

COMMISSION ON SAFETY AND ABUSE in America's Prisons

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Ms. Mathis and Ms. Bellows:

As the Co-Chairs of the Commission on Safety and Abuse in America's Prisons, we write in reply to the request of Professor Lynn Branham of the Association's PLRA Task Force. Professor Branham, in her letter of February 1, 2007, urges the Commission to communicate with the members of the House of Delegates why we strongly believe that reform of the PLRA is of critical importance to improving conditions of confinement. When one of us, John Gibbons, had the opportunity to speak before the Criminal Justice Section of the American Bar Association on November 8, 2006, in New Orleans, he told that body about the lessons he had learned over many years as a federal judge, practitioner, and professor and his reasons for supporting the Commission's recommendation to reform the PLRA. We would like to explain further how the Commission came to its conclusions and furthermore to express our personal support for the proposed ABA resolution based on what we have learned over our long careers in the criminal justice field.

As you may know, our Commission—bringing together an extraordinarily diverse group of 20 public servants—conducted a 15-month inquiry to understand and publicly discuss the most serious issues of safety in correctional facilities, for prisoners, staff, and the public. The work of the Commission, which was created by the Vera Institute of Justice, led to thirty recommendations. Among the four major topics that we encountered were a collection of issues relating to the oversight of prisons and jails. One of these was the question of the use of federal court litigation—which is a critical component of oversight—to confront and remedy constitutional and other violations that occur behind bars. Addressing the unique importance of access to the courts for the promotion of safe and humane correctional facilities, one

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of the Commission's recommendations set out four reforms to the PLRA that Congress should undertake:

- “Eliminate the physical injury requirement”;
- “Eliminate the filing fee for indigent prisoners or make it reflective of the person's earning power, and eliminate the restrictions on attorney fees”;
- “Lift the requirement that correctional agencies concede liability as a prerequisite to court-supervised settlement”; and
- “Change the exhaustion rule,” including eliminating the procedural default component at issue in the recent U.S. Supreme Court decision in *Woodford v. Ngo*.

The Commission focused on these reforms to the PLRA because they were highlighted by our witnesses, by the scholarly and practical literature and by the views of many on the Commission. They were not intended to provide an exhaustive list of ways that the statute should be changed. Nor did we see these specific recommendations as the only ways of achieving that reform. One of the Commission's goals throughout the report was to contribute to a conversation about how best to achieve improvements in correctional practice. Subsequent to our report, the conversation about changes to the PLRA has been greatly advanced by the work of your Criminal Justice Section. We are grateful for the opportunity to continue that conversation with you.

We read the resolution proposed by the Section—fleshed out by its well-documented report—as based on a set of principles with which we are fully in accord. We understand these principles to be: that the health of our correctional systems have depended, and continue to depend, on the availability of federal judicial hearing and remedies; that adequate access to the courts is critical to ensuring that the legal rights of incarcerated persons, especially rights protected by the United States Constitution, are fully realized; and that it is unfair and dangerous to the rule of law to single out one class of civil rights litigants—prisoners—as entitled to lesser opportunities than others for the vindication of these critical rights. The Section's proposal represents another step in recognizing that the justice we provide for persons who are incarcerated is a measure of, and important for, society as a whole. It resonates with the Commission's conclusion that, “what happens in correctional facilities has a significant impact on the health and safety of our communities.”

Our Commission concluded that there are aspects of the PLRA that, in effect if not in intention, present serious obstacles to the realization of these principles. Ten years of experience with the PLRA provide a sufficient empirical basis to conclude that amendment of the offending provisions is imperative at this time. We believe the recommendations before you provide a very firm framework for delivering that change; they provide a principled response to a critical problem in the delivery of justice.

Before turning to the specific recommendations in the proposal, we want to make one observation that we believe is critical. Although it may seem that the proposal seeks wholesale change to the statute, it more accurately can be seen as taking a cautious and restrained approach. It is important to focus on what the proposal does not seek to change. There were sound reasons for enacting certain provisions of the PLRA and the proposal's drafters appear to recognize and preserve those provisions.

The proposal leaves fully intact what we understand to be the core salutary feature of the PLRA, its requirement that federal courts pre-screen prisoners' lawsuits (28 U.S.C. §§1915(e)(2) and

1915A). That is, before defendant corrections officials are required to respond in any way to a complaint (indeed before they even are served with the complaint), the court must review the complaint and dismiss it if it is deemed frivolous, malicious, fails to state a claim on which relief can be granted, or seeks damages from a defendant who enjoys immunity. Named defendants suffer no prejudice if they present no response prior to the initial court screening—they cannot be found in default and no negative inference can be drawn from their silence. They have no obligation to respond unless and until the court determines that the prisoner has presented a claim that surpasses the PLRA’s statutory threshold. This pre-screening requirement strikes an appropriate balance between prisoners’ right of access to the courts to remedy alleged constitutional violations and the burdens that fall on prison officials to respond to individual lawsuits. The Section’s proposal wisely does not disturb this balance.

The proposal also cautiously avoids recommending elimination of another provision, the so-called three strikes provision (28 U.S.C. §1915(g)). This provision is clearly tailored to suppress the sorts of litigation—frivolous and malicious claims—that we all agree should be targeted. Unlike those provisions the Section’s proposal recommends changing, the three strikes provision seeks to distinguish between prisoner’s claims. And while the three strikes provision is not perfect, it seeks to distinguish between potentially meritorious claims brought in good faith and those that are simply brought for vindictive or recreational purposes. Our shared principles suggest that the PLRA be made to more closely promote this critical distinction. The proposal before you does an admirable job of retaining those portions of the PLRA that properly suppress malicious prisoners’ litigation while recommending modifying those portions that too broadly suppress prisoners’ ability to have a hearing in federal court for their colorable claims of constitutional and federal statutory violations.

Repeal the PLRA’s physical-injury requirement. This recommendation is identical to one that the Commission reached. The requirement stands as an unconscionable bar to fully remedying—and thus, hopefully, preventing—a range of violations of constitutional rights. It is a blunt tool that does not differentiate in any way between meritorious and non-meritorious claims. Rather, it discourages prisoners with very serious constitutional claims from bringing those claims to light in a federal court. Moreover, it does so in a way that discriminates for no valid purpose—and to much harmful effect—against prisoners. There is no comparable statutory bar for any other group of civil rights litigants to the recovery of monetary damages for violations by government actors of rights to freedom of religion or freedom of speech or deprivations of liberty or due process.

Amend the requirement for exhaustion of administrative remedies . . . The Commission recognized the importance of amending the exhaustion rules of the PLRA. Although we proposed a somewhat different approach to this problem, the Section’s proposal is fully consistent with the principles underlying our approach.

The exhaustion rule, like the physical injury requirement, poses far too high a barrier to a federal court hearing of federal law violations. Its breadth and inflexibility discriminates against prisoners among other civil rights litigants and results in the suppression of meritorious claims no less than non-meritorious claims, indeed perhaps even more so. As our Commission’s final report explained, the PLRA (largely through the exhaustion requirement) has had the intended effect of suppressing prisoners’ civil rights lawsuits. But it appears that it also has had the unintended, and dangerous, effect of sifting out meritorious claims somewhat more thoroughly than non-meritorious claims as shown by a decline in the ratio of successful suits (see our report at pages 84-85). The Section’s recommendation to amend the exhaustion rule is a careful and sensitive

effort to discourage truly frivolous lawsuits while not impeding access to the courts for good faith claims of constitutional violations.

The recommendation also supports the proper role of correctional agencies in addressing through administrative processes prisoners' grievances that lead to federal court litigation. The exhaustion requirement has proven to be a difficult and contentious aspect of the statute, itself consuming a tremendous amount of judicial resources. The Commission's view was that exhaustion should only be required where the correctional system's grievance procedure was deemed sufficiently meaningful in terms of the remedies available and the flexibility of the procedures allowed. We were concerned that the rule dangerously puts form over function, too often barring access to the courts for no meaningful purpose or based on almost insurmountable procedural obstacles.

The Section's recommendation takes a more cautious approach. It ensures that no lawsuit may go forward without first affording the correctional agency the opportunity to resolve the prisoner's grievance through the agency's administrative process. Moreover, it is careful not to provide any incentive to prisoners to forego the administrative process. Under the Section's recommended amendment, a prisoner is encouraged to seek administrative review; the incentive remains to take advantage of the opportunity to obtain relief through the quicker and less formal administrative process. Yet, the recommendation preserves the rights of those prisoners who, because of isolation, lack of legal sophistication, fear of retaliation, or incapacitation, have made a misstep in the administrative process or missed a single filing deadline. In such cases, access to the courts would be deferred for the correctional agency to take administrative action rather than eliminated, as it is under present law.

Amend the PLRA to allow prisoners who prevail on civil-rights claims to recover the same attorney's fees . . . Our Commission came to the same conclusion as the Criminal Justice Section with regard to the PLRA's limitation on the recovery of attorney fees. We see no reason to single out prisoners' civil rights claim for disparate treatment. Indeed, we recognize that prison litigation, especially class action litigation, plays a critical oversight role of our correctional institutions. Therefore, it ill serves prisoners, correctional agencies, and the public interest to discourage legal representation in these important cases. We are aware of no indication that the availability of attorney fees on the same basis as in other civil rights matters results in frivolous or malicious litigation. On the contrary, one of the purposes of the PLRA—to improve the quality of prisoners' suits—would be supported by eliminating the disparate fee recovery rules. The Section's recommendation achieves that salutary result

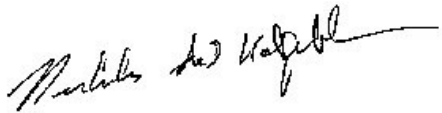
Our Commission made other recommendations for amending the PLRA. But it did not directly address the provisions that are the subject of two of the recommendations proposed by the Criminal Justice Section. Nonetheless, the undersigned personally support the Section's approach in both of the following recommendations.

Restore the equitable authority of courts in conditions-of-confinement cases. The Section's recommendation regarding the equitable authority of the federal courts is consistent with the findings of the Commission. The provisions within the PLRA that restrict the ability of federal courts to effectuate remedies of demonstrated federal constitutional violations have no principled basis. That they uniquely restrict a court's ability to protect a single class of person from constitutional harms is a further reason that they should be excised from the Act.

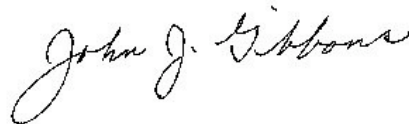
Repeal the PLRA provisions extending its requirements to juveniles . . . Our Commission's mandate did not extend to conditions in juvenile correctional facilities. Although we did not offer any specific recommendations regarding the treatment of juveniles in adult facilities, we are convinced of the grave safety consequences that may arise in such situations. The Section's recommendation to amend the PLRA to allow juveniles who claim their constitutional or federal statutory rights were violated to be treated no differently than non-incarcerated civil rights litigants appears to be a wise approach to those concerns.

We are grateful for the work your Criminal Justice Section has done and for the ABA's longstanding and ongoing commitment to protecting the rights of vulnerable members of society, including persons who are incarcerated. It is absolutely critical, we believe, that we not be content with rules that indiscriminately achieve one societal good (relief from the burdens of litigation) while at the same time causing injustice (barring remedies for very serious violations of persons constitutional rights). The parts of the PLRA that support our shared principles of justice can be preserved. The parts that are in conflict with those principles should be amended forthwith. As a former federal judge and Attorney General of the United States, we believe the proposal before the House of Delegates does the admirable and critically important work of distinguishing between the two.

Sincerely,



Nicholas de B. Katzenbach



The Hon. John J. Gibbons

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