Best Wishes this Holiday Season,
From Our Team to Yours.

We salute those who walk the toughest beat in the State, inside California’s prisons and jails. Correctional officers work in a volatile world of gangs, drugs and violence, where they face the state’s most serious and violent criminals every day and must hold the line. In turn, we defend custody staff when they are challenged in court. “To us and those like us, damn few.”
Use of Tattoos in Court
By Susan E. Coleman

The appearance of a party or witness often affects his or her credibility at trial, sometimes in a significant manner. For example, when an inmate has swastikas tattooed on his shaved head, the jury is less likely to believe his testimony and also less likely to find in his favor. While tattoos have become more acceptable in society, certain tattoos are still taboo in everyday society. When an inmate-plaintiff in a civil rights case has this type of appearance, with tattoos that are clearly racist or gang-related, it helps the defense significantly.

EXHIBIT A

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Because of the inherent prejudice (i.e., preconceived opinions) that can occur from the exhibition of this type of tattoo, some courts have allowed criminal defendants to cover up their tattoos. Of course people can always wear long-sleeved shirts with collars, but sometimes that isn’t enough. In Florida, the court approved taxpayer-paid costs of $125 per day for a cosmetologist to cover up a murder defendant’s tattoos so that he could be “judged fairly.”
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Similarly, Keith Antoine Jackson’s criminal defense attorney argued to the D.C. Court of Appeals that his manslaughter conviction should be overturned because he was not permitted to use makeup during trial to cover up a teardrop tattoo below his left eye. Jackson claimed his constitutional right to be presumed innocent at trial was undermined because a teardrop tattoo has signified, at least in West Coast gang circles, that the wearer has killed someone. At trial, Jackson was denied a makeover because a witness needed to identify him. The Court of Appeals found that the tattoo didn’t affect the guilty verdict, partly because Jackson offered an innocent explanation for the tattoo (claiming that he got the teardrop for a dead relative to resemble “shedding a tear for them”), and affirmed the conviction.

Teardrop tattoos have been used as evidence in court cases in other jurisdictions. In Texas, James Lee Henderson, a Crip, was sentenced to death for the 1993 murder of an 85-year old woman during a burglary. Henderson got the teardrop tattoo while in county jail after the killing, which resulted in the tattoo being used as evidence at his trial. In another Texas death row case, Michael Dean Gonzalez was convicted of stabbing his two neighbors to death after a detective testified that the two teardrops represented the number of people he had killed. Both Gonzalez and Henderson remain on death row after unsuccessful appeals.

Courts are split on whether tattoo coverage is required in criminal cases to eliminate prejudice and guarantee a fair trial. In Nevada and Florida, courts have granted such motions, whereas courts in Utah and Texas have denied them. Lawyers arguing for coverage of tattoos cite Estelle v. Williams (1976) 425 U.S. 501, which holds that forcing defendants to wear prison jumpsuits “undermines the constitutional presumption of innocence.” The Ninth Circuit in Quinteros noted that “a particular tattoo could create prejudice under certain circumstances.” In Dawson v Delaware, the Supreme Court vacated a sentence in part due to the prosecution’s use of an “Aryan Brotherhood” tattoo when the racist message was irrelevant to the crime at issue, holding that showing the tattoo only served to prejudice the jury.

In other circumstances, a tattoo may be admissible as relevant evidence, such as to identify a culprit based on a witness’s identification of a particular tattoo. In prosecutions for gang-related offenses, when enhancement to the sentence is added for crimes done in furtherance of a gang, the defendant’s gang tattoos may be relevant to show membership and rank in a gang. Some gang tattoos are easy to understand – such as a “Crip Nation” tattoo or “NLR” for a Nazi Low Rider. Other gang tattoos may be subject to interpretation and heavily coded, and in these situations that are less obvious, the judge may find them too prejudicial to admit.

In civil cases, since the presumption of innocence does not apply, and instead inmate-plaintiffs have the burden of proof, hopefully courts will be more likely to allow the use of tattoos as evidence when they are relevant to an element of the case. In the meantime, inmates are unlikely to start thinking about the consequences of their actions and stop getting prison tattoos.
A Religious Right to Conjugal Visits?
By Kristina Doan Gruenberg

California is only one of six states which allows conjugal visits for prisoners. The other states are Connecticut, Mississippi, New Mexico, New York, and Washington. Within these states, there are regulations limiting which inmates can receive conjugal visits. For example, the California Department of Corrections and Rehabilitation (CDCR) prohibits conjugal visits for inmates with life sentences, inmates convicted of a violent offense involving a minor or family member, and inmates convicted of any sex offense.

Now, Madero L. Pouncil, a prisoner serving a life sentence without the possibility of parole at Mule Creek State Prison, is challenging CDCR’s regulations because he claims that they interfere with his religious beliefs. Pouncil states that he is Muslim and believes that marriage is one of the most important institutions in Islam. He asserts that the main duties of a Muslim to his or her spouse are to consummate their marriage, and to have sexual relations as a form of worship.

In 1999, Pouncil married his first wife while he was incarcerated, and in 2002, he requested a conjugal visit with her. Prison officials denied his request under California Code of Regulations, title 15, section 3177(b)(2), which prohibits overnight family visits to inmates who are serving a prison term of life without the possibility of parole. Pouncil and his first wife thereafter divorced and Pouncil remarried in July 2007. A year later, he requested a conjugal visit with his new wife. Pouncil’s request was denied in August 2008, as were all of Pouncil’s subsequent administrative appeals.

In 2009, Pouncil filed a federal lawsuit, alleging that prison officials violated his religious rights by denying him conjugal visits. Pouncil sought the following relief: "Reinstate Family Visits for Lifers, and Life without the possibility of parole Inmate[s] so I can fulfill my duties religiously to my wife, and guide my children in my family with direct understanding of my faith." The case was stayed until recently, pending resolution of a statute of limitations argument by prison officials, but on November 21, 2012, the Ninth Circuit decided that the case should proceed on the merits in the district court.

Not surprisingly, many other inmates have also challenged restrictions and limitations on conjugal visits. In Block v. Rutherford, inmates at LA County jail filed a class action against the County Sheriff and other officials, challenging, on due process grounds, the jail’s policy of denying pretrial detainees contact visits with their spouses, relatives, children, and friends. The Supreme Court held that there is no legal requirement that prisoners be allowed conjugal visits. The Court noted that contact visits, including conjugal visits, invite a host of security problems, such as exposing the correctional facility to the introduction of drugs, weapons, and other contraband. The Court therefore held that restrictions on conjugal visits are constitutional so long as they are not meant as punishment.

While the higher courts have not specifically addressed whether inmates are entitled to conjugal visits under the First Amendment and the Religious Land Use and Institutionalized Persons Act (RLUIPA), it appears unlikely that Pouncil will be able to succeed on his claims because CDCR can argue that their regulations on conjugal visits are in place to maintain safety and security, and are narrowly tailored to...
inmates who are more prone to violence or have had disciplinary problems. Under RLUIPA, the government cannot impose a substantial burden on an inmate’s religious exercise unless the government establishes that the burden furthers “a compelling governmental interest,” and does so by “the least restrictive means . . . .” Similarly, under the First Amendment Free Exercise Clause, the government can only limit the free exercise of religion when it is reasonably related to legitimate penological interests.

Using this legal framework, a Wisconsin district court dismissed an inmate’s lawsuit for conjugal visits as part of his “religion.” Nathaniel Allen Lindell claimed to be a Pagan, specifically Wotanist (also known as Odonism, Wotanism is often practiced by white supremacists in prison). Lindell requested conjugal visits with women “for purposes of sexual magic and divination.” The court held that supervising, arranging, and finding appropriate space to allow conjugal visits for Lindell, who had a history of violence in prison, would be administratively burdensome and pose security risks. The court also stated that they could not find that Lindell has a sincerely held belief that his religion requires conjugal visits with women “for purposes of sexual magic and divination.”

Lindell’s case is somewhat unique because his laundry list of religious requests made it easy to question the sincerity of his beliefs. In addition to conjugal visits, Lindell also requested gold, silver, iron, horn medallions, pendants, rings, a temple to contain statues of deities, religious tapestries and paintings, books, goats, boars, horses, chickens and other animals for sacrifice and ceremonial feasts, silk cords and an altar. Nonetheless inmates serving life sentences, as well as other inmates who are prohibited from having conjugal visits, will have a difficult time challenging prison visitation regulations because the courts have long-recognized that conjugal visits pose a security threat.

Akhtar v. Mesa: An Insight into How Correctional Staff Can Avoid Being Found Deliberately Indifferent to a Prisoner’s Medical Needs
By Martin Kosla

Most medical deliberate indifference cases deal with care provided by medical practitioners to inmates. However, custody officers can also be sued under the Eighth Amendment for deliberate indifference to an inmate’s medical needs. The recent case of Akhtar v. Mesa, et. al., 698 F.3d 1202 (9th Cir. 2012), provides insight as to what correctional officers should do in order to avoid being sued (or at least being found liable) for deliberate indifference to a prisoner’s medical needs.

In Akhtar v. Mesa, plaintiff-inmate Akhtar suffered from numerous medical conditions, including chronic kidney disease, coronary artery disease, uncontrolled hypertension, high cholesterol, gout, and gastro esophageal reflux disease. Inmate Akhtar also had permanent brain damage from a previous motorcycle accident and he had suffered a stroke. He also had limited English speaking and reading skills, as well as mobility and hearing problems.

On December 2, 2008, inmate Akhtar was informed by one of the defendant correctional officers that he was being moved to an emergency bunk located in an open dormitory in the day room of the building. Inmate Akhtar showed the defendant correctional officers,
including a correctional sergeant, his medical chrono and told them that he would rather go to Administrative Segregation than move to an emergency bunk. He was issued a Rules Violation Report and placed in Administrative Segregation. On December 9, 2008, inmate Akhtar received another Rules Violation Report for refusing to move to the emergency bunk. Inmate Akhtar was subsequently moved to a triple bunk in the dayroom, which was about 75 feet from the closest urinal. While housed in the dayroom, inmate Akhtar fell from his bunk bed and broke his wrist. He also urinated in his clothes several times because he was unable to reach the restroom in time.

In January 2009, Inmate Akhtar filed two inmate grievances, challenging the Rules Violation Reports for refusal to move to the bunk bed. He alleged that the correctional officers were deliberately indifferent to his well-being by moving him to the emergency bunk, and that he was denied due process because he did not receive an interpreter and staff assistant. The grievances were denied at all levels.

Inmate Akhtar subsequently filed a federal lawsuit against the defendant correctional officers. He alleged deliberate indifference to his serious medical needs under the Eighth Amendment, based on the defendants’ failure to comply with his medical chrono regarding his housing needs and the failure to provide an interpreter at medical appointments.

The defendant correctional officers filed a motion to dismiss based on failure to exhaust and failure state a claim under the Eighth Amendment. After inmate Akhtar failed to oppose the motion, the district court dismissed the case with prejudice.

Akhtar appealed the decision to the Ninth Circuit, which held the district court erred when it dismissed inmate Akhtar’s claims for failure to exhaust. The appellate court reviewed inmate Akhtar’s prison grievances and concluded that he had in fact exhausted his administrative remedies with respect to his claims. The Ninth Circuit also held that the district court erred by dismissing the complaint on the alternative ground that inmate Akhtar failed to state a claim under the Eighth Amendment. The Ninth Circuit found that Akhtar’s complaint set forth sufficient facts to show that, assuming the facts as alleged were true, the defendant-correctional officers were deliberately indifferent. Inmate Akhtar alleged that he showed his medical chrono requiring a lower bunk in a ground-floor cell to the correctional officers. He also alleged that the correctional officers ignored the medical chrono by moving him to an emergency bunk in the dayroom. The Ninth Circuit further found that inmate Akhtar had alleged that he was harmed as a result of the defendant correctional officers’ failure to comply with his chrono. Inmate Akhtar alleged that he suffered a broken wrist as well as humiliation and embarrassment. As such, the Ninth Circuit vacated the judgment in favor of the correctional officers, and remanded the case back to the district court.

The Akhtar v. Mesa case demonstrates that correctional officials and staff may be liable for deliberate indifference to a prisoner’s medical needs if they ignore specific medical orders relating to the prisoner’s needs. Accordingly, if an inmate shows a valid medical chrono, be sure to either comply with the terms of the chrono or consult with medical staff before ignoring the requirement for a lower bunk or other medical accommodations.
Risky Business: Evaluation of Condom Distribution to Prisoners

By Ulysses Aguayo

According to the Bureau of Justice Statistics, 1 in 34 Americans will have been incarcerated by the end of 2012; that translates to more than 7 million people, passing in and out of jails and prisons. Couple the above pass-through rate with the Center for Disease Control’s finding that inmates are 5 times more likely to develop blood-borne infectious diseases (e.g. HIV, AIDS, Hepatitis B, and Hepatitis C) and Sexually Transmitted Diseases (e.g. Syphilis, Gonorrhea, and Chlamydia), most often through consensual sex during incarceration, and the resulting health concerns are immense.

Moreover, the State’s cost of providing inmates with medical care is numbing. According to a publication titled Incarcerated Populations and HIV/AIDS: Policy Facts, the average cost of caring for a healthy inmate is around $25,000 per year; the average cost of caring for an inmate with HIV is $80,396 per year; and the average cost of caring for an inmate with AIDS is $105,000 per year. These cost and public health concerns have led some to reason that Correctional facilities should implement disease prevention methods, such as making condoms available to inmates.

The idea is that by providing inmates access to condoms, custody officials can reduce the transmission rate of STDs and Blood-borne infectious diseases, directly impacting cost of inmate medical care and their health. According to the CDC, condoms can be 97% effective at preventing the transmission of STDs and HIV during sex. Further, the cost of a condom, including packaging and distribution, is .22 cents each. Given the efficacy and relatively inexpensive nature of condoms, the Centers for Disease Control formally recommended that Correctional facilities nationwide implement policies and programs for condom distribution to inmates.

As a result of health concerns and the costs of prison medical care, the “Prison Condom Bill” was introduced in California in 2007, which would have mandated condom distribution in California jails and prisons. Governor Schwarzenegger vetoed the bill, voicing several concerns, including: 1) promotion of illegal activity (California Penal Code § 286(e) makes it illegal to have sex in jails/prisons); 2) potential new contraband; and 3) detrimental effect on staff morale. The topic continues to be controversial in California state prisons.

In 2008, San Francisco County Jail (“SFCJ”), partnered with the San Francisco Office of Public Health, started its own pilot program to make condoms available for inmates. SFCJ implemented a year-long program, during which they installed a condom dispenser in the SFCJ gymnasium facility, to which 800 inmates had weekly access. The results of the program were evaluated by the National Center for Biotechnology Information (“NCBI”), and served to dispel most of the reasons behind the denial of the Prison Condom Bill in 2007.

First, those who self-reported as HIV-positive, and those who identified as anything other than heterosexual, used the condom dispenser more than those who identified as heterosexual or HIV-negative. This means that those inmates posing a higher risk (those more likely to engage in sexual relations with each other, and those more likely to spread HIV) were the primary users of the condoms.
Second, the San Francisco Office of Public Health and the NCBI conducted pre-program and post-program interviews with custody and administrative staff regarding the same concerns articulated by Governor Schwarzenegger in 2007. The pre-program interviews reflected substantial agreement by correctional officers and staff that condom distribution would lead to increased, illegal sexual activity, new contraband, and would lower staff morale. However, the NCIB’s post-program interviews showed that the opposite occurred. SFCJ officers and administrative staff all indicated that sexual activity had not increased, and new contraband had not been developed by the introduction of condoms (measured by rule violation reports). Moreover, staff agreed that custody operations were not impeded, and staff acceptance of condom access for prisoners had increased. By dispelling most concerns regarding the distribution of condoms to inmates, the SFCJ’s pilot program was a relative success.

Currently, only Vermont and Mississippi allow for the distribution of condoms in state correctional facilities. The cities of New York, San Francisco, Los Angeles, Washington, D.C., and Philadelphia also permit distribution. In Los Angeles County, staff from the nonprofit Center for Health Justice visit the L.A. County Men’s Central Jail weekly to distribute condoms in a segregated unit for gay men. In California prisons, the California Men’s Facility in Vacaville and the California State Prison – Solano, both had one year pilot projects for condom distribution.

Given the efficacy of condoms in preventing the transmission rate of STDs and Blood-borne infectious diseases, and the cost savings for inmate medical care that would result if these diseases were prevented, perhaps it is time to reconsider state-wide implementation. As Joseph Bick, M.D., (Chief Medical Officer at the California Medical Facility) stated in an interview about HIV prevention: “Perhaps if we accepted the reality of sex in prison and provided condoms, we could get at least some [inmates] to exercise that option in and out of jail.”