criminal conviction or sentence must generally first exhaust their state court remedies, then seek federal court relief through a writ of habeas corpus. Only if the conviction or sentence is overturned may the prisoner-plaintiff then pursue a damages action for an unlawful conviction or sentence under 42 U.S.C. § 1983. *See Heck v. Humphrey*, 512 U.S. 477, 486, 114 S.Ct. 2364, 2372 (1994).
[42] *Sandin v. Conner*, 515 U.S. 472 (1995).
[43] *See Beverati v. Smith*, 120 F.3d 500 (4th Cir. 1997); *Mackey v. Dyke*, 111 F.3d 460 (6th Cir. 1997); *Pichardo v. Kinker*, 73 F.3d 612 (5th Cir. 1996); *Luken v. Scott*, 71 F.3d 192 (5th Cir. 1995).
[44] 125 S.Ct. 2384, 2394-95 (2005).
[45] *Id.*
[46] *Id.* at 2395-98.
[47] *Edwards v. Balisok*, 520 U.S. 641 (1997).

KNOW YOUR RIGHTS:
ENVIRONMENTAL HAZARDS & TOXIC MATERIALS

What Rights Do Prisoners Have?

Exposing prisoners to dangerous conditions or toxic substances may violate the Eighth Amendment of the Constitution, which prohibits cruel and unusual punishment. Prison officials violate the Eighth Amendment if, with deliberate indifference, they expose a prisoner to a condition that poses an unreasonable risk of serious damage to that prisoner's future health. *Helling v. McKinney*, 509 U.S. 25, 35 (1993). Deliberate indifference is more difficult to prove than negligence or carelessness.

What Types of Conditions have Courts Found to Violate the Eighth Amendment?

- ***Inadequate ventilation***: *Board v. Farnham*, 394 F.3d 469 (7th Cir. 2005); *Keenan v. Hall*, 83 F.3d 1083, 1090 (9th Cir. 1996); *Ramos v. Lamm*, 639 F.2d 559, 569-70 (10th Cir. 1980).
- ***Excessive heat***: *Gates v. Cook*, 376 F.3d 323, 339-40 (5th Cir. 2004); *Reece v. Gragg*, 650 F. Supp. 1297, 1304 (D. Kan. 1986); *Rhem v. Malcolm*, 371 F. Supp. 594, 627 (S.D.N.Y. 1974); *but see Chandler v. Crosby*, 379 F.3d 1278, 1297-98 (11th Cir. 2004) (cell temperatures that occasionally approached 100 degrees did not violate the Eighth Amendment).
- ***Excessive cold***: *Gaston v. Coughlin*, 249 F.3d 156, 164-65 (2nd Cir. 2001); *Palmer v. Johnson*, 193 F.3d 346, 352-53 (5th Cir. 1999); *Dixon v. Godinez*, 114 F.3d 640, 642 (7th Cir. 1997); *Foulds v. Corley*, 833 F.2d 52, 54 (5th Cir. 1987).
- ***Lack of drinkable water***: *Hearns v. Terhune*, 413 F.3d 1036, 1042-43 (9th Cir. 2005) (lack of cold water where yard temperatures reached 100 degrees); *Jackson v. Arizona*, 885 F.2d 639, 641 (9th Cir. 1989) (allegation that drinking water was polluted was not a frivolous claim); *Jackson v. Duckworth*, 955 F.2d 21, 22 (7th Cir. 1992).
- ***Toxic or noxious fumes***: *Johnson-El v. Schoemehl*, 878 F.2d 1043, 1054-55 (8th Cir. 1989) (pesticides sprayed into housing units); *Cody v. Hillard*, 599 F.Supp. 1025, 1032 (D.S.D. 1984) (inadequate ventilation of toxic fumes in inmate workplaces), *aff'd in part and rev'd in part on other grounds*, 830 F.2d 912 (8th Cir. 1987) (en banc); but see *Givens v. Jones*, 900 F.2d 1229, 1234 (8th Cir. 1990) (no Eighth Amendment violation where prisoner suffered migraine headaches as a result of noise and fumes during three week long housing unit renovation).
- ***Exposure to sewage***: *DeSpain v. Uphoff*, 264 F.3d 965, 977 (10th Cir. 2001) (exposure to flooding and human waste).
- ***Exposure to second-hand tobacco smoke***: *Helling v. McKinney*, 509 U.S. at 35 (1993) (prisoner stated an Eighth Amendment claim where his cellmate smoked 5 packs of cigarettes a day); *Lehn v. Holmes*, 364 F.3d 862, 872 (7th Cir. 2004); *Atkinson v. Taylor*, 316 F.3d 257 (3rd Cir. 2003); *Reilly v. Grayson*, 310 F.3d 519 (6th Cir. 2002).
- ***Excessive noise***: *Keenan v. Hall*, 83 F.3d 1083, 1090 (9th Cir. 1996).
- ***Sleep deprivation***: *Gates v. Cook*, 376 F.3d 323, 340 (5th Cir. 2004); *Harper v. Showers*, 174 F.3d 716, 720 (5th Cir. 1999).

- ***Sleeping on the floor***: *Thompson v. City of Los Angeles*, 885 F.2d 1439, 1448 (9th Cir. 1989) ("[A] jail's failure to provide detainees with a mattress and bed or bunk runs afoul of the commands of the Fourteenth Amendment.").
- ***Lack of fire safety***: *Hadix v. Johnson*, 367 F.3d 513, 525 (6th Cir. 2004); *Hoptowit v. Spellman*, 753 F.2d 779, 784 (9th Cir. 1985); *Gates v. Collier*, 501 F.2d 1291, 1300, 1305 (5th Cir. 1974).
- ***Risk of injury or death in the event of an earthquake***: *Jones v. City and County of San Francisco*, 976 F.Supp. 896, 909-10 (N.D. Cal. 1997).
- ***Inadequate food or unsanitary food service***: *Phelps v. Kanoplas*, 308 F.3d 180 (2nd Cir. 2002); *Ramos v. Lamm*, 639 F.2d 559, 570-71 (10th Cir. 1980); *Wilson v. VanNatta*, 291 F.Supp.2d 811, 817 (N.D. Ind. 2003); *Drake v. Velasco*, 207 F.Supp. 2d 809 (N.D. Ill. 2002).
- ***Inadequate lighting or constant lighting***: *Gates v. Cook*, 376 F.3d 323, 341-42 (5th Cir. 2004) (inadequate lighting); *Keenan*, 83 F.3d at 1090-91 (constant illumination).
- ***Exposure to insects, rodents, and other vermin***: *Gates v. Cook*, 376 F.3d 323, 340 (5th Cir. 2004); *Gaston v. Coughlin*, 249 F.3d 156, 166 (2nd Cir. 2001); *Jackson v. Duckworth*, 955 F.2d 21, 22 (7th Cir. 1992); *Williams v. Griffin*, 952 F.2d 820, 825 (4th Cir. 1991); *Foulds v. Corley*, 833 F.2d 52, 54 (5th Cir. 1987).
- ***Defective plumbing***: *Jackson*, 955 F.2d at 22; *Williams*, 952 F.2d at 825; *McCord v. Maggio*, 927 F.2d 844, 847 (5th Cir. 1991).
- ***Deprivation of basic sanitation***: *Gates v. Cook*, 376 F.3d 323, 337-38 (5th Cir. 2004); *McBride v. Deer*, 240 F.3d 1287, 1292 (10th Cir. 2001); *Palmer v. Johnson*, 193 F.3d 346, 352 (5th Cir. 1999); *Harper v. Showers*, 174 F.3d 716, 717, 720 (5th Cir. 1999); *Bradley v. Puckett*, 157 F.3d 1022, 1025 (5th Cir. 1998); *Howard v. Adkison*, 887 F.2d 134, 137 (8th Cir. 1989).
- ***Denial of adequate toilet facilities***: *Gates v. Cook*, 376 F.3d 323, 340-41 (5th Cir. 2004); *Mitchell v. Newryder*, 245 F.Supp.2d 200 (D. Me. 2003).
- ***Exposure to asbestos***: *Powell v. Lennon*, 914 F.2d 1459, 1463 (11th Cir. 1990); but see *McNeil v. Lane*, 16 F.3d 123, 125 (7th Cir. 1994) (exposure to "moderate levels of asbestos" did not violate the Eighth Amendment).
- ***Exposure to the extreme behavior of severely mentally ill prisoners***: *Gates v. Cook*, 376 F.3d 323, 343 (5th Cir. 2004) (exposure to constant screaming and feces-smearing of mentally ill prisoners "contributes to the problems of uncleanliness and sleep deprivation, and by extension mental health problems, for the other inmates").
- ***Miscellaneous unhealthy or dangerous conditions***: *Hall v. Bennett*, 379 F.3d 462 (7th Cir. 2004) (unsafe conditions for prisoner performing electrical work); *Brown v. Missouri Dep't of Corrections*, 353 F.3d 1038, 1040 (8th Cir. 2004) (prisoner injured in vehicle accident after transport officers refused to fasten his seat belt).

What Types of Conditions Do *Not* Violate the Eighth Amendment?

Some courts have suggested that dangerous conditions do not violate the Constitution if workers in the surrounding community work in the same conditions. For example, an allegation that a prisoner was forced to work in heavy corn dust without a mask, causing nosebleeds, hair loss, and sores on his face, did not state an Eighth Amendment claim unless "the practice clearly differed from that of the surrounding agricultural community or violated a clearly established law." *Jackson v. Cain*, 864 F.2d 1235, 1245 (5th Cir. 1989). Similarly, exposure to a pesticide did not violate the Eighth Amendment when the exposure violated only a non-

mandatory regulation and was not shown to be any different from practices in the surrounding agricultural community. *Sampson v. King*, 693 F.2d 566, 569 (5th Cir. 1982).

Are Prisons Required to Comply with Civilian Environmental Regulations?

The Constitution does not require prisons to comply with all civilian environmental regulations. *French v. Owens*, 777 F.2d 1250, 1257 (7th Cir. 1985) (finding that a prison does not need to comply with OSHA or state regulations). However, these regulations may be enforced by various government agencies, and a prisoner may be able to argue that they are evidence of contemporary standards of decency.

If you have a case involving dangerous conditions or toxic substances, it may be helpful to complain to state or local health departments, the federal Occupational Safety and Health Administrations (OSHA), or other relevant agencies. State or local regulations may be enforceable in state courts.

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KNOW YOUR RIGHTS:
PRIVILEGED AND NON-PRIVILEGED MAIL

The Supreme Court has held that the First Amendment of the United States Constitution entitles prisoners to receive and send mail, subject only to the institution's right to censor letters or withhold delivery if necessary to protect institutional security, and if accompanied by appropriate procedural safeguards.[1] A prison official may have the authority to read a prisoner's mail if there is probable cause to believe that the inmate is conspiring with persons outside the prison to traffic in contraband or to arrange an escape. A prison's restrictions on mail received by prisoners must be rationally related to a legitimate penological interest.[2]

A prison's restrictions on prisoners' outgoing correspondence must meet a more exacting standard. They must be "no greater than is necessary or essential" to protect an "important or substantial" government interest.[3] Prison officials' ability to inspect and censor mail depends on whether the mail is privileged or not.

Non-Privileged Mail
(including commercial mail, letters from family members, friends and businesses)

The Constitution permits incoming non-privileged mail to be opened outside the prisoner's presence.[4] Prison officials can read non-privileged mail for security or for other correctional purposes without probable cause and without a warrant.[5] Business and commercial mail may be treated as non-privileged. Some courts restrict the reading of outgoing mail.[6]

Prisons may not ban mail simply because it contains material downloaded from the internet.[7] Prisoners may not be punished for posting material on the internet with the assistance of non-incarcerated third parties.[8] The Supreme Court has held that, in extreme cases, prison officials can withhold newspapers, magazines and photographs from prisoners to motivate better behavior.[9]

Privileged Mail
(including attorney-client communications, mail from the ACLU of Wyoming)
In order for mail to be treated as privileged, it must be clearly marked.[10] "Privileged" mail is entitled to greater confidentiality and freedom from censorship. Privileged mail may be briefly held to verify the identity of the addressee.[11] Privileged mail may be checked for contraband but cannot be read in the ordinary course of prison routine.[12] The "contraband" check must be conducted in front of the prisoner.[13] Outgoing privileged mail may generally be sent unopened.[14] Though legal correspondence is privileged, the Supreme Court has held that mail between prisoners containing legal advice *is not* privileged and does not receive more constitutional protection than other inmate speech.[15]

Some courts have accorded privileged status to mail to and from various public officials and agencies of state, local and federal government.[16] Disagreements exist regarding whether mail to and from the media is privileged.

What Can a Prisoner Do if Privileged Mail is Opened Outside the Prisoner's Presence?

A court will not necessarily rule for the prisoner in every case in which privileged email was opened outside of the prisoner's presence. This is not a reflection on whether the prisoner's right was violated, but instead reflects the deference the courts give to prison administrators. A court might rule, for example, that a prison receives a large volume of letters each day and may make a mistake once in a while.

A prisoner will have a greater chance of winning a lawsuit if there is a showing that he or she was actually harmed by the opening of the letter outside the prisoner's presence. Examples of actual harm would be if the prison official's policy is to open all privileged mail outside the recipient's presence, if the letter is copied, or if information contained in the letter is used against the prisoner.

When a prisoner receives a piece of privileged mail that has been opened outside his or her presence, the prisoner should file a grievance. Often, prison officials will admit that they erred, and that such accidents should not occur in the future. The prisoner should keep a copy of this grievance and any responses in case this act happens again. If the error happens again, the prisoner should file another grievance, mentioning the previous one and the previous official's response. If the prisoner can establish that the prison has a policy to open privileged mail outside the recipient's presence, then the prisoner has a better chance of succeeding in a lawsuit.

Important Note: The law is always evolving. If you have access to a prison law library, it is a good idea to confirm that the cited cases and statutes are still good law. This information sheet was last updated in 2010.

[1] *Hudson v. Palmer*, 468 U.S. 517, 547 (1984). See also *Parrish v. Johnson*, 800 F.2d 600, 604 (6th Cir. 1986) ("Any 'arbitrary opening and reading of … mail [with] no justification – other than harassment' may violate the First Amendment.").
[2] *Turner v. Safley*, 482 U.S. 78, 89-91 (1987).
[3] *Procunier v. Martinez*, 416 U.S. 396, 413-14 (1974), *overruled in part on other grounds by Thornburgh v. Abbott*, 490 U.S. 401 (1989); *Nasir v. Morgan*, 350 F.3d 366 (3rd Cir. 2003); *but see Ortiz v. Fort Dodge Correctional Facility*, 368 F.3d 1024, 1026 n.2 (8th Cir. 2004) (applying *Turner* standard to restrictions on outgoing correspondence).
[4] *See Martin v. Tyson*, 845 F.2d 1451, 1456-57 (5th Cir. 1988), *cert. denied*, 488 U.S. 863 (1988).
[5] *See Smith v. Boyd*, 945 F.2d 1041, 1043 (8th Cir. 1991).
[6] *See Wolfish v. Levi*, 573 F.2d 118, 130 (2nd Cir. 1978), *rev'd in part on other grounds sub nom*, *Bell v. Wolfish*, 441 U.S. 520 (1979).
[7] *Clement v. California Dep't of Corrections*, 364 F.3d 1148 (9th Cir. 2004).
[8] *Canadian Coalition Against the Death Penalty v. Ryan*, 269 F.Supp.2d 1199 (D. Ariz. 2003).
[9] *Beard v. Banks*, 548 U.S. 521 (2006).
[10] *See O'Donnell v. Thomas*, 826 F.2d 788, 790 (8th Cir. 1987).
[11] *See Guajardo v. Estelle*, 580 F.2d 748, 758-59 (5th Cir. 1978), *clarified on other grounds by McFarland v. Leyh (In re Texas Gen. Petroleum Corp.)*, 52 F.3d 1330 (5th Cir. 1995).
[12] *See Reneer v. Sewell*, 975 F.2d 258, 260 (6th Cir. 1992); *Al-Amin v. Smith*, 511 F.3d 1317 (11th Cir. 2008).
[13] *See Reneer v. Sewell*, 975 F.2d 258, 260 (6th Cir. 1992).
[14] *See Davidson v. Scully*, 694 F.2d 50, 53 (2nd Cir. 1982).
[15] *See Shaw v. Murphy*, 528 U.S. 223, 230-31 (2001).
[16] *See Muhammad v. Pitcher*, 35 F.3d 1081, 1083-86 (6th Cir. 1994); *but see O'Keefe v. Van Boening*, 82 F.3d 322 (9th Cir. 1996) (prison's refusal to treat letters to state agencies and officials as privileged "legal mail" did not violate the First Amendment).

KNOW YOUR RIGHTS:
PUBLICATIONS SENT BY MAIL[1]

"[P]rison walls do not form a barrier separating prison inmates from the protections of the Constitution," including the First Amendment.[2] This means that prisoners have some right to receive publications through the mail. However, prisoners' First Amendment rights are far more limited than those of non-prisoners, and prison officials can significantly restrict the publications prisoners receive.

Legal Test

Restrictions on prisoners' access to publications cannot be arbitrary; they must be "reasonably related to legitimate penological interests."[3] Nonetheless, in practice, courts generally will accept the judgment of prison authorities in deciding whether censoring a publication is reasonable.

Following the Supreme Court's decision in *Turner*, courts consider the following factors in determining whether prison censorship is permissible:

1. **Whether there is a "valid, rational connection between the prison regulation and the legitimate governmental interest put forward to justify it."[4]** In other words, does the censorship serve a valid purpose, such as preventing violence? This factor is the most important and often determines how courts rule.

2. **Whether there are "alternative means of exercising the right that remain open to prison inmates."[5]** For example, if prisoners cannot receive certain publications in the mail, do they have other access to publications? For example, can prisoners still receive other publications in the mail, or read books in a library?

3. **What impact the "accommodation of the asserted constitutional right" will have on "guards and other inmates, and on the allocation of prison resources generally."[6]** In other words, what are the downsides (including financial cost to the prison system) of not censoring publications?

4. **Whether there are "ready alternatives" for furthering the governmental interest.**[7] In other words, is there something obvious the prison could do that would protect whatever interest the prison has in mind (such as security) without banning publications?

The *Turner* standard applies to *convicted* prisoners, and somewhat greater protections may apply to pre-trial detainees held in jails.[8] The law is unsettled as to the protections afforded to immigration detainees. Some courts have held that immigration detainees are entitled to greater protections than pretrial detainees. Even if a policy is *facially* constitutional (meaning the policy itself does not violate the Constitution) you may be able to argue that the policy *as applied* to the particular material you want to receive violates the Constitution.[9]

Total Ban on Receipt of Publications

Many courts have held that the "prohibition of virtually all reading materials deprives the inmates of their First Amendment right to receive information and ideas."[10] However, categorical bans on publications sent by mail have been upheld in some cases, particularly where such rules apply to jails that hold detainees for a short period of time or prisoners in particularly restrictive segregation units.[11]

News and Political Speech

Courts have generally struck down rules which deny inmates access to mainstream newspapers and magazines.[12] The confiscation of inmates' political literature violates the First Amendment unless prison officials can show that the publication poses a danger to prison security—for example, by inciting violence.[13]

Weapons, Escape Plans, and Illegal Activity

Prisons and jails may ban material that describes how to build weapons, instructs how to escape, or instructs how to break the law.[14]

Nudity and Pornography

Courts have held that prisons and jails generally can ban magazines that contain frontal nudity and/or pornography (including magazines such as *Playboy* and *Penthouse*, as well as more "hardcore" magazines).[15] Courts are divided as to whether magazines that show partial nudity (such as *Stuff* and *FHM*) can also be banned.[16] It has also been held that prohibitions on nudity that lack exceptions for materials with artistic merit (such as pictures of nude figures on the Sistine Chapel ceiling) are not constitutional.[17]

Bureau of Prisons Program Statement 5266.10 – which applies to federal prisons only – lists the following examples of publications that contain some nudity but nonetheless may be delivered to prisoners: *National Geographic*; *Our Body, Our Selves;* sports magazine swimsuit issues; and lingerie catalogs.

Religious Publications

Under the First Amendment, the *Turner* standard, described above, also applies to religious exercise.[18] Thus, regulation of publications will overcome First Amendment challenges if the restrictions are reasonably related to penological interests. However, prisons cannot discriminate against religious publications by arbitrarily subjecting them to rules that do not apply to nonreligious publications.[19]

In addition to the First Amendment, access to religious publications is sometimes protected by the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc *et seq*. (RLUIPA) (which applies to non-federal prisoners) and the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq.* (RFRA) (which applies to federal prisoners). Generally speaking, RLUIPA and RFRA are more protective of religious exercise than the First Amendment, prohibiting state or local institutions from imposing a *substantial burden* on the religious exercise of prisoners unless that burden furthers a *compelling* government interest and is the *least restrictive* means of furthering that interest.[20] For example, some courts have held that prisons may not ban even religious materials that express racist or intolerant thoughts, so long as they do not advocate actual violence.[21] However, courts have held that prison officials do not violate RLUIPA or the (listing *FHM* and *Stuff* along with magazines that show full nudity, describing them collectively as publications that "invariably contain nude or semi-nude depictions, or sexually explicit content," and upholding ban on such publications).

However, courts have held that prison officials do not violate RLUIPA or the First Amendment when they prevent prisoners from receiving racist and intolerant publications that actively advocate violence.[22]

Publisher Only Rules

Court have generally upheld rules that only permit prisoners to receive hardcover and softcover books and bound periodicals from commercial sources.[23] However, some courts have held that prisoners cannot be prohibited from receiving clippings and copies of articles from noncommercial sources.[24]

Gift Subscriptions

Most courts have held that prison officials cannot prevent friends or family members from purchasing gift subscriptions for prisoners by forcing prisoners to pay for subscriptions out of their own accounts.[25] Other cases have reached the opposite conclusion.[26]

Right to Notice

Prisoners have a right to be notified by prison officials when they censor an incoming publication.[27]

Practical Considerations

- In theory, prisons and jails cannot unreasonably restrict access to publications.
- Nonetheless, winning a lawsuit that challenges a restriction on publications (even a seemingly unreasonable restriction) is not an easy task. Courts will expect you to be able to prove that a restriction serves no reasonable purpose. This means that even to defeat a policy that seems arbitrary or too restrictive on its face, you will probably still need to develop a full factual record about whether the policy is justified. This can be

extremely difficult if you do not have the funds to conduct full discovery or afford expert witnesses.

- In some cases, you may be able to show that a policy is unreasonable because the prison's rationale conflicts with other policies. For example, if a prison bans magazines on the ground that they create a fire hazard but allows newspapers and books that create similar fire risks, you may be able to show that the ban on magazines is not rational.
- If you are challenging the failure to deliver publications on a limited number of occasions, a court may hold that prison officials did not violate the Constitution by failing to deliver the publications to you even if you had a constitutional right to receive them. This is because isolated failures to deliver publications may be the result of negligence by mailroom personnel, rather than intent to violate the Constitution.[28]
- If your goal is to obtain a judgment awarding money (as opposed to only changing the rules or allowing you to receive a publication), several additional doctrines may make it very hard (though not always impossible) to succeed in court.
- When you learn that a publication has been rejected, you should always try to check the institution's publication policy. If you believe the policy has been violated, you may be able to get the publication delivered by filing a grievance showing that the failure to deliver the publication violated the policy.

Important Note: The law is always evolving. If you have access to a prison law library, it is a good idea to confirm that the cited cases and statutes are still good law. This information sheet was last updated in 2009.

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[1] Copyright August 14, 2009, by the National Prison Project of the ACLU. This document may be freely distributed without charge to prisoners and to those providing legal assistance to them.
[2] *Turner v. Safley,* 482 U.S. 78, 84 (1987).
[3] *Turner,* 482 U.S. at 89.
[4] *Id*.
[5] *Id*.
[6] *Id*. at 90.

[7] *Id*.
[8] *Bell v. Wolfish*, 441 U.S. 520, 545 (1979) ("[P]retrial detainees, who have not been convicted of any crimes, retain at least those constitutional rights that we have held are enjoyed by convicted prisoners.").
[9] *See, e.g.*, *Thornburgh v. Abbott*, 490 U.S. 401, 404 (1989) (rejecting facial challenge to Bureau of Prisons policy on incoming publications but leaving open the possibility that the policy might be unconstitutional as applied to particular publications).
[10] *Parnell v. Waldrep*, 511 F. Supp. 764, 768 (W.D.N.C. 1981); *see also Mann v. Smith*, 796 F.2d 79, 82 (5th Cir. 1986) (striking down jail's categorical ban on magazines and newspapers); *Payne v. Whitmore***,** 325 F.Supp. 1191, 1193 (N.D. Cal. 1971) (striking down jail's total prohibition on receiving newspapers and magazines by mail).
[11] *E.g. Beard v. Banks*, 548 U.S. 521, 531 (2006) (prison may ban inmates in long-term segregation unit from receiving newspapers and magazines); *Hause v. Vaught*, 993 F.2d 1079, 1084 (4th Cir. 1993) (jail holding detainees for short periods of time may ban prisoners from receiving publications in the mail). *But see Parnell*, 511 F. Supp. at 768 (striking down publications ban at jail); *Mann*, 796 F.2d at 82 (same); *Payne v. Whitmore***,** 325 F. Supp. at 1193 (N.D. Cal. 1971) (same); *Prison Legal News v. Fulton County*, 1:07-CV-2618-CAP (N.D. Ga. July 13, 2009) (same).
[12] *E.g. Morrison v. Hall*, 261 F.3d 896, 903-05 (9th Cir. 2001) (striking down regulation limiting prisoners to first class and second class mail that prevented prisoners from receiving *The New York Times*, *Sports Illustrated*, and *Montana Outdoors*); *Prison Legal News v. Cook*, 238 F. 3d 1145, 1151 (9th Cir. 2001) (striking down same regulation as applied to *Prison Legal News*).
[13] *E.g.*, *Greybuffalo v. Kingston*, 581 F. Supp. 2d 1034 (W.D. Wis. 2007) (prisoner had right to receive literature regarding the American Indian Movement, a civil rights organization, but not literature from a Native American group characterized as a "gang").
[14] *E.g.*, *Thornburgh v. Abbott,* 490 U.S. 401, 405 n. 5 (1989).
[15] *Mauro v. Arpaio*, 188 F.3d 1054, 1063 (9th Cir. 1999) (en banc); *Amatel v. Reno*, 156 F.3d 192 (D.C. Cir. 1998).
[16] *Compare Strope v. Collins*, 492 F.Supp.2d 1289, 1300 (D. Kan. 2007) (denying summary judgment to prison officials who refused to deliver *FHM* and stating "a rational trier of fact could conclude that defendants' censorship of entire publications based on the fact that they contain a few photographs of women which reveal their partially bare buttocks is not reasonably related to a legitimate penological interest") *with Moses v. Dennehy,* 523 F.Supp.2d 57, 64 (D. Mass. 2007).
[17] *Aiello v. Litscher*, 104 F. Supp. 2d 1068, 1080 (W.D. Wis. 2000).
[18] *See O'Lone v. Shabazz*, 482 U.S. 342, 350-53 (1987).
[19] *Bess v. Alameida*, No. 03-2498, 2007 WL 2481682, at *17 (E.D. Cal. Aug. 29, 2007) (rule that "applied solely to religious publications, distinguishing between religious publications and all other publications" violated the Constitution); *see also generally Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993) ("At a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs....").
[20] *Cutter v. Wilkinson,* 544 U.S. 709, 712 (2005).
[21] *E.g.*, *Nichols v. Nix*, 810 F. Supp. 1466 (S.D. Iowa 1993), *aff'd*, No. 93-1490, 1994 WL 20653 (8th Cir. Jan. 28, 1994).
[22] *Borzych v. Frank*, 439 F.3d 388, 390-91 (7th Cir. 2006).
[23] *Bell v. Wolfish*, 441 U.S. 520, 549-550 (1979); *see also Ward v. Washtenaw County Sheriff's Dep't.,* 881 F.2d 325, 329 (6th Cir. 1989); *Hurd v. Williams,* 755 F.2d 306, 308-09 (3d Cir. 1985); *Kines v. Day,* 754 F.2d 28, 30 (1st Cir. 1985); *Cotton v. Lockhart,* 620 F.2d 670, 672 (1980).
[24] *Allen v. Coughlin,* 64 F.3d 77, 81 (2d Cir.1995); *see also Lindell v. Frank*, 377 F.3d 655, 659-60 (7th Cir. 2004).
[25] *Crofton v. Roe*, 170 F.3d 957, 961 (9th Cir. 1999); *Jacklovich v. Simmons*, 392 F.3d 420 (10th Cir. 2004).
[26] *Wardell v. Maggard*, 470 F.3d 954, 961-63 (10th Cir. 2006) (prison policy banning gift subscriptions is constitutional); *Rice v. State*, 95 P.3d 994, 1011-12 (Kan. 2004).
[27] *E.g.*, *Procunier v. Martinez,* 416 U.S. 396, 417 (1974) (holding that the "decision to censor or withhold delivery of a particular letter must be accompanied by minimum procedural safeguards," including notice), *overruled on other* grounds, *Thornburgh,* 490 U.S. 401; *Prison Legal News v. Cook*, 238 F.3d 1145, 1152-53 (9th Cir. 2001).
[28] *E.g.*, *Jones v. Salt Lake County*, 503 F.3d 1147, 1163 (10th Cir. 2007).

KNOW YOUR RIGHTS:
MEDICAL, DENTAL AND MENTAL HEALTH CARE

Medical Care

Prison officials are obligated under the Eighth Amendment to provide prisoners with adequate medical care.[1] This principle applies regardless of whether the medical care is provided by governmental employees or by private medical staff under contract with the government.[2]

In order to prevail on a constitutional claim of inadequate medical care, prisoners must show that prison officials treated them with "deliberate indifference to serious medical needs."[3]

What is deliberate indifference?

A prison official demonstrates "deliberate indifference" if he or she recklessly disregards a substantial risk of harm to the prisoner.[4] This is a higher standard than negligence, and requires that the official *knows of and disregards* an excessive risk of harm to the prisoner.[5] The prison official does not, however, need to know of a specific risk from a specific source.[6]

Proof of prison officials' knowledge of a substantial risk to a prisoner's health can be proven by circumstantial evidence. For example, it may be inferred from "the very fact that the risk was obvious."[7] This circumstantial proof may be shown by deterioration in prisoners' health, such as obvious conditions like sharp weight loss. A prison official cannot "escape liability if the evidence showed that he merely refused to verify underlying facts that he strongly suspected to be true, or declined to confirm inferences of risk that he strongly suspected to exist."[8]

Officials' knowledge can also be proven by direct evidence. For example, prisoners might present sick call requests, medical records, complaints, formal grievances or other records reflecting: the nature of the complaint, the date of the complaint, the individuals to whom the complaint was made, the treatment provided, the adequacy of the treatment, the date the treatment was provided, the medical staff seen, the nature of follow-up care ordered and whether it was carried out, the effects of any delay in obtaining treatment, and any additional information relating to the complaint.

What is a Serious Medical Need?

The Eighth Amendment prohibits the "unnecessary and wanton infliction of pain."[9] Some factors courts have considered in determining whether a "serious medical need" is at issue are "(1) whether a reasonable doctor or patient would perceive the medical need in question as important and worthy of comment or treatment; (2) whether the medical condition significantly affects daily activities; and (3) the existence of chronic and substantial pain."[10] Additionally, courts will be likely to find a "serious medical need" if a condition "has been diagnosed by a

physician as mandating treatment or … is so obvious that even a lay person would easily recognize the necessity of a doctor's attention."[11]

A serious medical need is present whenever the failure to treat a prisoner's condition could result in further significant injury or the unnecessary and wanton infliction of pain."[12] Significant injury, pain or loss of function can constitute "serious medical needs" even if they are not life-threatening.[13] Pain can constitute a "serious medical need" even if the failure to treat it does not make the condition worse.[14] At least one court has held that pregnancy, at least in its later stages, constitutes a serious medical need.[15]

Elements of an Adequate Medical Care System

The Eighth Amendment requires that prison officials provide a system of ready access to adequate medical care. Prison officials show deliberate indifference to serious medical needs if prisoners are unable to make their medical problems known to the medical staff or if the staff is not competent to examine the prisoners, diagnose illnesses, and then treat or refer the patient.[16] The prison must also provide an adequate system for responding to emergencies. If outside facilities are too remote or too inaccessible to handle emergencies promptly and adequately, then the prison must provide adequate facilities and staff to handle emergencies within the prison.[17]

A mere difference of medical judgment is not actionable.[18] But the decisions of prison doctors are not per se unassailable.[19] In general, the prisoner must be able to show that the actions of medical staff could not be supported by legitimate medical judgment.

Some examples of actionable harm from inadequate medical care include:

- Serious denials or delay in access to medical personnel.[20]
- A denial of access to appropriately qualified health care personnel.[21]
- A failure to inquire into facts necessary to make a professional judgment.[22]
- A failure to carry out medical orders.[23]
- Reliance on non-medical factors in making treatment decisions.[24]
- Judgment so egregiously bad that it really isn't medical.[25]

Dental Care

Dental care of prisoners is governed by the same constitutional standard of deliberate indifference as is medical care.[26]

"Dental care is one of the most important medical needs of inmates."[27] Dental care that consists of pulling teeth that can be saved is constitutionally inadequate.[28] Delays in dental care can also violate the Eighth Amendment, particularly if the prisoner is suffering pain in the interim.[29] Prolonged deprivation of toothpaste can violate the Eighth Amendment.[30] One court has held that some minimal level of prophylactic dental care is constitutionally required.[31]

Mental Health Care

Mental health care of prisoners is governed by the same constitutional standard of deliberate indifference as is medical care. A "severe" mental illness is one "that has caused significant

disruption in an inmate's everyday life and which prevents his functioning in the general population without disturbing or endangering others or himself."[32]

Elements of an Adequate Mental Health Care System

The Eighth Amendment requires that prison officials provide a system of ready access to adequate mental health care. First, there must be a systematic program for screening and evaluating inmates in order to identify those who require mental health treatment. Second, treatment must entail more than segregation and close supervision of the inmate patients. Third, treatment requires the participation of trained mental health professionals, who must be employed in sufficient numbers to identify and treat in an individualized manner those treatable inmates suffering from serious mental disorders. Fourth, accurate, complete, and confidential records of the mental health treatment process must be maintained. Fifth, prescription and administration of behavior-altering medications in dangerous amounts, by dangerous methods, or without appropriate supervision and periodic evaluation, is an unacceptable method of treatment. Sixth, a basic program for the identification, treatment and supervision of inmates with suicidal tendencies is a necessary component of any mental health treatment program.[33]

Some examples of actionable harm from inadequate mental health care include:

- Lack of adequate mental health screening on intake.[34]
- Failure to follow up on prisoners with known or suspected mental health disorders.[35]
- Failure to provide adequate numbers of qualified mental health staff.[36]
- Housing mentally ill prisoners in segregation or "supermax" units.[37]
- Failure to transfer seriously mentally ill prisoners to more appropriate facilities.[38]
- Improper use of restraints.[39]
- Excessive use of force against mentally ill prisoners.[40]
- Lack of training of custody staff in mental health issues.[41]

Medical Billing

Many prisons across the country charge inmates for basic medical care as a way to cut costs and discourage prisoners who abuse sick call. The government, however, still has an obligation to provide medical care for prisoners.[42] One court has expressed the belief that medical billing policies requiring prisoners to pay for care may be unconstitutional.[43] But most courts have found co-pay and over-the-counter (OTC) policies constitutional as long as prisoners are not deprived of needed care because of their inability to pay.[44] When a billing policy prevents a prisoner from receiving adequate health care because the prisoner cannot pay, courts will be more likely to conclude that the policy is unconstitutional.[45]

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[1] *Estelle v. Gamble*, 429 U.S. 97, 103 (1976).
[2] *West v. Atkins*, 487 U.S. 42, 57-58 (1988); *Richardson v. McKnight*, 521 U.S. 399 (1997).
[3] *Estelle*, 429 U.S. at 104.
[4] *Farmer v. Brennan*, 511 U.S. 825, 836 (1994).
[5] *Id.* at 837.
[6] *Id.* at 843; *Bradley v. Puckett*, 157 F.3d 1022, 1025 (5th Cir. 1998).
[7] *Farmer*, 511 U.S. at 842.
[8] *Id.* at 843 n.8.

[9] *Estelle v. Gamble*, 429 U.S. at 104.
[10] *Brock v. Wright*, 315 F.3d 158, 162 (2nd Cir. 2003) (internal quotation marks omitted).
[11] *Hill v. DeKalb Reg'l Youth Detention Ctr.*, 40 F.3d 1176, 1187 (11th Cir. 1994) (internal quotation marks, citation omitted).
[12] *Clement v. Gomez*, 298 F.3d 898, 904 (9th Cir. 2002).
[13] *See Greeno v. Daley*, 414 F.3d 645, 653 (7th Cir. 2005) (severe heartburn with frequent vomiting); *Brock v. Wright*, 315 F.3d 158, 163-64 (2nd Cir. 2003) (painful keloids); *Clement v. Gomez*, 298 F.3d 898 (9th Cir. 2002) (effects of pepper spray on bystanders); *Ellis v. Butler*, 890 F.2d 1001, 1003 (8th Cir. 1989) (swollen, painful knee); *Pulliam v. Shelby County*, 902 F. Supp. 797, 801-02 (W.D. Tenn. 1995) (denial of dilantin prescribed for seizure disorder); *Chaney v. City of Chicago*, 901 F.Supp. 266, 270 (N.D. Ill. 1995) (post-surgical care of foot); *Bouchard v. Magnusson*, 715 F.Supp. 1146, 1148 (D. Me. 1989) (persistent back pain); *Smallwood v. Renfro*, 708 F. Supp. 182, 187 (N.D. Ill. 1989) (cut lip); *Henderson v. Harris*, 672 F.Supp. 1054, 1059 (N.D. Ill. 1987) (hemorrhoids); *Case v. Bixler*, 518 F.Supp. 1277, 1280 (S.D. Ohio 1981) (boil).
[14] *See Boretti v. Wiscomb*, 930 F.2d 1150, 1154 (6th Cir. 1991) (denial of dressing and pain medication for wound); *Ellis v. Butler*, 890 F.2d 1001, 1003 (8th Cir. 1989) (nurse's failure to deliver pain medication); *Washington v. Dugger*, 860 F.2d 1018, 1021 (11th Cir. 1988) (denial of treatments that could "eliminate pain and suffering at least temporarily"); *H.C. v. Jarrard*, 786 F.2d 1080, 1083, 1086 (11th Cir. 1986) (denial of medical care for injured shoulder was unconstitutional, although no permanent injury resulted); *Lavender v. Lampert*, 242 F.Supp.2d 821 (D. Or. 2002) (failure to provide pain medication for partial spastic paralysis of the foot).
[15] *Doe v. Gustavus*, 294 F.Supp.2d 1003, 1008 (E.D.Wis. 2003).
[16] Such referrals may be to other physicians within the prison, or to physicians or facilities outside the prison if reasonably speedy access exists.
[17] *Hoptowit v. Ray*, 682 F.2d 1237, 1252-53 (9th Cir. 1982).
[18] *Stewart v. Murphy*, 174 F.3d 530, 535 (5th Cir. 1999).
[19] *See, e.g., Greeno v. Daley*, 414 F.3d 645 (7th Cir. 2005) ("a prisoner is not required to show that he was literally ignored"); *Hunt v. Uphoff*, 199 F.3d 1220, 1223-24 (10th Cir. 1999) (one doctor denied insulin prescribed by another doctor); *Miller v. Schoenen*, 75 F.3d 1305 (8th Cir. 1996) (recommendations from outside hospitals not followed).
[20] *Estelle v. Gamble*, 429 U.S. at 104; *Weyant v. Okst*, 101 F.3d 845, 856-57 (2nd Cir. 1996) (delay of hours in getting medical attention for diabetic in insulin shock); *Natale v. Camden County Correctional Facility*, 318 F.3d 575 (3rd Cir. 2003) (delay of 21 hours in providing insulin to diabetic); *Wallin v. Norman*, 317 F.3d 558 (6th Cir. 2003) (delay of one week in treating urinary tract infection, and one day in treating leg injury); *Murphy v. Walker*, 51 F.3d 714, 719 (7th Cir. 1995) (two-month delay in getting prisoner with head injury to a doctor).
[21] *LeMarbe v. Wisneski*, 266 F.3d 429 (6th Cir. 2001), *cert. denied*, 535 U.S. 1056 (2002) (failure of surgeon to send patient to a specialist); *Mandel v. Doe*, 888 F.2d 783, 789-90 (11th Cir. 1989) (physician's assistant failed to diagnose broken hip, refused to order x-ray, and prevented prisoner from seeing a doctor); *Washington v. Dugger*, 860 F.2d 1018, 1021 (11th Cir. 1988) (failure to return prisoner to VA hospital for treatment of Agent Orange exposure); *Toussaint v. McCarthy*, 801 F.2d 1080, 1112 (9th Cir. 1986) (rendering of medical services by unqualified personnel is deliberate indifference).
[22] *Liscio v. Warren*, 901 F.2d 274, 276-77 (2nd Cir. 1990) (physician failed to inquire into the cause of arrestee's delirium and thus failed to diagnose alcohol withdrawal); *Miltier v. Beorn*, 896 F.2d 848, 853 (4th Cir. 1990) (doctor failed to perform tests for cardiac disease in patient with symptoms that called for them); *Inmates of Occoquan v. Barry*, 717 F. Supp. 854, 867-68 (D.D.C. 1989) (failure to perform adequate health screening on intake).

[23] *Estelle v. Gamble*, 429 U.S. at 105 ("intentionally interfering with treatment once prescribed"); *Lawson v. Dallas County*, 286 F.3d 257 (5th Cir. 2002) (failure to follow medical orders for care of paraplegic prisoner); *Walker v. Benjamin*, 293 F.3d 1030 (7th Cir. 2002) (refusal to provide prescribed pain medication); *Koehl v. Dalsheim*, 85 F.3d 86, 88 (2nd Cir. 1996) (denial of prescription eyeglasses); *Erickson v. Holloway*, 77 F.3d 1078, 1080 (8th Cir. 1996) (officer's refusal of emergency room doctor's request to admit the prisoner and take x-rays); *Boretti v. Wiscomb*, 930 F.2d 1150, 1156 (6th Cir. 1991) (nurse's failure to perform prescribed dressing changes).

[24] *Boswell v. Sherburne County*, 849 F.2d 1117, 1123 (8th Cir. 1988) (budgetary restrictions); *Jones v. Johnson*, 781 F.2d 769, 771 (9th Cir. 1986) (same); *Ancata v. Prison Health Services, Inc.*, 769 F.2d 700, 704-05 (11th Cir. 1985) (refusal to provide specialty consultations without a court order); *Wilson v. VanNatta*, 291 F.Supp.2d 811, 816 (N.D. Ind. 2003) (cost).

[25] *Greeno v. Daley*, 414 F.3d 645, 654 (7th Cir. 2005) (treatment "so blatantly inappropriate as to evidence intentional mistreatment likely to seriously aggravate [plaintiff's] condition"); id. at 655 ("doggedly persist[ing] in a course of treatment known to be ineffective"); *Adams v. Poag*, 61 F.3d 1537, 1543-44 (11th Cir. 1995) (medical treatment that is "so grossly incompetent, inadequate, or excessive as to shock the conscience" constitutes deliberate indifference); *Hughes v. Joliet Correctional Ctr.*, 931 F.2d 425, 428 (7th Cir. 1991) (evidence that medical staff treated the plaintiff "not as a patient, but as a nuisance").

[26] *Hoptowit v. Ray*, 682 F.2d 1237, 1253 (9th Cir. 1982).

[27] *Ramos v. Lamm*, 639 F.2d 559, 576 (10th Cir. 1980); *accord Wynn v. Southward*, 251 F.3d 588, 593 (7th Cir. 2001); *Hunt v. Dental Dept.*, 865 F.2d 198, 200 (9th Cir. 1989).

[28] *Chance v. Armstrong*, 143 F.3d 698, 700-02 (2nd Cir. 1998); *Dean v. Coughlin*, 623 F. Supp. 392, 405 (S.D.N.Y. 1985); *Heitman v. Gabriel*, 524 F. Supp. 622, 627 (W.D. Mo. 1981).

[29] *Hartsfield v. Colburn*, 371 F.3d 454, 457 (8th Cir. 2004) (six weeks); *Canell v. Bradshaw*, 840 F. Supp. 1382, 1387, 1393 (D. Or. 1993), *aff'd*, 97 F.3d 1458 (9th Cir. 1996) (several days); *Fields v. Gander*, 734 F.2d 1313, 1315 (8th Cir. 1984) (three weeks); *Farrow v. West*, 320 F.3d 1235 (11th Cir. 2003) (fifteen-month delay in providing dentures).

[30] *Board v. Farnham*, 394 F.3d 469 (7th Cir. 2005).

[31] *Barnes v. Government of Virgin Islands*, 415 F.Supp. 1218, 1235 (D.V.I. 1976).

[32] *Tillery v. Owens*, 719 F.Supp. 1256, 1286 (W.D. Pa. 1989), *aff'd*, 907 F.2d 418 (3rd Cir. 1990).

[33] *Ruiz v. Estelle*, 503 F.Supp. 1265, 1339 (S.D. Tex. 1980) (citations omitted), *aff'd in part and rev'd in part on other grounds*, 679 F.2d 1115 (5th Cir.), *amended in part and vacated in part*, 688 F.2d 266 (5th Cir. 1982); *accord Balla v. Idaho State Bd. of Corrections*, 595 F.Supp. 1558, 1577 (D. Idaho 1984); *Coleman v. Wilson*, 912 F.Supp. 1282, 1298 n.10 (E.D. Cal. 1995).

[34] *Woodward v. Correctional Medical Servs.*, 368 F.3d 917 (7th Cir. 2004); *Gibson v. County of Washoe*, 290 F.3d 1175, 1189 (9th Cir. 2002), *cert. denied*, 537 U.S. 1106 (2003); *Inmates of Occoquan v. Barry*, 717 F.Supp. 854, 868 (D.D.C. 1989); *Inmates of the Allegheny County Jail v. Pierce*, 487 F.Supp. 638, 642, 644 (W.D. Pa. 1980).

[35] *Woodward v. Correctional Medical Servs.*, 368 F.3d 917 (7th Cir. 2004) (failure to respond to signs that prisoner was suicidal); *De'Lonta v. Angelone*, 330 F.3d 630 (4th Cir. 2003) (failure to treat prisoner's compulsion to self-mutilate); *Olsen v. Bloomberg*, 339 F.3d 730 (8th Cir. 2003) (failure to take reasonable steps to prevent prisoner suicide); *Cavalieri v. Shepard*, 321 F.3d 616, 621-22 (7th Cir.), *cert. denied*, 540 U.S. 1003 (2003) (failure to respond to warnings that prisoner was suicidal); *Comstock v. McCrary*, 273 F.3d 693 (6th Cir. 2001), *cert. denied*, 537 U.S. 817(2002); *Sanville v. McCaughtrey*, 266 F.3d 724, 738 (7th Cir. 2001); *Waldrop v. Evans*, 871 F.2d 1030, 1036 (11th Cir. 1989); *Arnold v. Lewis*, 803 F.Supp. 246, 257-58 (D. Ariz. 1992).

[36] *Waldrop v. Evans*, 871 F.2d 1030, 1036 (11th Cir. 1989) (non-psychiatrist was not qualified to evaluate significance of prisoner's suicidal gesture); *Cabrales v. County of Los Angeles*, 864 F.2d 1454, 1461 (9th Cir. 1988), *vacated*, 490 U.S. 1087 (1989), *reinstated*, 886 F.2d 235 (9th Cir. 1989); *Wellman v. Faulkner*, 715 F.2d 269, 272-73 (7th Cir. 1983) ("a psychiatrist is needed to supervise long term maintenance" on psychotropic medication); *Ramos v. Lamm*, 639 F.2d 559, 577-78 (10th Cir. 1980).

[37] *Jones'El v. Berge*, 164 F.Supp.2d 1096 (W.D. Wis. 2001); *Ruiz v. Johnson*, 37 F.Supp.2d 855, 913-15 (S.D. Tex. 1999), *rev'd on other grounds*, 243 F.3d 941 (5th Cir. 2001), *adhered to on remand*, 154 F.Supp.2d 975 (S.D. Tex. 2001); *Coleman v. Wilson*, 912 F.Supp. 1282, 1320-21 (E.D. Cal. 1995); *Madrid v. Gomez*, 889 F.Supp. 1146, 1265-66 (N.D. Cal. 1995); *Casey v. Lewis*, 834 F.Supp. 1477, 1549-50 (D. Ariz. 1993); *Finney v. Mabry*, 534 F.Supp. 1026, 1036-37 (E.D. Ark. 1982); *see also Gates v. Cook*, 376 F.3d 323, 343 (5th Cir. 2004) (noting evidence that "the

isolation and idleness of Death Row combined with the squalor, poor hygiene, temperature, and noise of extremely psychotic prisoners create an environment 'toxic' to the prisoners' mental health").

[38] *Morales Feliciano v. Rossello Gonzalez*, 13 F.Supp.2d 151, 209, 211 (D.P.R. 1998); *Madrid*, 889 F.Supp. at 1220; *Coleman*, 912 F.Supp. at 1309; *Arnold v. Lewis*, 803 F.Supp. 247, 257 (D. Ariz. 1992).

[39] *Wells v. Franzen*, 777 F.2d 1258, 1261-62 (7th Cir. 1985); *Campbell v. McGruder*, 580 F.2d 521, 551 (D.C. Cir. 1978).

[40] *Coleman*, 912 F.Supp. at 1321-23; *Kendrick v. Bland*, 541 F.Supp. 21, 25-26 (W.D. Ky. 1981).

[41] *Olsen v. Layton Hills Mall*, 312 F.3d 1304, 1319-20 (10th Cir. 2002).

[42] *Estelle*, 429 U.S. 97 (1976); *see also DeShaney v. Winnebago County Dep't of Social Servs*,, 489 U.S. 189, 199-200 (1989) ("[W]hen the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs – *e.g.*, food, clothing, shelter, medical care, and reasonable safety – it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause.").

[43] *See Collins v. Romer* 962 F.2d 1508 (10th Cir. 1992).

[44] *See Reynolds v. Wagner*, 128 F.3d 166 (3rd Cir. 1997) (charging inmates for medical care is not per se unconstitutional; deterrent effect did not violate the Eighth Amendment or Due Process Clause); *Gardner v. Wilson*, 959 F. Supp. 1224, 1228 (C.D. Cal. 1997); *Bihms v. Klevenhagen*, 928 F.Supp. 717, 718 (S.D. Tex. 1996) (no constitutional right is implicated by the state seeking compensation for costs of maintaining prisoners); *Hudgins v. De Bruyn*, 922 F.Supp. 144 (S.D. Ind. 1996); *Johnson v. Department of Public Safety & Correctional Servs.*, 885 F.Supp. 817 (D. Md. 1995) (co-pay system bore rational relationship to legitimate prison goal of efficient use of resources and promoting inmate responsibility, and therefore was not unconstitutional).

[45] *See, e.g., Martin v. DeBruyn*, 880 F.Supp. 610, 615 (N.D. Ind. 1995) ("[a] prison official violates the Eighth Amendment by refusing to provide [over-the-counter] medicine for a serious medical need only if the inmate lacks sufficient resources to pay for the medicine. If the inmate can afford the medicine but chooses to apply his resources elsewhere, it is the inmate, and not the prison official, who is indifferent to serious medical needs.").

KNOW YOUR RIGHTS:
OUT OF CELL RIGHTS[1]

Prisoners are constitutionally entitled to some form of exercise or out-of-cell recreation.[2] While constitutionally protected, there are no specific constitutional standards for out-of-cell recreation under the Eighth Amendment.[3] Therefore, courts have held that denial of out-of-cell recreation may be considered on a case-by-case basis and prison officials may deny out-of-cell recreation in certain cases and for certain inmates.[4]

In deciding out-of-cell cases, courts look at several factors:

1. Size of the cell
   Courts look to the size of the cell to determine out-of-cell recreation cases. Some courts consider in-cell exercise to be appropriate alternative, provided the cell is large enough.
2. Amount of time in the cell
   Extended periods of in-cell time may necessitate longer periods of out-of-cell recreation.
3. Overall nature and duration of confinement
   The security level and disciplinary needs of individual prisoners are heavily considered.
4. Safety and practicality of out-of-cell recreation
   The physical circumstances of individual prisons may determine whether certain types of out-of-cell recreation are feasible.
5. Other factors
   Courts also look to whether prisoners have access to alternatives to out-of-cell recreation, such as work duty, and individual prison facility considerations.

Am I Entitled to Outdoor Exercise?

Courts differ on whether prisoners are entitled to outdoor exercise.[5] However, prisoners may have a right to fresh air or regular outdoor recreation[6] unless circumstances include inclement weather,[7] unusual circumstances,[8] or disciplinary needs.[9] Circumstances at individual prisons may also render outdoor recreation unfeasible and indoor recreation may be substituted.[10] Indoor exercise facilities that provide an opportunity to fresh air and exercise may suffice.[11]

The Tenth Circuit, in *Bailey v. Schillinger*, noted that no court has ever held that outdoor exercise or recreation is an absolute right.[12] However, the *Bailey* decision also recognized the psychological and physical importance of regular outdoor exercise.[13]

How Many Hours per Week am I Entitled to Out-of-Cell Time?

Most courts have held that 5 hours per week of out-of-cell recreation is the constitutional minimum.[14] However, most courts have also held that curtailment or even total elimination of out-of-cell exercise for short periods is constitutional under certain circumstances. These "short periods" should not exceed 10 days.[15]

I Have Been Repeatedly Denied Out-of-Cell Time. Are My Rights Being Violated?

Generally in recreation cases, courts will look closely at the amount of time inmates have been deprived of exercise.[16] The minimum constitutional requirements for amount of out-of-cell time may vary from case to case depending on overall conditions in a particular prison. Most courts have held that 5 hours per week of out-of-cell recreation is the constitutional minimum. However, this may change if prison security is threatened or based on other factors discussed above.

I am in Segregation. What are My Out-of-Cell Rights?

Courts have held that inmates who are locked in their cells most of the time and are not allowed to participate in alternative out-of-cell recreation (such as work or other programs) must still be allowed 5 hours per week of out-of-cell exercise.[17]

For example, in *Davenport v. DeRoberts*, the 7th Circuit found that maximum-security inmates who were confined to their cells for 90+ consecutive days were entitled to a minimum of 5 hours out-of-cell time per week, but that each case must be evaluated individually.[18]

Important Note: The law is always evolving. If you have access to a prison law library, it is a good idea to confirm that the cited cases and statutes are still good law. This information sheet was last updated in 2009.

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[1] Some of the information contained in this publication was taken from *Prisoner's Self-Help Litigation Manual*, (3rd ed. 1995) by John Boston and Daniel Manville.

[2] *Delaney v. DeTella*, 256 F.3d 679 (7th Cir. 2001).

[3] *Harris v. Fleming*, 839 F.2d 1232, 1236 (7th Cir. 1988).

[4] *Id*. *Grumpl v. Seiter*, 689 F. Supp. 754, 755 (S.D. Ohio, 1987); *see also Ruiz v. Estelle*, 679 F.2d 1115, 1152 (5th Cir. 1982).

[5] *Toussaint v. Yockey*, 722 F.2d 1490, 1492-93 (9th Cir. 1984) (yes); *Martin v, Tyson*, 845 F.2d 1451, 1456 (5th Cir. 1988) (no).

[6] *Bailey v. Schillinger*, 828 F.2d 651 (10th Cir. 1987); *Spain v. Procunier*, 600 F.2d 189 (9th Cir. 1979).

[7] *Kennibrew v. Russell*, 578 F. Supp. 164 (E.D. Tenn, 1983).

[8] *Spain v. Procunier*, 600 F.2d 189 (9th Cir. 1979).

[9] *Id*.

[10] *Parnell v. Waldrep*, 511 F. Supp. 764 (W.D. N.C. 1981).

[11] *Smith v. Romer*, (10th Cir.)

[12] *Bailey v. Schillinger*, 828 F.2d 651 (10th Cir. 1987); *Spain v. Procunier*, 600 F.2d 189 (9th Cir. 1979).

[13] *Id.*

[14] *Davenport v. DeRoberts*, 844 F.2d 1310, 1315 (7th Cir. 1988).

[15] *Toussaint v. Yockey*, 722 F.2d 1490, 1492-93 (9th Cir. 1984).

[16] *Davenport*, 844 F.2d 1310, 1315 (7th Cir. 1988).

[17] *Davenport*, 844 F.2d 1310, 1315 (7th Cir. 1988).

[18] *Id.*

KNOW YOUR RIGHTS:
PREGNANCY-RELATED HEALTH CARE

If you are pregnant, being in prison or jail does not mean you lose your right to decide whether to continue your pregnancy or have an abortion.

Your Constitutional Rights are Being Violated if You are Told That:

1. You must have an abortion you do not want.
2. You are not allowed to have an abortion that you do want.
3. You must get a court order before getting an abortion.
4. You must pay for prenatal care or an abortion with your own money, regardless of your financial situation.
5. You must pay for the costs of the jail transporting you to a clinic or hospital to get prenatal care or to have an abortion.

If Any of These Things Listed Above Happens to You, You Should:

1. Ask yourself if it is just one particular nurse or guard who's giving you a hard time. If it is, then ask other medical staff or officials to help you.
2. Document everything that happens. Put your request for an abortion or other medical care in writing and keep a copy. Also, keep a list of the people you've spoken to or contacted. Be sure to write down what they've told you and the dates and times you've spoken to them.
3. In addition to your request for medical care, you should also file a grievance (an official complaint). If your grievance is denied or rejected, you must file an appeal.

It is very important that you file all appeals that are allowed in your jail or prison's grievance system. It is also very important that you follow all the rules and deadlines of the grievance system. These rules and deadlines are usually written in the inmate handbook. If officials will not give you the grievance forms you need, will not let you file or appeal a grievance, or are interfering with your use of the grievance system in any way, you should immediately contact your lawyer or the ACLU Reproductive Freedom Project.

If you are still told that you must have an abortion even though you don't want to, or you are unable to get an abortion or prenatal care you want, you should contact your lawyer or the ACLU Reproductive Freedom Project (212-549-2633). Collect calls will be accepted Monday through Friday, between the hours of 9:30 a.m. and 5:00 p.m. eastern time.

Whether you decide to continue the pregnancy or have an abortion, it is important to act quickly. Early prenatal care is very important for you to have a healthy pregnancy and a healthy baby. If you decide to have an abortion, it is also important to act quickly. While abortions are extremely safe, the costs and risks increase with time. The longer you wait, the harder it may be to find a doctor in your area able to provide the service.

KNOW YOUR RIGHTS:
FREEDOM OF RELIGION

The free exercise of religion principally derives protection from some combination of three federal legal sources: (1) the Free Exercise Clause of the First Amendment to the U.S. Constitution; (2) the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. § 2000bb *et seq.*; and (3) the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. § 2000cc *et seq*. While the Supreme Court has substantially restricted the rights of prisoners when interpreting the First Amendment, Congress has made it easier for prisoners to win cases regarding religious freedom by passing RFRA and RLUIPA.

THE FREE EXERCISE CLAUSE OF THE FIRST AMENDMENT

When is Religious Exercise Constitutionally Protected?

Generally, beliefs that are "religious" and "sincerely held" are protected by the Free Exercise Clause of the First Amendment to the United States Constitution.

Courts often disagree about what qualifies as a religion or a religious belief. So-called "mainstream" belief systems, such as Christianity, Islam and Judaism, are universally understood to be religions. Less well-known or nontraditional faiths, however, have had less success being recognized as religions. While Rastafari, Native American religions, and various Eastern religions have generally been protected, belief systems such as the Church of the New Song, Satanism, the Aryan Nations, and the Five Percenters have often gone unprotected. The Supreme Court has never defined the term "religion." However, in deciding whether something is a religion, lower courts have asked whether the belief system addresses "fundamental and ultimate questions," is "comprehensive in nature," and presents "certain formal and external signs." *Africa v. Pennsylvania*, 662 F.2d 1025, 1032 (3d Cir. 1981); *see also Dettmer v. Landon*, 799 F.2d 929, 931-32 (4th Cir. 1986). If you want a nontraditional belief system to be recognized as a religion, it may help if you can show how your beliefs are similar to other, better-known religions: Does your religion have many members? Any leaders? A holy book? Other artifacts or symbols? Does it believe in a God or gods? Does it believe that life has a purpose? Does it have a story about the origin of people?

In addition to proving that something is a religion, you must also convince prison administrators or a court that your beliefs are sincerely held. In other words, you must really believe it. In deciding whether a belief is sincere, courts sometimes look to how long a person has believed something and how consistently he or she has followed those beliefs. *See Sourbeer v. Robinson*, 791 F.2d 1094, 1102 (3d Cir. 1986); *Vaughn v. Garrison*, 534 F. Supp. 90, 92 (E.D.N.C. 1981). Just because you have not believed something your entire life, or because you have violated your beliefs in the past, does not automatically mean that a court will find that you are insincere. *See Reed v. Faulkner*, 842 F.2d 960, 963 (7th Cir. 1988); *Weir v. Nix*, 890 F. Supp. 769, 775-76 (S.D. Iowa 1995). However, if you recently converted or if you have repeatedly acted in a

manner inconsistent with your beliefs, you will probably have a hard time convincing a court that you are sincere.

When are Prison Restrictions on the Exercise of Religion Constitutionally Permitted?
You have an absolute right to believe anything you want. You do not, however, always have a constitutional right to do things (or not do things) just because of your religious beliefs.

The constitutional right of free exercise does not excuse anyone, including prisoners, from complying with a "neutral" rule (one not intended to restrict religion) of "general applicability" (one that applies to everyone in the same way) simply because it requires them to act in a manner inconsistent with their religious beliefs. *See Employment Div. v. Smith*, 494 U.S. 872, 879 (1990). A rule that applies only to a religious group is not generally applicable. *See Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 543 (1993).

In prison cases, courts permit restrictions on religious exercise as long as such restrictions are "reasonably related to legitimate penological interests." *Turner v. Safley*, 482 U.S. 78, 89 (1987). This standard is not very protective of prisoners' First Amendment rights. In *O'Lone v. Estate of Shabazz*, the Supreme Court upheld two regulations that effectively prohibited Muslim prisoners from attending Friday afternoon congregational services. 482 U.S. 342 (1987). The Court reasoned that although some prisoners were completely unable to attend services, the restrictions were reasonable because prisoners could practice other aspects of their faith. *Id.* at 351-52.

RFRA & RLUIPA: Expanded Statutory Protections for Religious Activities

Congress has passed two statutes providing heightened protection for religious exercise in prison.. The Religious Freedom Restoration Act (RFRA) applies to federal and District of Columbia prisoners. *O'Bryan v. Bureau of Prisons*, 349 F.3d 399, 401 (7th Cir. 2003) (federal prisoners); *Kikumura v. Hurley*, 242 F.3d 950, 960 (10th Cir. 2001) (same); *Jama v. U.S.I.N.S.*, 343 F. Supp. 2d 338, 370 (D.N.J. 2004) (immigration detainees); *Gartrell v. Ashcroft*, 191 F. Supp. 2d 23 (D.D.C. 2002) (District of Columbia prisoners). The Religious Land Use and Institutionalized Persons Act (RLUIPA) applies to state or local institutions that receive money from the federal government; this includes most local and every single State prison system. *See Cutter v. Wilkinson*, 544 U.S. 709, 716 n.4 (2005).

Both RFRA and RLUIPA balance a prisoner's right to exercise his or her religion against the government's interests. The general balancing test is that the government may not impose a substantial burden on the religious exercise of prisoners unless that burden (1) is in furtherance of a *compelling governmental interest*; and (2) is the *least restrictive means* of furthering that interest. RLUIPA additionally defines "religious exercise" to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000cc-5(7)(A).

This test is *more protective* than the *Turner* standard that applies to Free Exercise claims under the First Amendment. Therefore, if a religious practice was protected under the Free Exercise Clause, it will probably be protected under RFRA or RLUIPA. And even if a practice was not

protected under the Free Exercise Clause, it may sill be protected under RFRA or RLUIPA. The cases below discuss the application of the First Amendment to various aspects of religious exercise. Cases brought under RFRA and RLUIPA can be expected to yield similar or more favorable results.

Religious Foods

Prisoners have enjoyed a fair amount of success with claims protecting religious dietary practices. *Ford v. McGinnis*, 352 F.3d 582, 597 (2d Cir. 2003) ("[A] prisoner has a right to a diet consistent with his or her religious scruples."); *Lomholt v. Holder*, 287 F.3d 683 (8th Cir. 2002) (prisoner's allegation that he was punished for religious fasting stated a First Amendment claim).

Courts have often found that prisoners have a right to avoid eating foods that are forbidden by their religious beliefs. *See Moorish Science Temple of Amer., Inc. v. Smith*, 693 F.2d 987, 990 (2d Cir. 1982). Where reasonable accommodations by the prison can be made to provide religious meals, courts have ordered such diets be made available to prisoners. *See Ashelman v. Wawrzaszek*, 111 F.3d 674, 678 (9th Cir. 1997). Courts have also required accommodations for special religious observances related to meals. *See Makin v. Colorado Dep't of Corrections*, 183 F.3d 1205, 1211-14 (10th Cir. 1999) (failure to accommodate Muslim fasting requirements during Ramadan infringed on First Amendment rights); *Levitan v. Ashcroft*, 281 F.3d 1313, 1322 (D.C. Cir. 2002) (reversing summary judgment for defendants in Catholic prisoners' challenge to denial of communion wine). Some courts have rejected efforts by prison officials to charge prisoners for religious diets. *See Beerheide v. Suthers*, 286 F.3d 1179, 1192 (10th Cir. 2002) (no rational relationship between penological concerns and proposed co-payment for kosher diet).

Prisoners requesting highly individualized diets, however, have rarely been successful. *See DeHart v. Horn*, 390 F.3d 262, 269-72 (3d Cir. 2004).

Religious services notwithstanding the Supreme Court's decision in *Estate of Shabazz*, courts have generally protected prisoners from interference with their ability to attend religious services or engage in prayer. *Mayweathers v. Newland*, 258 F.3d 930, 938 (9th Cir. 2001) (upholding injunction against disciplining Muslim prisoners for missing work to attend Friday services); *Omar v. Casterline*, 288 F. Supp. 2d 775, 781 (W.D. La. 2003) (refusal to tell Muslim prisoner the date or time of day to allow him to pray and fast states First Amendment claim); *Youngbear v. Thalacker*, 174 F. Supp. 2d 902, 912-15 (N.D. Iowa 2001) (one year delay in providing sweat lodge for Native American religious activities violates First Amendment).

Sabbath

Courts have also found that restrictions requiring prisoners to violate the Sabbath or other religious duties violate the First Amendment. *McEachin v. McGuinnis*, 357 F.3d 197, 204-05 (2d Cir. 2004) (intentionally giving Muslim prisoner an order during prayer may violate First Amendment); *Hayes v. Long*, 72 F.3d 70 (8th Cir. 1995) (requiring Muslim prisoner to handle pork violated First Amendment); *Murphy v. Carroll*, 202 F. Supp. 2d 421, 423-25 (D. Md. 2002) (prison officials' designation of Saturday as cell-cleaning day violated Free Exercise rights of Orthodox Jewish prisoner).

Religious Objects

Courts have often concluded that prison officials may generally ban religious objects if they can

make a plausible claim that the objects could pose security problems. *See Spies v. Voinovich*, 173 F.3d 398, 406 (6th Cir. 1999); *Mark v. Nix*, 983 F.2d 138, 139 (8th Cir. 1993). However, prison officials must present evidence that such restrictions responded to valid security concerns. *Boles v. Neet*, 486 F.3d 1177, 1182-83 (10th Cir. 2007). Also, prison officials may not ban some religious objects and not others without any justification. *See Sasnett v. Litscher*, 197 F.3d 290, 292 (7th Cir. 1999) (Free Exercise Clause violated where prison regulation banned the wearing of Protestant crosses but allowed Catholic rosaries without any reasonable justification for distinction). Courts have also concluded that prison officials are not required to provide religious objects as long as prisoners are free to purchase or obtain the objects themselves. *See Frank v. Terrell*, 858 F.2d 1090, 1091 (5th Cir. 1988).

Religious Literature

Courts have concluded that although officials may limit the amount of reading material that a prisoner keeps in his or her cell, officials may not bar religious literature when other literature is permitted and prisoners generally have a right to read the primary text of their faith tradition. *See*, *e.g.*, *Sutton v. Rasheed*, 323 F.3d 236, 250-58 (3d Cir. 2003); *Jesus Christ Prison Ministry v. California Dep't of Corrections*, 456 F. Supp. 2d 1188, 1201-02 (E.D. Cal. 2006) (policy barring prisoners from receiving religious books from organizations not on approved vendor list is unconstitutional).

Personal Grooming

Prisoners have rarely been successful in challenging grooming and dress regulations. Courts have generally upheld restrictions on haircuts. *See Hines v. South Carolina Dep't of Corrections*, 148 F.3d 353, 356 (4th Cir. 1998); *Sours v. Long*, 978 F.2d 1086, 1087 (8th Cir. 1992). This has also been true with regard to headgear and other religious attire. *See Muhammad v. Lynaugh*, 966 F.2d 901, 902-03 (5th Cir. 1992); *Sutton v. Stewart*, 22 F. Supp. 2d 1097, 1106 (D. Ariz. 1998).

A prison rule about grooming may, however, be vulnerable to attack if it is not enforced equally against all religions. *See Sasnett v. Litscher*, 197 F.3d 290, 292 (7th Cir. 1999); *Swift v. Lewis*, 901 F.2d 730, 731-32 (9th Cir. 1990) (where prison permitted long hair and beards for some religions but not others, it must present evidence justifying this unequal treatment); *Wilson v. Moore*, 270 F. Supp. 2d 1328, 1353 (N.D. Fla. 2003).

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KNOW YOUR RIGHTS:
ENVIRONMENTAL HAZARDS & TOXIC MATERIALS

What Rights Do Prisoners Have?

Exposing prisoners to dangerous conditions or toxic substances may violate the Eighth Amendment of the Constitution, which prohibits cruel and unusual punishment. Prison officials violate the Eighth Amendment if, with deliberate indifference, they expose a prisoner to a condition that poses an unreasonable risk of serious damage to that prisoner's future health. *Helling v. McKinney*, 509 U.S. 25, 35 (1993). Deliberate indifference is more difficult to prove than negligence or carelessness.

What Conditions Have Courts Found to Violate the Eighth Amendment?

- ***Inadequate ventilation***: *Board v. Farnham*, 394 F.3d 469 (7th Cir. 2005); *Keenan v. Hall*, 83 F.3d 1083, 1090 (9th Cir. 1996); *Ramos v. Lamm*, 639 F.2d 559, 569-70 (10th Cir. 1980).
- ***Excessive heat***: *Gates v. Cook*, 376 F.3d 323, 339-40 (5th Cir. 2004); *Reece v. Gragg*, 650 F. Supp. 1297, 1304 (D. Kan. 1986); *Rhem v. Malcolm*, 371 F. Supp. 594, 627 (S.D.N.Y. 1974); *but see Chandler v. Crosby*, 379 F.3d 1278, 1297-98 (11th Cir. 2004) (cell temperatures that occasionally approached 100 degrees did not violate the Eighth Amendment).
- ***Excessive cold***: *Gaston v. Coughlin*, 249 F.3d 156, 164-65 (2nd Cir. 2001); *Palmer v. Johnson*, 193 F.3d 346, 352-53 (5th Cir. 1999); *Dixon v. Godinez*, 114 F.3d 640, 642 (7th Cir. 1997); *Foulds v. Corley*, 833 F.2d 52, 54 (5th Cir. 1987).
- ***Lack of drinkable water***: *Hearns v. Terhune*, 413 F.3d 1036, 1042-43 (9th Cir. 2005) (lack of cold water where yard temperatures reached 100 degrees); *Jackson v. Arizona*, 885 F.2d 639, 641 (9th Cir. 1989) (allegation that drinking water was polluted was not a frivolous claim); *Jackson v. Duckworth*, 955 F.2d 21, 22 (7th Cir. 1992).
- ***Toxic or noxious fumes***: *Johnson-El v. Schoemehl*, 878 F.2d 1043, 1054-55 (8th Cir. 1989) (pesticides sprayed into housing units); *Cody v. Hillard*, 599 F.Supp. 1025, 1032 (D.S.D. 1984) (inadequate ventilation of toxic fumes in inmate workplaces), *aff'd in part and rev'd in part on other grounds*, 830 F.2d 912 (8th Cir. 1987) (en banc); but see *Givens v. Jones*, 900 F.2d 1229, 1234 (8th Cir. 1990) (no Eighth Amendment violation where prisoner suffered migraine headaches as a result of noise and fumes during three week long housing unit renovation).
- ***Exposure to sewage***: *DeSpain v. Uphoff*, 264 F.3d 965, 977 (10th Cir. 2001) (exposure to flooding and human waste).
- ***Exposure to second-hand tobacco smoke***: *Helling v. McKinney*, 509 U.S. at 35 (1993) (prisoner stated an Eighth Amendment claim where his cellmate smoked 5 packs of cigarettes a day); *Lehn v. Holmes*, 364 F.3d 862, 872 (7th Cir. 2004); *Atkinson v. Taylor*, 316 F.3d 257 (3rd Cir. 2003); *Reilly v. Grayson*, 310 F.3d 519 (6th Cir. 2002).
- ***Excessive noise***: *Keenan v. Hall*, 83 F.3d 1083, 1090 (9th Cir. 1996).
- ***Sleep deprivation***: *Gates v. Cook*, 376 F.3d 323, 340 (5th Cir. 2004); *Harper v. Showers*, 174 F.3d 716, 720 (5th Cir. 1999).

- ***Sleeping on the floor***: *Thompson v. City of Los Angeles*, 885 F.2d 1439, 1448 (9th Cir. 1989) ("[A] jail's failure to provide detainees with a mattress and bed or bunk runs afoul of the commands of the Fourteenth Amendment.").
- ***Lack of fire safety***: *Hadix v. Johnson*, 367 F.3d 513, 525 (6th Cir. 2004); *Hoptowit v. Spellman*, 753 F.2d 779, 784 (9th Cir. 1985); *Gates v. Collier*, 501 F.2d 1291, 1300, 1305 (5th Cir. 1974).
- ***Risk of injury or death in the event of an earthquake***: *Jones v. City and County of San Francisco*, 976 F.Supp. 896, 909-10 (N.D. Cal. 1997).
- ***Inadequate food or unsanitary food service***: *Phelps v. Kanoplas*, 308 F.3d 180 (2nd Cir. 2002); *Ramos v. Lamm*, 639 F.2d 559, 570-71 (10th Cir. 1980); *Wilson v. VanNatta*, 291 F.Supp.2d 811, 817 (N.D. Ind. 2003); *Drake v. Velasco*, 207 F.Supp. 2d 809 (N.D. Ill. 2002).
- ***Inadequate lighting or constant lighting***: *Gates v. Cook*, 376 F.3d 323, 341-42 (5th Cir. 2004) (inadequate lighting); Keenan, 83 F.3d at 1090-91 (constant illumination).
- ***Exposure to insects, rodents, and other vermin***: *Gates v. Cook*, 376 F.3d 323, 340 (5th Cir. 2004); *Gaston v. Coughlin*, 249 F.3d 156, 166 (2nd Cir. 2001); *Jackson v. Duckworth*, 955 F.2d 21, 22 (7th Cir. 1992); *Williams v. Griffin*, 952 F.2d 820, 825 (4th Cir. 1991); *Foulds v. Corley*, 833 F.2d 52, 54 (5th Cir. 1987).
- ***Defective plumbing***: *Jackson*, 955 F.2d at 22; *Williams*, 952 F.2d at 825; *McCord v. Maggio*, 927 F.2d 844, 847 (5th Cir. 1991).
- ***Deprivation of basic sanitation***: *Gates v. Cook*, 376 F.3d 323, 337-38 (5th Cir. 2004); *McBride v. Deer*, 240 F.3d 1287, 1292 (10th Cir. 2001); *Palmer v. Johnson*, 193 F.3d 346, 352 (5th Cir. 1999); *Harper v. Showers*, 174 F.3d 716, 717, 720 (5th Cir. 1999); *Bradley v. Puckett*, 157 F.3d 1022, 1025 (5th Cir. 1998); *Howard v. Adkison*, 887 F.2d 134, 137 (8th Cir. 1989).
- ***Denial of adequate toilet facilities***: *Gates v. Cook*, 376 F.3d 323, 340-41 (5th Cir. 2004); *Mitchell v. Newryder*, 245 F.Supp.2d 200 (D. Me. 2003).
- ***Exposure to asbestos***: *Powell v. Lennon*, 914 F.2d 1459, 1463 (11th Cir. 1990); but see *McNeil v. Lane*, 16 F.3d 123, 125 (7th Cir. 1994) (exposure to "moderate levels of asbestos" did not violate the Eighth Amendment).
- ***Exposure to the extreme behavior of severely mentally ill prisoners***: *Gates v. Cook*, 376 F.3d 323, 343 (5th Cir. 2004) (exposure to constant screaming and feces-smearing of mentally ill prisoners "contributes to the problems of uncleanliness and sleep deprivation, and by extension mental health problems, for the other inmates").
- ***Miscellaneous unhealthy or dangerous conditions***: *Hall v. Bennett*, 379 F.3d 462 (7th Cir. 2004) (unsafe conditions for prisoner performing electrical work); *Brown v. Missouri Dep't of Corrections*, 353 F.3d 1038, 1040 (8th Cir. 2004) (prisoner injured in vehicle accident after transport officers refused to fasten his seat belt).

<u>What Conditions Do N*ot* Violate the Eighth Amendment?</u>

Some courts have suggested that dangerous conditions do not violate the Constitution if workers in the surrounding community work in the same conditions. For example, an allegation that a prisoner was forced to work in heavy corn dust without a mask, causing nosebleeds, hair loss, and sores on his face, did not state an Eighth Amendment claim unless "the practice clearly differed from that of the surrounding agricultural community or violated a clearly established law." *Jackson v. Cain*, 864 F.2d 1235, 1245 (5th Cir. 1989). Similarly, exposure to a pesticide did not violate the Eighth Amendment when the exposure violated only a non-

mandatory regulation and was not shown to be any different from practices in the surrounding agricultural community. *Sampson v. King*, 693 F.2d 566, 569 (5th Cir. 1982).

Are Prisons Required to Comply with Civilian Environmental Regulations?

The Constitution does not require prisons to comply with all civilian environmental regulations. *French v. Owens*, 777 F.2d 1250, 1257 (7th Cir. 1985) (finding that a prison does not need to comply with OSHA or state regulations). However, these regulations may be enforced by various government agencies, and a prisoner may be able to argue that they are evidence of contemporary standards of decency.

If you have a case involving dangerous conditions or toxic substances, it may be helpful to complain to state or local health departments, the federal Occupational Safety and Health Administrations (OSHA), or other relevant agencies. State or local regulations may be enforceable in state courts.

Important Note: The law is always evolving. If you have access to a prison law library, it is a good idea to confirm that the cited cases and statutes are still good law. This information sheet was last updated in 2005.

KNOW YOUR RIGHTS:
RESTRICTIONS ON VISITATION

Visitation Rights

Visitation restrictions do not violate the Constitution unless they have no reasonable relationship to a legitimate penological goal (a goal related to prison management and/or criminal rehabilitation).[1] The Supreme Court has stopped short of holding that prisoners have no rights of association, but has upheld severe limits on visiting by children and ex-prisoners, and an indefinite denial of all non-legal visiting for prisoners convicted of infractions related to substance abuse.[2]

Time, Place and Manner of Visits

Restrictions on the time, place and manner of visiting will generally be upheld by courts.[3] Courts may give prisons great deference because the prisons may not have the resources to allow visits or ensure safe environments for visits as populations increase.[4] Thus, distinctions in visitation rules for general population prisoners, as opposed to those in segregation or protective custody, will generally be upheld.[5]

It is not unconstitutional to place convicted prisoners in a facility so distant that it is difficult or impossible for them to receive visits.[6] Courts have reasoned that a state's goal of segregating an inmate from society seems inconsistent with allowing that inmate access to visitors.[7]

The Constitution does not require contact visits (prison visitations that permit visitors and inmates to have a limited degree of contact without a glass-barrier)[8] or conjugal visits (unsupervised visits between inmates and their spouses, usually over a weekend, which permit sexual contact)[9] either for convicted prisoners or for pre-trial detainees. Courts have been more sympathetic in cases involving county jails with extremely limited visiting opportunities or oppressive conditions.[10]

Who May Visit

Courts have upheld rules restricting visitors.[11] Visitors may be required to get prior approval for visits.[12] Close family members including children may be barred from visiting based not only on good cause, such as a past attempt to smuggle contraband,[13] but also by facility regulation.[14] Prisoners are entitled to receive visits from clergy and religious advisers, but prison officials have considerable control over how these rights are exercised.[15]

Legal Visits

All inmates have a right to legal visits, but the Sixth Amendment does not require full and unfettered contact between an inmate and his or her attorney in all circumstances. If the state denies a contact visit with a lawyer, however, it must provide a rationale.[16] Additionally, prisons

and jails must provide reasonable schedules and facilities for visits by attorneys and paralegals.[17]

Generally, prisoners must be granted confidentiality in their legal visits.[18] New laws passed in the wake of September 11th, however, have placed some limitations on the privilege of confidential communications with an attorney. If the Attorney General believes there is "reasonable suspicion" that a person in custody "may" use communications with attorneys or their agents "to further or facilitate acts of terrorism," the Justice Department "shall … provide appropriate procedures for the monitoring or review of communications between that inmate and attorneys or attorneys' agents who are traditionally covered by the attorney-client privilege." 28 C.F.R. § 501.3(d). In such a case, the Justice Department must either provide written notice to the inmate and attorneys involved or get court authorization to monitor the communications. *Id.* A Justice Department privilege team will then review the information to determine whether it relates to imminent acts of violence or terrorism. Information that the privilege team determines to relate to imminent acts of violence or terrorism can be disclosed. Information that does not relate to imminent acts of violence or terrorism cannot be disclosed unless a federal judge approves the disclosure. 28 C.F.R. § 501.3(d)(3). These regulations are being challenged by a number of organizations that believe them to be unconstitutional.

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[1] *See Overton v. Bazzetta*, 539 U.S. 126, 141-42 (2003); *Turner v. Safley*, 482 U.S. 78, 89 (1987).
[2] *Overton v. Bazzetta*, 539 U.S. 126 (2003).
[3] *See Overton*, 539 U.S. 126; *Martin v. Tyson*, 845 F.2d 1451, 1455-56 (5th Cir. 1988).
[4] *Overton*, 539 U.S. at 129.
[5] *See Taylor v. Rogers*, 781 F.2d 1047, 1049-50 (4th Cir. 1986).
[6] *See Olim v. Wakinekona*, 461 U.S. 238 (1983).
[7] *Overton*, 539 U.S. at 141 (Thomas, J., concurring).
[8] *See Block v. Rutherford*, 468 U.S. 576, 588-89 (1984).
[9] *See Champion v. Artuz*, 76 F.3d 483, 486 (2nd Cir. 1996).
[10] *See Morrow v. Harwell*, 768 F.2d 619, 626-27 (5th Cir. 1985).
[11] *See Overton*, 539 U.S. at 129-31; Smith v. Coughlin, 748 F.2d 783, 788-89 (2nd Cir. 1984).
[12] *See Ramos v. Lamm*, 639 F.2d 559, 580-81 (10th Cir. 1980).
[13] *See Robinson v. Palmer*, 841 F.2d 1151, 1156 (D.C. Cir. 1988).
[14] *Overton*, 539 U.S. at 129-31.
[15] *See Reimers v. Oregon*, 863 F.2d 630, 631-32 (9th Cir. 1988).
[16] *See Mann v. Reynolds*, 46 F.3d 1055, 1060-61 (10th Cir. 1995).
[17] *See Procunier v. Martinez*, 416 U.S. 396, 419 (1974), *overruled on other grounds by Thornburgh v. Abbott*, 490 U.S. 401 (1989); *Negron v. Wallace*, 436 F.2d 1139, 1144-45 (2nd Cir. 1971).
[18] *See Johnson-El v. Schoemehl*, 878 F.2d 1043, 1051-52 (8th Cir. 1989).