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TESTIMONY OF LARRY FRANKEL, EXECUTIVE DIRECTOR, AMERICAN CIVIL LIBERTIES UNION OF PENNSYLVANIA ON PRISONER LITIGATION REFORM PRESENTED AUGUST 28, 1996 TO THE SUBCOMMITTEE ON COURTS OF THE JUDICIARY COMMITTEE, PENNSYLVANIA HOUSE OF REPRESENTATIVES

Good morning Chairman Clark and other members of the Judiciary Committee. I want to thank you for inviting the American Civil Liberties Union of Pennsylvania to present our views on prisoner litigation reform and House Bills 2697 and 2770.

The ACLU recognizes that there is a legitimate public interest in reducing the number of non-meritorious claims filed by prisoners. Our office receives hundreds of letters from prisoners who think that they might have a case and want us to take up their cause. We expend a considerable portion of our limited resources in responding to prisoners and determining which of their claims may have merit.

It is easy to declare one's opposition to frivolous lawsuits filed by prisoners. It is a lot more difficult to identify what claims are frivolous and what claims are worthy of being brought into court. Unless the General Assembly is very careful about defining what is frivolous and assisting our courts in segregating the frivolous lawsuits from those that should remain in the judicial system, it is inevitable that important claims will be improperly dismissed.

And it is awfully clear that House Bill 2697 is not carefully drafted. In fact, given some

of the glaring deficiencies of this bill, it would not be unreasonable to suspect that the real intent of the drafters of House Bill 2697 is not to limit frivolous claims but to make it virtually impossible for our courts to remedy unsafe and inhumane prison conditions.

This legislation, as drafted, could result in the premature dismissal of claims such as these that I will briefly describe. Please note, these claims have been litigated:

1. In the District of Columbia, correctional officers and other prison employees routinely sexually assaulted female prisoners. One guard fondled a female prisoner who was receiving care in the infirmary. He forced her to perform oral sex and then raped her. Another officer forced a prisoner to perform oral sex on him while she was emptying trash as part of her work detail. Prisoners v. District of Columbia (1994).

2. A judge found that guards at a state prison had engaged in a pattern of unprovoked and sadistic assaults on prisoners. While the prisoners were restrained in handcuffs and shackles, prison guards bashed their heads into walls and floors and repeatedly kicked and hit the prisoners. As a result of the attacks the prisoners' teeth were knocked out, their jaws fractured and their limbs broken. The judge found that the administrators knew about but disregarded this brutality. Madrid v. Gomez (California 1995).

3. In one Pennsylvania facility, youth were repeatedly beaten by the staff. There was evidence that the staff trafficked in illegal drugs and engaged in sexual relations with the confined youth. D.B. v. Commonwealth (1993).

4. Dozens of female prisoners, some as young as 16, were forced to have sex with guards and maintenance workers. Many of the prisoners became pregnant and were

coerced by prison staff into having abortions. Cason v. Seckinger (Georgia 1994).

5. A 17-year old boy, who was in jail for failing to pay traffic fines, was tortured for 14 hours and murdered in his cell by other prisoners. Another teenager in the same prison had been beaten unconscious by the same assaultive prisoners a few days before. Yellen v. Ada County (Idaho 1985).

6. Despite warnings by the Commissioner of Health regarding the risk of a tuberculosis epidemic, prison officials failed to implement basic procedures for the detection and control of tuberculosis. Thereafter, more than 400 prisoners were found to be infected in a single prison, a level of infection that posed a threat to prisoners, prison personnel, their families and the general public. Austin v. Department of Corrections (Pennsylvania 1992).

7. Prison staff had engaged in sexual relations with female prisoners. They also had allowed male inmates to engage in forcible intercourse with the female prisoners. Hamilton v. Morial (Louisiana 1995).

8. A number of suicidal children were transferred to a state mental hospital. There the children were placed in restraints, bound to their beds and forcibly injected with psychotropic drugs. Robert K. V. Bell (South Carolina 1984).

9. A female prisoner, who had received virtually no prenatal care, gave birth on the floor of the jail, without medical assistance, three hours after she had informed prison staff that she was in labor. Other female prisoners had stillborn or severely deformed babies as a result of the lack of pregnancy-related medical care. Yeager v. Smith and Harris v. McCarthy (California 1989).

While I hope that most courts would seriously consider claims such as the ones raised in these lawsuits, the provisions of House Bill 2697 could make it more difficult for such claims to be heard by a court and would make it much more difficult for our courts to order appropriate relief.

One of the primary problems with this legislation is the failure to even attempt to define the term frivolous. What may strike one judge as frivolous may appear to be quite serious to another judge. If the General Assembly wants to go on record as opposing frivolous litigation, it should accept the responsibility for defining exactly what that phrase means.

It is difficult to understand what this legislation accomplishes by authorizing our courts to dismiss a lawsuit which does not state a claim upon which relief may be granted. (See page 4, lines 18-20) Our courts already have that power and I am quite sure that they regularly enter appropriate orders in response to motions to dismiss (preliminary objections under the Pennsylvania Rules of Civil Procedure), judgments on the pleadings and motions for summary judgment.

The bill also permits courts to dismiss a case if the court determines that the defendants are likely to be immune from the cause of action. Frankly, I am not sure how a court would even be able to interpret such a provision. Courts frequently determine whether a party enjoys absolute or qualified immunity as a matter of law. However, unless it is clear on the face of the complaint that immunity exists, the parties almost always engage in discovery and/or present evidence at trial so that such a determination regarding immunity can be made. The language of this bill only confuses the existing procedure. At present, there are motions that the government can file if they can successfully demonstrate immunity. There is little concrete evidence to

demonstrate that they need yet another procedural basis for these motions.

The bill also attempts to bar lawsuits brought by prisoners who have previously filed prison conditions litigation if a court had made a finding that the prior action was filed in bad faith or that the prisoner knowingly presented false evidence. I am not sure what this accomplishes except to give the prison officials a green light to mistreat any prisoner who had filed litigation and a court has made one of the requisite findings. What will protect such a prisoner from inhumane and oppressive conditions and how will he or she be able to challenge them. While it is understandable for some to try and prevent the litigious prisoner from filing an excessive number of lawsuits, that prisoner is still entitled to a safe and sanitary prison cell. This legislation could strip him or her of the right to petition the court even if he or she is denied the constitutionally mandated necessities.

In fact, all of the provisions in Section 3(d) of HB 2697 regarding frivolous litigation raise substantial questions about whether the legislature is itself denying access to courts. Those questions will undoubtedly lead to a constitutional challenge, one that we believe would be successful. As the Court said in Tillery v. Owens, 719 F. Supp. 1256 (W.D. PA. 1989):

> Prisoners have a well-established constitutional due process right of access to the courts. *Bounds v. Smith*, 430 U.S. 817, 821, 97 S.Ct. 1491, 1494, 52 L.Ed.2d 72 (1977). It is fundamental that access to the courts for the purpose of challenging confinement, conditions of confinement or violations of civil rights may not be denied or obstructed. *Id.* At 827, 97 S. Ct. At 1497; *Johnson v. Avery*, 393 U.S. 483, 485, 89 S.Ct. 747, 748, 21 L.Ed.2d 718 (1969).

719 F. Supp at 1281.

This legislation, in essence, will deny or obstruct many challenges to conditions of confinement and violations of civil rights. In addition to this violation of due process, this

legislation will leave some prisoners with little or no access to our courts, while other prisoners will continue to enjoy access, a potential violation of the Equal Protection Clause.

This legislation also invades the authority of the courts to fashion appropriate remedies. I know that the members of this Committee are aware of the importance of the doctrine of the separation of powers. By limiting the kinds of remedies that may be ordered, including the elimination of special masters and artificial restrictions on prospective relief, the General Assembly may accomplish little but violate that doctrine and prevent our courts from effectively dealing with compelling claims that come before them.

The legislation also unnecessarily limits the duration of court orders intended to spur the proper authorities to fix unconstitutional conditions. Even though it takes many years of hard work by all parties to bring about real change and to remedy substantial health and safety problems, this legislation would create artificial deadlines for the courts and corrections officials.

The ability of corrections officials to act responsibly and reasonably is undermined by the provision that limits the effect of settlement agreements. This legislation would treat such agreements as voidable contracts and act as a disincentive to the settlement of cases that could result in a resolution of the conditions which led to the litigation in the first place.

Rather than continuing to point out each and every deficiency of this legislation, I would like to conclude my testimony with some observations on the reality of prison conditions litigation. It is simply ludicrous to think that courts easily or eagerly order any kind of relief in prison conditions litigation. The last thing most judges want to do is to assume responsibility for the abysmal conditions of our prisons. When courts feel compelled to act, it is because of some truly horrific conditions that violate any sense of decency. They are acting to correct the failures

of the legislative and executive branches to properly discharge their duties regarding prisoners. Restricting the courts' powers may make some legislators feel good. It will not, however, address the problems that exist in our prisons.

All Pennsylvanians have a stake in sanitary and secure correctional facilities. When riots or tuberculosis epidemics break out in our prisons, as they have in the not-too-distant past in Pennsylvania, the potential impact on the safety and health of the general public is enormous. The costs to society are great. It is in the public's interest to have every place of incarceration in this Commonwealth run in accordance with constitutional standards. Prison condition litigation is an important tool for insuring that the public's interest is safeguarded. House Bill 2697 so severely limits the ability for the judicial branch to address the pervasive problems of an overcrowded prison system as to ultimately endanger the entire public. For the sake of all Pennsylvanians, and not just its prisoners, we urge you to reject this legislation.