9th Cir.
* interference w/ access to Courts
use of Solitary Confinement to
house protective Custody
retaliation, Humiliation

303 Fed.Appx. 513
This case was not selected for
publication in the Federal Reporter.
Not for Publication in West's Federal Reporter
See Fed. Rule of Appellate Procedure 32.1
generally governing citation of judicial decisions
issued on or after Jan. 1, 2007. See also Ninth
Circuit Rule 36-3. (Find CTA9 Rule 36-3)
United States Court of Appeals,
Ninth Circuit.

Terry Jay MEYERS, Plaintiff–Appellant,
v.
Jim POPE, Sheriff; Don Van Buskirk, Captain; Caselica. Seargent; T. Seals, Sheriff; C. Oblinger, Deputy; Shasta County Board of Supervisors; and Carol Birch, Defendants–Appellees.

No. 06–16935.
|
Argued and Submitted Oct. 20, 2008.
|
Filed Dec. 16, 2008.

Synopsis
Background: Civil detainee in county jail, pursuant to California's Sexually Violent Predator Act (SVPA), brought civil rights action under § 1983 against county board of supervisors and jail employees, seeking injunctive and monetary relief for violations of his constitutional rights during his confinement. The United States District Court for the Eastern District of California, Lawrence K. Karlton, J., 2006 WL 2839843, granted summary judgment in favor of defendants as to detainee's Fourth, Fifth, Sixth, and Fourteenth Amendment claims, and dismissed detainee's Equal Protection claims. Detainee appealed.

Holdings: The Court of Appeals held that:

[1] detainee did not waive his due process right to be held in non-punitive conditions of confinement;

[2] jail employees were not entitled to qualified immunity;

[3] existence of genuine issue of material fact precluded summary judgment for defendants on detainee's claim alleging that they violated his Fourteenth Amendment rights by denying him access to the courts;

[4] existence of genuine issue of material fact precluded summary judgment for defendants on detainee's claim alleging that they violated his Fourth Amendment right to be free from unreasonable searches and seizures; and

[5] existence of genuine issue of material fact precluded summary judgment for defendants on detainee's Fourteenth Amendment right to privacy claim.

Vacated and remanded with instructions.

West Headnotes (5)

[1] **Constitutional Law**
⚖ Waiver in general
92 Constitutional Law
92VI Enforcement of Constitutional Provisions
92VI(B) Estoppel, Waiver, or Forfeiture
92k947 Waiver in general
Civil detainee in county jail, pursuant to California's Sexually Violent Predator Act (SVPA), did not waive his due process right to be held in non-punitive conditions of confinement by refusing to waive his statutory right to be held in administrative segregation, where he was never offered housing that met statutory definition of administrative segregation. U.S.C.A. Const.Amend. 14; West's Ann.Cal.Penal Code § 4002(b).

Cases that cite this headnote

[2] **Civil Rights**
⚖ Prisons, jails, and their officers;parole and probation officers
78 Civil Rights
78III Federal Remedies in General
78k1372 Privilege or Immunity;Good Faith and Probable Cause
78k1376 Government Agencies and Officers
78k1376(7) Prisons, jails, and their officers; parole and probation officers
Due process rights of civil detainee in county jail, pursuant to California's Sexually Violent Predator Act (SVPA), to be held in non-punitive conditions of confinement were clearly established at time of alleged violation, and, thus, county jail employees were not entitled to qualified immunity in detainee's civil rights action under § 1983. U.S.C.A. Const.Amends. 14; 42 U.S.C.A. § 1983; West's Ann.Cal.Welf. & Inst.Code § 6600.

Cases that cite this headnote

[3] **Federal Civil Procedure**
⚖ Civil rights cases in general
170A Federal Civil Procedure
170AXVII Judgment
170AXVII(C) Summary Judgment
170AXVII(C)2 Particular Cases
170Ak2491.5 Civil rights cases in general
Genuine issue of material fact existed as to whether county board of supervisors and jail employees interfered with detainee's right to talk with counsel in confidential settings by monitoring all of his telephone calls, precluding summary judgment for board and employees on detainee's claim alleging that they violated his Fourteenth Amendment rights by denying him access to the courts. U.S.C.A. Const.Amend. 14.

1 Cases that cite this headnote

[4] **Federal Civil Procedure**
⚖ Civil rights cases in general
170A Federal Civil Procedure
170AXVII Judgment
170AXVII(C) Summary Judgment
170AXVII(C)2 Particular Cases
170Ak2491.5 Civil rights cases in general
Genuine issue of material fact existed as to whether county board of supervisors and jail employees, on a weekly basis, forced detainee to strip naked and stand covered only with a blanket while his cell was searched, and, on one occasion, ordered him from his cell and forced him to undergo a strip search, which involved a visual cavity search, precluding summary judgment for board and employees on detainee's claim alleging that they violated his Fourth Amendment right to be free from unreasonable searches and seizures. U.S.C.A. Const.Amend. 4.

8 Cases that cite this headnote

[5] **Federal Civil Procedure**
⚖ Civil rights cases in general
170A Federal Civil Procedure
170AXVII Judgment
170AXVII(C) Summary Judgment
170AXVII(C)2 Particular Cases
170Ak2491.5 Civil rights cases in general
Genuine issue of material fact existed as to whether county board of supervisors and jail employees failed to protect detainee's right to privacy by telling him that females would watch him shower as soon as he began detention in administrative segregation, precluding summary judgment for board and employees on detainee's claim alleging that they violated his Fourteenth Amendment right to privacy. U.S.C.A. Const.Amend. 14.

Cases that cite this headnote

Attorneys and Law Firms

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Appeal from the United States District Court for the Eastern District of California, Lawrence K. Karlton, District Judge, Presiding. D.C. No. CV–03–00241–LKK.

Before: HUG, ROTH *, and CLIFTON, Circuit Judges.

MEMORANDUM **

**1 This case arises from Terry J. Meyers's confinement in Shasta County Jail's Administrative Segregation

those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which it believes demonstrate the absence of a genuine issue of material fact.

Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S.Ct., 2548, 2553 (1986). "[W]here the nonmoving party will bear the burden of proof at trial on a dispositive issue, a summary judgment motion may properly be made in reliance solely on the 'pleadings, depositions, answers to interrogatories, and admissions on file.' " *Id.* Indeed, summary judgment should be entered, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. *See id.* at 322, 106 S.Ct. at 2552. "[A] complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Id.* In such a circumstance, summary judgment should be granted, "so long as whatever is before the district court demonstrates that the standard for entry of summary judgment, as set forth in Rule 56(c), is satisfied." *Id.* at 323, 106 S.Ct. at 2553.

If the moving party meets its initial responsibility, the burden then shifts to the opposing party to establish that a genuine issue as to any material fact actually does exist. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S.Ct. 1348, 1356 (1986). In attempting to establish the existence of this factual dispute, the opposing party may not rely upon the allegations or denials of its pleadings but is required to tender evidence of specific facts in the form of affidavits, and/or admissible discovery material, in support of its contention that the dispute exists. *See* Fed.R.Civ.P. 56(e); *Matsushita*, 475 U.S. at 586 n. 11, 106 S.Ct. at 1356 n. 11. The opposing party must demonstrate that the fact in contention is material, i.e., a fact that might affect the outcome of the suit under the governing law, *see Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510 (1986); *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir.1987), and that the dispute is genuine, i.e., the evidence is such that a reasonable jury could return a verdict for the nonmoving party, *see Wool v. Tandem Computers, Inc.*, 818 F.2d 1433, 1436 (9th Cir.1987).

*4 In the endeavor to establish the existence of a factual dispute, the opposing party need not establish a material issue of fact conclusively in its favor. It is sufficient that "the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial." *T.W. Elec. Serv.*, 809 F.2d at 631. Thus, the "purpose of summary judgment is to 'pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial.' " *Matsushita*, 475 U.S. at 587, 106 S.Ct. at 1356 (quoting Fed.R.Civ.P. 56(e) advisory committee's note on 1963 amendments).

In resolving the summary judgment motion, the court examines the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any. Fed.R.Civ.P. 56(c). The evidence of the opposing party is to be believed. *See Anderson*, 477 U.S. at 255, 106 S.Ct. at 2513. All reasonable inferences that may be drawn from the facts placed before the court must be drawn in favor of the opposing party. *See Matsushita*, 475 U.S. at 587, 106 S.Ct. at 1356. Nevertheless, inferences are not drawn out of the air, and it is the opposing party's obligation to produce a factual predicate from which the inference may be drawn. See *Richards v. Nielsen Freight Lines*, 602 F.Supp. 1224, 1244–45 (E.D.Cal.1985), *aff'd*, 810 F.2d 898, 902 (9th Cir.1987). Finally, to demonstrate a genuine issue, the opposing party "must do more than simply show that there is some metaphysical doubt as to the material facts.... Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.' " *Matsushita*, 475 U.S. at 587, 106 S.Ct. 1356 (citation omitted).

On September 25, 2003, the court advised plaintiff of the requirements for opposing a motion pursuant to Rule 56 of the Federal Rules of Civil Procedure. *See Rand v. Rowland*, 154 F.3d 952, 957 (9th Cir.1998) (en banc), cert. *denied*, 527 U.S. 1035 (1999), and *Klingele v. Eikenberry*, 849 F.2d 409, 411–12 (9th Cir.1988).

Discussion

Defendants move for summary judgment as a matter of law.

The following facts are undisputed: plaintiff is confined at Atascadero State Hospital (ASH) pursuant to a civil commitment under California's Sexually Violent Predator Act (SVPA). Plaintiff was transferred on three occasions from Atascadero (ASH) to Shasta County Jail (Jail) on December 7, 2001; on July 26, 2002; and on October 4, 2002. The period of time at issue in this complaint is January 1, 2002 through December 31, 2002.[12] On October 30, 2002, plaintiff was found by a Shasta County jury to be, beyond a reasonable doubt, a Sexually Violent Predator.[14] Plaintiff is not a gravely disabled mental health patient, as defined by California law, and has never been confined under the Lanterman Petris Short Act, codified at Welf. & Inst.Code § 5525 et seq.[15] Plaintiff refused SVP mental health treatment during 2002. Shasta County Jail received instructions from Atascadero not to provide plaintiff with mental health treatment programs or medication during his limited jail confinement. On January 1, 2002, Cal.Penal Code § 4002 was enacted, allowing county jail officials to confine sexually violent predators in administrative segregation (ad seg).[16] Plaintiff repeatedly refused to sign a waiver that would have allowed jail officials to house him in protective custody. During his periods of confinement at Shasta County Jail in 2002, plaintiff suffered no serious physical injury or medical problems or assaults by other inmates or by sheriff's deputies. Plaintiff's attorney did not file an appeal concerning the re-commitment process based on plaintiff's complaints about access to the law library, telephone access, or visiting access. Plaintiff corrected, in his deposition, the allegations in his amended complaint that he was subjected to unnecessary and random visual body cavity searches throughout the calendar year 2002. *See* MSJ, Exh W.

*5 Plaintiff does not dispute that he is not a gravely disabled mental health patient, nor that he is not a patient pursuant to the Lanterman Petris Short Act, codified at Welf. & Inst.Code § 5325[17] et seq.; nevertheless, he maintains that he is entitled to the rights and privileges set forth under § 5325 as an involuntarily detained civilly committed individual. Opp., pp. 3–5.[18] Although plaintiff does not dispute that he refused Sexually Violent Predator treatment throughout 2002, he asserts that under the SVPA, the Sex Offender Commitment Program (SOCP) is not mandatory and that his 90 day treatment conferences and discharge summary written by ASH physicians for 2002 indicate that plaintiff was involved in Phase I treatment of the SOCP and still is today. Opp., p. 6. He also asserts that he has actively participated in various treatment groups, including: Thinking Skills, Criminal Thinking, Arts and Crafts, 12–week Substance Abuse, 4–week Substance Abuse, Alcoholics Anonymous (AA), Narcotics Anonymous (NA). Opp., p. 6. Plaintiff does not dispute that Cal.Penal Code § 4002 applies to him but contends that defendants did not apply the provision properly in his case. Opp., p. 8. Cal.Penal Code § 1610(b),[19] referenced in Cal.Penal Code § 4002 (*see* footnote 16) requires that a civil detainee awaiting commitment or re-commitment proceedings must be housed in a facility wherein program treatment may be continued. Opp., p. 9. Defendants counter that, under instructions from ASH physicians, the Jail was not to provide mental health programs or medication during his limited confinement. MSJ., p. 12, Exh. H, p. 9, Exh. I, p. 2. (Plaintiff takes umbrage at defendants use of his confidential medical records, but plaintiff provides no persuasive authority for assertion of any such privilege, especially when it is plaintiff who has put the matter at issue by his litigation).

Although defendants do not include it as an undisputed fact, no party disputes that plaintiff was retained in Shasta County Jail from December, 2001, upon plaintiff's arrival from ASH in the Jail's Medical Unit until February 2002, whereupon he was placed in Administrative Segregation at the Jail until June 20, 2002; thereafter, he was retained in Administrative Segregation at the jail from July 26, 2002 upon his transport from ASH until September 9, 2002, and from October 4, 2002 until December 12, 2002. Defendant Van Buskirk's Declaration at ¶¶ 5, 6, 7.

Defendants argue that plaintiff is responsible for his placement in a unit with restricted, lock-down conditions for failing to seek a waiver "similar to the procedure set forth in Penal Code section 4002" (MSJ, p. 15) and that defendants fully complied with Cal.Penal Code § 4002 and were even more liberal in repeatedly providing plaintiff "the opportunity to sign a waiver to transfer into the more open Protective Custody unit" (MSJ, p. 17)

As a civil detainee, the applicable standard for plaintiff is not the more restrictive standards for cruel and unusual punishment under the Eighth Amendment; rather, " 'the more protective fourteenth amendment standard applies to conditions of confinement when detainees ... have not been convicted' of a crime." *Jones v. Blanas*, 393 F.3d 918, 931 (9th Cir.2004), quoting *Gary H. v. Hegstrom*, 831 F.2d 1430, 1432 (9th Cir. 1987), citing *Youngberg v. Romeo*, 457 U.S. 307, 102 S.Ct. 2452 (1982) (civilly committed individuals), and *Bell v. Wolfish*, 441 U.S. 520, 99 S.Ct. 1861 (1979). Defendants argue that plaintiff provides no evidence that any defendant knew of the

deprivations alleged and thereafter deliberately ignored that information; however, this contention applies an inappropriate Eighth Amendment standard to plaintiff's claims. Defendants are entitled to summary judgment as to any of plaintiff's claims wherein he seeks to invoke the Eighth Amendment because, as noted, it is the broader protections of the Fourteenth Amendment that apply in the context of a pretrial civil detainee.

*6 The Fourteenth Amendment requires the government to do more than provide the "minimal civilized measure of life's necessities," *Rhodes [v. Chapman]*, 452 U.S. [337] at 347, 101 S.Ct. 2392, for non-convicted detainees. Rather, "due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed." *Jackson v. Indiana*, 406 U.S. 715, 738, 92 S.Ct. 1845[] (1972).

The case of the individual confined awaiting civil commitment proceedings implicates the intersection between two distinct Fourteenth Amendment imperatives. First, "[p]ersons who have been involuntarily committed are entitled to more considerate treatment and conditions of confinement than criminals whose conditions of confinement are designed to punish." *Youngberg*, 457 U.S. at 321–22, 102 S.Ct. 2452. Second, when the state detains an individual on a criminal charge, that person, unlike a criminal convict, "may not be *punished* prior to an adjudication of guilt in accordance with due process of law.' " *Bell*, 441 U.S. at 535, 99 S.Ct. 1861 (emphasis added); *see also Demery v. Arpaio*, 378 F.3d 1020, 1029 (9th Cir.2004)("[T]he Fourteenth Amendment prohibits all punishment of pretrial detainees."). As civil detainees retain greater liberty protections than individuals detained under criminal process, *see Youngberg*, 457 U.S. at 321–24, 102 S.Ct. 2452, and pre-adjudication detainees retain greater liberty protections than convicted ones, *see Bell*, 441 U.S. at 535–36, 99 S.Ct. 1861, it stands to reason that an individual detained awaiting civil commitment proceedings is entitled to protections at least as great as those afforded to a civilly committed individual and at least as great as those afforded to an individual accused but not convicted of a crime.

Jones v. Blanas, 393 F.3d at 931–932.

In *Jones v. Blanas*, where the plaintiff was, like plaintiff herein, an individual detained in a county jail awaiting involuntary civil commitment proceedings under the SVPA, the Ninth Circuit found "that the conditions of confinement for an individual detained under civil process but not yet committed must be tested by a standard at least as solicitous to the rights of the detainee as the standards applied to a civilly committed individual and to an individual accused but not convicted of a crime." *Id.*, at 932.

While the *Jones* Court noted that the Eleventh Circuit[20] has gone so far as to hold that it is unconstitutional for individuals awaiting involuntary civil commitment proceedings to be held in jail at all, the Ninth Circuit did not venture so far, but asserted that "[a]t a bare minimum," such an individual cannot be subjected to conditions amounting to punishment. *Id.*, at 932 [citations omitted].

Because a person detained pending confinement under the SVPA is a civil detainee, "an SVPA detainee is entitled to 'more considerate treatment' than his criminally detained counterparts." *Id.*, citing *Youngberg*, 457 U.S. at 321–22. "[W]hen a SVPA detainee is confined in conditions identical to, similar to, or more restrictive than, those in which his criminal counterparts are held, we presume that the detainee is being subjected to 'punishment.' " *Id.*, citing *Sharp v. Weston*, 233 F.3d 1166, 1172–73 (9th Cir.2000) *(Youngberg* required that those civilly confined at a commitment center must receive "more considerate" treatment than inmates at a correctional center where the commitment center was located).

*7 In addition, "when an individual awaiting SVPA adjudication is detained under conditions more restrictive than those the individuals would face following SVPA confinement, we presume the treatment is punitive." *Jones v. Blanas*, 393 F.3d at 933. California's SVPA does not implicate constitutional Double Jeopardy Clause and Ex Post Facto Clause guarantees, *Seling v. Young*, 531 U.S. 250, 121 S.Ct. 727 (2001); *Kansas v. Hendricks*, 521 U.S. 346, 117 S.Ct. 2072 (1997), because, the state supreme court has found that the statutory scheme of the SVPA is civil, and not criminal, in nature. *Hubbart v. Superior Court*, 19 Cal.4th 1138, 81 Cal.Rptr.2d 492 (Cal.1999). Explicitly, as the Ninth Circuit has observed, California's Supreme Court noted that the state legislature, "made clear that, despite their criminal

record, persons eligible for commitment and treatment as SVP's are to be viewed 'not as criminals, but as sick persons.' " *Jones v. Blanas, supra*, at 933, quoting *Hubbart, supra* at 1171, 81 Cal.Rptr.2d at 514.[21] Thus, the Ninth Circuit states plainly that, having held that confinement of sexually violent predators is civil for purposes of analysis under the Ex Post Facto Clause (or as to the Double Jeopardy Clause), so the confinement is civil for the purpose of establishing the rights to which a detainee is entitled while confined. *Jones v. Blanas, supra*, at 933. "Civil status means civil status, with all the Fourteenth Amendment rights that accompany it." *Id.* (This also means, of course, as to any of plaintiff's claims wherein he inappropriately alleges violations of the Double Jeopardy and Ex Post Facto Clauses, defendants are correct that such claims must be rejected and they are entitled to summary judgment as to those inapposite Fifth Amendment claims.)

In sum, a civil detainee awaiting adjudication is entitled to conditions of confinement that are not punitive. Under Bell and our circuit precedent, a restriction is "punitive" where it is intended to punish, or where it is "excessive in relation to [its non-punitive] purpose," *Demery*, 378 F.3d at 1028 ..., or is "employed to achieve objectives that could be accomplished in so many alternative and less harsh methods," *Hallstrom*, 991 F.2d at 1484.... With respect to an individual confined awaiting adjudication under civil process, a presumption of punitive conditions arises where the individual is detained under conditions identical to, similar to, or more restrictive than those under which pretrial criminal detainees are held, or where the individual is detained under conditions more restrictive than those he or she would face upon commitment. Finally, to prevail on a Fourteenth Amendment claim regarding conditions of confinement, the confined individual need not prove "deliberate indifference" on the part of government officials.

Jones v. Blanas, 393 F.3d at 933–34.

In his declaration, defendant Captain Don Van Buskirk states that when plaintiff first arrived at Shasta County Jail in December 2001, he was housed in the jail's medical unit on the first floor of jail, isolated from other jail housing units and with controlled movement. Von Buskirk Decl. ¶ 5. Defendant Van Buskirk declares that plaintiff was safe, separated from other prisoners and provided with his own television and coffee dispenser. *Id.* However, in February of 2002, the medical unit became needed for medical patients and, in addition, defendant Van Buskirk was informed of changes in Cal.Penal Code § 4002, which allowed for housing of SVPs in administrative segregation so long as they were confined in a cell separate from "criminal defendants" and not allowed to mix with criminal defendants in the dayroom. *Id.*, at ¶ 6.

*8 As noted, plaintiff was housed at the jail on three occasions in 2002: from December 2001 to June 20, 2002; from July 26, 2002 until September 9, 2002; from October 4, 2002 until December 12, 2002. *Id.*, ¶ 7. Defendant Van Buskirk concedes that inmates in the ad seg unit have restricted out of cell time. *Id.*, ¶ 4. Inmates in the ad seg unit have different security needs and may have " 'keep-away' " status or pose a security threat. *Id.* Prisoners in ad seg shower, access the dayroom, make phone calls and exercise alone; due to the numbers that must be allowed dayroom time alone, out of cell time is limited and the inmates leave their cells based on a schedule. *Id.*

Defendant Van Buskirk avers that some SVPs have been safely housed in the Jail's Protective Custody (PC) Unit; PC prisoners are separated from other prisoners but function as the general population housing unit does. *Id.*, ¶ 3. PC inmates have almost unlimited dayroom access, are allowed to mingle with other PC inmates, can shower, watch television and make collect phone calls for up to eight hours a day on two different out-of-cell shifts. *Id.*

Defendant Van Buskirk declares that following the Ninth Circuit's decision in *Jones v. Blanas*, he has modified Jail policies with respect to housing and services provided to SVPs. *Id.*, ¶ 4. The revised policy calls for considering alternative housing options for SVPs prior to moving an SVP to ad seg, such as housing them in medical cells or converting the small, first floor segregation units to an SVP unit. *Id.* In practice, following Jones, all SVPs have been housed in a medical cell. *Id.* Moreover, according to defendant Van Buskirk, the new Jail policy requires a level of services that exceeds those afforded pretrial criminal detainees, included increased visitation, outdoor recreation and enhanced law library access. *Id.*

The undersigned would not find that the conditions of administrative segregation in the jail were compliant with *Jones v.. Blanas*, at least as a matter of law at summary judgment. However, the court finds plaintiff's refusal to be placed in the still safe, but much less

restrictive protective custody has waived any damages claim arising out of a Fourteenth Amendment due process violation. Plaintiff concedes that defendants repeatedly offered him this custody status, *(see* plaintiff's excerpted deposition testimony at pp. 6–9 of the MSJ points and authorities). That plaintiff thought, correctly or not (and the undersigned believes incorrectly) that he might be waiving his claims in this lawsuit or otherwise to claim that he was "civilly committed" if he were to agree to a protective custody arrangement does not permit him to sue for damages accruing as a result of his decision. Plaintiff certainly has provided no authority for such a position. No evidence in this case suggests that protective custody would not meet the minimum limits set forth for pretrial detainees, and the evidence that has been submitted indicated that it would (unlimited dayroom access, television privileges, phone privileges, hygienic privileges in a safe(r) environment).

*9 To hold otherwise would impose an impractical burden on custody officials. If plaintiff's reasoning were to be upheld, prisoners could sue for damages for lack of exercise even though they chose to remain in their cells because the exercise offered was not that precisely desired by the prisoners. Or, damages could be sought because prisoners would not eat the otherwise acceptable food provided because the "starving" prisoners had other dietary desires. Finally, a prisoner could sue for a failure to protect in a prison environment even though officials gave the prisoner an opportunity to remove himself from a dangerous situation. Prisoners or civil detainees have a duty to help themselves when possible to avoid constitutional deprivations. Prisoners may waive constitutional rights to which they might otherwise be entitled. *See* Berry v. Sherman, 365 F.3d 631, 634 (8th Cir.2004).

Plaintiff waived his rights to lesser custody restrictions. Summary judgment is appropriate for defendants.

Qualified Immunity

Defendants' claim that they are entitled to qualified immunity as to plaintiff's claims of entitlement based status as a civil detainee (MSJ, pp. 17–19) is well founded.

> Qualified immunity shields government officials "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982) (citations omitted); see also *Malley v. Briggs*, 475 U.S. 335, 341, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986) (qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law"). Consideration of qualified immunity in a Section 1983 claim raises two questions. *Menotti v. City of Seattle*, 409 F.3d 1113, 1152 (9th Cir.2005). Under the approach set out by *Saucier v. Katz*, we first must ask "whether a constitutional right would have been violated on the facts alleged." 533 U.S. 194, 200, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001). "If no constitutional right would have been violated were the allegations established, there is no necessity for further inquiries concerning qualified immunity." *Id.* at 201.
>
> If a constitutional violation is established, we consider "whether that right was 'clearly established' such that 'it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted.' " *Menotti*, 409 F.3d at 1152, quoting *Saucier*, 533 U.S. at 202. "This inquiry is wholly objective and is undertaken in light of the specific factual circumstances of the case." *San Jose Chapter of the Hells Angels Motorcycle Club v. City of San Jose*, 402 F.3d 962, 971 (9th Cir.), cert. denied sub nom., *Decena v. San Jose Charter of Hells Angels Motorcycle Club*, — U.S. —— 126 S.Ct. 796, 163 L.Ed.2d 627 (2005), citing *Saucier*, 533 U.S. at 201. "Under the Harlow standard ... an allegation of malice is not sufficient to defeat immunity if the defendant acted in an objectively reasonable manner." *Malley*, 475 U.S. at 341. "The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *City of San Jose*, 402 F.3d at 971, quoting Saucier, 533 U.S. at 202. "[I]f officers of reasonable competence could disagree on this issue, immunity should be recognized." *Malley*, 475 U.S. at 341.
>
> *10 *Brittain v. Hansen*, 2006 WL 1702721, *3 (9th Cir.2006).
>
> Assuming for the moment that plaintiff has maintained a cognizable constitutional claim, the undersigned finds that reasonable officers would not find that the law regarding SVP placements in County jail was sufficiently established to avoid qualified immunity. First, *Jones v. Blanas, supra*, the specific case on point here was not decided until two years after the events in question here. Although the law on pre-trial detainees was clearly established prior to this time, the categorization of SVP defendants, convicted sex offense felons who were contesting the after-sentence mandated "civil commitment treatment," were by no means clearly defined as fitting within the group of ordinary pre-trial detainees. Moreover, plaintiff's refusal to opt to remove himself from the harsher conditions attributed to dangerous or disciplined convicted prisoners takes this case far outside the parameters of an ordinary pre-trial detainee. Significantly, defendants were reasonably relying on state law, Cal.Penal Code § 4002(a) which appeared to permit the administrative segregation classification of plaintiff. While blind reliance on patently unconstitutional state law is not sufficient to avoid liability, even via qualified immunity, bona-fide reliance on an operative statute is a factor in the analysis which favors defendants. *Grossman v. City of Portland*, 33 F.3d 1200, 1209 (9th Cir.1994) (noting that "the existence of a statute or ordinance authorizing particular conduct is a factor which militates in favor of the conclusion that a reasonable official would find that conduct constitutional").
>
> Finally, the placement of a convicted sex offender simply in the general population of pre-trial detainees is near an Eighth Amendment violation. Anyone who has worked closely with prisons and jails recognizes the danger of such placement to the sex offender at the hands of other prisoners. The court gives some recognition of the plight that relatively small county jail personnel have with respect to the many demands for housing classifications in a limited facility. While the Constitution will not forgive a patent violation of rights on account of a lack of funds or facilities, neither does the Constitution expect naivete on the part of courts. When defendants are attempting to balance many competing needs, including the safety of the sex offender, a bona fide attempt to do the best one can to respect rights in a difficult situation is a factor which weighs in favor of qualified immunity.
>
> For all these reasons, the undersigned finds that the right of plaintiff, a SVP civil committee, to be housed a pre-trial detainee, with equivalent rights and privileges of a pretrial detainee were not so clearly established such that the reasonable officer would have known of this law insofar as the law requires placement in the general population, or in a "special place" in the jail where all privileges available to pretrial detainees are available.[22]

First Amendment Right of Access to the Courts

*11 Defendants contend that plaintiff was not denied his First Amendment right of access to the courts[23] by the restrictive conditions to which he was subject, a fact which plaintiff has failed to dispute sufficiently. Plaintiff alleges that the punitive conditions of his housing hindered his right of access to the courts because he was unable to access the law library adequately to assist his counsel with his civil commitment proceedings. Defendants' argument that plaintiff simply has not substantiated the requisite injury for a First Amendment right of access to the court's claim is well-taken.

Plaintiff's vague assertion that in some unspecified way he was unable to assist his attorney by not accessing the Jail law library does not identify an actual injury. *Lewis v. Casey*, 518 U.S. 343, 351–53, 355, 116 S.Ct. 2174 (1996) (prisoner must allege actual injury). Specifically, plaintiff must allege a specific instance in which he was denied the tools needed to litigate in a criminal trial or appeal, a habeas proceedings, or a section 1983 civil rights action challenging the conditions of confinement. *See id.* at 355, 116 S.Ct. at 2182. The Supreme Court held that before a denial of access to the courts claim can go forward, an inmate must "demonstrate that a nonfrivolous legal claim had been frustrated or was being impeded." *Id.* Accordingly, before a claim of denial of access to the courts can proceed, an inmate must demonstrate that he was precluded or thwarted in his efforts to present a legally or factually arguable claim to the courts. Plaintiff has failed to do so, either in his amended complaint or in his opposition. Moreover, it is clear that plaintiff had counsel to represent him in the civil commitment proceedings he references. Defendants are entitled to summary judgment on this claim.

Quasi–Judicial Immunity

Defendants contend that they are entitled to quasi-judicial immunity because they were obligated to house plaintiff because of a state court order requiring defendants to transport plaintiff from ASH to the Jail for re-commitment proceedings; thus, the manner of his housing and confinement at the Jail was not attributable to a policy, practice or procedure of the Sheriff's Department or the County. MSJ, p. 23 & Exhs. A through D.

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Quasi-judicial immunity protects an officer who lawfully executes a valid court order. *See Coverdell v. Department of Soc. and Health Servs.*, 834 F.2d 758, 764–65 (9th Cir.1987). "Absolute judicial immunity is not reserved solely for judges, but extends to nonjudicial officers for 'all claims relating to the exercise of judicial functions.' " *In re Castillo*, 297 F.3d 940, 947 (9th Cir.2002). Furthermore, "[a]n absolute immunity [defense] defeats a suit at the outset, so long as the official's actions were within the scope of the immunity." *See Imbler v. Pachtman*, 424 U.S. 409, 419 n. 13, 96 S.Ct. 984, 990 n. 13 (1976).

The case cited as authority by defendants in support of their assertion of entitlement to quasi-judicial immunity is *Munoz v. Kolender*, 208 F.Supp.2d 1125, 1152 (S.D.Cal.2002), which in turn relies on an Eleventh Circuit case, *Roland v. Phillips*, 19 F.3d 552, 557 (11th Cir.1994). In *Munoz*, the district court, in granting absolute quasi-judicial immunity from suit in his official capacity for damages to the defendant San Diego County Sheriff for the execution of court orders in retaining custody of Munoz, pending SVP proceedings (inter alia, holding a SVP civil detainee under the same conditions as those to which criminal detainees were subject), asserted that the defendant sheriff could not be held liable in his official capacity "[a]bsent a policy, custom, or procedure so seriously deficient as to violate a constitutional right and a showing of direct liability through supervisory management...."

***12** The undisputed facts of the instant case do not demonstrate that the manner of execution of the state Superior Court's order(s) implicated in any way the manner of plaintiff's placement or retention in the Jail, as plaintiff points out (Opp., pp. 12–13), but refer explicitly to his transport to Shasta County Court for re-commitment proceedings. The transport/custody order(s) do not give carte blanche to defendants for plaintiff to be confined in any manner whatever while he was in custody at the jail awaiting his re-commitment hearing. *Roland v. Phillips*, 19 F.3d at 557, the Eleventh Circuit case, does not say otherwise but rather simply finds quasi-judicial immunity appropriate for an executing law enforcement officer who carries out a valid verbal or written judicial order. In this case, the state court transport/custody orders were not placed at issue; rather, the county's housing policy or practice for pretrial civil detainees is the gravamen of this action.[24] Defendants do not show a demonstrable basis for entitlement to quasi-judicial immunity.

Defendant Shasta County Board of Supervisors

Defendants also aver that the defendant Shasta County Board of Supervisors does not establish jail policy. MSJ, pp. 23–24. Plaintiff contends that he does not allege that the Board establishes the customs, policies and practices of the Jail, but rather that the Board allocates funds to the Jail based on their approval of the Jail policies, advancing a theory of liability based on approval or ratification of Jail policies by the Board. Opp., p. 35. In their reply, defendants observe that plaintiff sets forth no facts to demonstrate that the Board of Supervisors established policy at the Jail. Reply, p. 2. However, that is not the dispositive question.

The Ninth Circuit has found that a county sheriff acts on behalf of the county in the oversight and management of county jails. *Cortez v. County of Los Angeles*, 294 F.3d 1186, 1190 (9th Cir.2002). Under California law, "[s]heriffs are given broad statutory authority to manage county jails...." *Id.*, citing Cal. Govt.Code § 26605 ("sheriff shall ... be sole and exclusive authority to keep the county jail and the prisoners in it...."). As the jail administrator, "the Sheriff is responsible for developing and implementing policies pertaining to inmate housing." *Id.*

"[S]heriffs answer to the county for their conduct, even in their law enforcement capacities." *Id.*, at 1191 [citations omitted]. "The county board of supervisors is charged with the responsibility of ensuring the sheriff's faithful performance of his duties." *Id.*, citing *Brewster v. Shasta County*, 275 F.3d 803, 808 (9th Cir.2001) (citing Cal. Govt.Code § 25303)[25]; *Dibb v. County of San Diego*, 8 Cal.4th 1200, 1210, 36 Cal.Rptr.2d 55 (1994) ("under section 25303, the board of supervisors has a statutory duty to supervise the conduct of all county officers"); *see also, Streit v. County of Los Angeles*, 236 F.3d 552 (9th Cir.2001). Thus, the Board of Supervisors is not entitled to summary judgment on the grounds that it had nothing to do with the placement of plaintiff in this case. At least, further factual development would be required.

Conclusion

***13** Accordingly, IT IS HEREBY RECOMMENDED that:

1. Defendants' September 9, 2005, motion for summary judgment be granted:

a.) Granted as to plaintiff's inapposite Fifth Amendment claims for violations of the Double Jeopardy and Ex Post Facto Clauses;

b.) Granted with respect to any claims made pursuant to the First, Sixth and Eighth Amendment claims;

c.) Granted as to plaintiff's claims of violations of his rights under the substantive due process clause under the Fourteenth Amendment;

d.) Granted on the basis of qualified immunity;

2. Judgment be entered for defendants.[26]

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(l). Within twenty days after being served with these findings and recommendations, any party may file written objections with the court and serve a copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections shall be served and filed within ten days after service of the objections. The parties are advised that failure to file objections within the specified time may waive the right to appeal the District Court's order. *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir.1991).

All Citations

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Footnotes

1 Plaintiff filed a "rebuttal" to the reply, a filing contemplated neither by the Federal Rules of Civil Procedure nor the E.D. Local Rules, which filing will be disregarded.

2 In the *Order*, filed on September 30, 2004, defendants' November 25, 2003, motion to dismiss was granted only as to the equal protection claim, but it was also noted that plaintiff had no claim concerning his transportation and receipt at the county jail per se. *See also, Order*, filed on August 8, 2005, p. 7.

3 The specific First Amendment claim for relief that was stricken was plaintiff's claim that he was "deprived of 'his right to freedom of the press' by allegedly not being allowed to watch television at Shasta County Jail." *See Findings and Recommendations*, filed August 22, 2003, p. 1.

4 Plaintiff's allegations were also set forth in the August 8, 2005, *Order*.

5 Defendants, in their summary judgment motion, p. 1, state that the previous identification of defendant Casebeer as "Caselica" is incorrect.

6 As has been repeatedly noted in prior court orders and findings and recommendations, the court's order filed, on August 25, 2003, at footnote 1, states that although plaintiff had named this individual "C. Oblinger" in the May 12, 2003 amended complaint, by notice filed on July 14, 2003, plaintiff corrected the name to "Carol Birch." In their summary judgment motion, p. 1, defendants have now corrected the apparently erroneous spelling of "Birch" to "Burch."

7 " 'Sexually violent predator' means a person who has been convicted of a sexually violent offense against two or more victims and who has a diagnosed mental disorder that makes the person a danger to the health and safety of others in that it is likely that he or she will engage in sexually violent criminal behavior." Cal. Welf. & Inst.Code § 6600(a)(1).

8 § 6604 sets forth, inter alia, that a person determined to be a sexually violent predator "shall be committed for two years to the custody of the State Department of Mental Health for appropriate treatment and confinement in a secure facility designated by the Director of Mental Health...."

9 The court infers that plaintiff means to say November 30, 2002, as there is no Nov. 31.

10 As noted at footnote 5, this defendant was misnamed "C. Oblinger" in the amended complaint.

11 Under § 5325, persons who are involuntarily detained for treatment or evaluation (as well as voluntary patients and those who are mentally retarded) have, inter alia, the following rights: to wear their own clothing; to keep personal possessions; to keep and spend a reasonable amount of money for small purchases; to see visitors daily; to make and receive confidential calls; to mail and receive unopened correspondence; to refuse convulsive treatment and psychosurgery.

12 As has been noted in earlier orders and findings and recommendations, the court, in its order dismissing the original complaint with leave to amend, filed on April 22, 2003, found that plaintiff, not incarcerated at Shasta County Jail at the time of filing his complaint, had not shown how his claims had not been mooted; his claims for injunctive relief were therefore dismissed. *See Order*, filed on April 22, 2003, p. 4. Subsequently, however, in his amended complaint, plaintiff

averred that he is likely to be returned to Shasta County Jail every two years for a recommitment trial. The court would have found persuasive plaintiff's argument that, pursuant to Cal. Welf. & Inst.Code § 6600 et seq., the Sexually Violent Predator (SVP) Act, a person shall be returned for recommitment proceedings to the County in which he/she was originally committed every two years and would have found his injunctive relief claims as framed in the amended complaint not to be moot. Defendants averred as much in their November 25, 2003 motion to dismiss (p.1), citing Cal. Welf & Inst.Code § 6602. Indeed, plaintiff avers that when he is not at Atascadero, he is confined at Shasta County Jail for commitment/recommitment hearings. AC, pp. 2, 6. However, plaintiff wholly undercut any injunctive relief claims, as defendants noted, by later expressly stating in the amended complaint that it is limited to claims of pain and suffering arising from the conditions of his confinement at Shasta County Jail "between January 1, 2002 and November 31[sic], 2002." AC, p. 6, ¶ 13. Moreover, plaintiff seeks only money damages in his "prayer for relief." AC, pp. 19–20.

13 Defendants identify the relevant period as being from January 1, 2002 to December 31, 2002 even though the amended complaint names the period as extending only until November 31, 2002; as there is no 31st of November, plaintiff probably intended November 30, 2002 as the ending date, but could have meant December 31, 2002. However, plaintiff was evidently housed at Shasta County Jail (hereafter, Jail) during the third and final period of confinement until December 12, 2002, when he was transferred back to the custody of ASH (defendants' Exh. K), and in his opposition, plaintiff endorses the idea of the period at issue as extending until December 31, 2002. As defendants themselves assert the period as *covering the entire 2002 calendar year, the court will not narrow it beyond that point, notwithstanding the somewhat* confused earlier dating in the allegations of the amended complaint.

14 While plaintiff "objects" to defendants' references to the SVPA and to plaintiff's status as a Sexually Violent Predator, on the inapposite ground that they are irrelevant and likely to inflame and bias a jury, he does not dispute the accuracy of defendants' characterization of his status, in fact, he asserts that it is "an actual fact," never contested by him. *See* "plaintiff's objection to defendants' points and authorities ...," pp. 1, 4–5, which the court construes as plaintiff's opposition to defendants' dispositive motion.

15 Defendants, apparently inadvertently, incorrectly identified the Cal. Welf. & Inst.Code Section, codifying Lanterman–Petris–Short Act as § 5525 et seq., rather than § 5325 et seq.

16 "Persons committed on criminal process and detained for trial, persons convicted and under sentence, and persons committed upon civil process, shall not be kept or put in the same room...." Cal.Penal Code § 4002(a), in part.

> "Inmates who are held pending civil process under the sexually violent predator laws shall be held in administrative segregation. For purposes of this subdivision, administrative segregation means separate and secure housing that does not involve any deprivation of privileges other than what is necessary to protect the inmates and staff. Consistent with Section 1610, to the extent possible, the person shall continue in his or her course of treatment, if any. An alleged sexually violent predator held pending civil process may waive placement in secure housing by petitioning the court for a waiver. In order to grant the waiver, the court must find that the waiver is voluntary and intelligent, and that granting the waiver would not interfere with any treatment programming for the person requesting the waiver. A person granted a waiver shall be placed with inmates charged with similar offenses or with similar criminal histories, based on the objective criteria set forth in subdivision (a)." Cal.Penal Code § 4002(b).

17 Defendants, apparently inadvertently, incorrectly identified the Cal. Welf. & Inst.Code Section, codifying Lanterman–Petris–Short Act as § 5525 et seq., rather than § 5325 et seq.

18 Plaintiff, later in his opposition (pp. 18–19), does attempt to reverse himself and assert that he is a patient pursuant to Welf. & Inst.Code § 5325 and that the Lanterman–Petris–Short Act applies to all persons "involuntarily detained," but in his response to defendant Van Buskirk's request for admissions, plaintiff had explicitly admitted that he had "never been involuntary [sic] confined or medicated under the Lanterman–Petris Short Act ("LPS"), codified at California Welfare and Institutions Code § 5325 et seq." Defendants' Exhs. F & G, no. 18.

19 Cal.Penal Code § 1610(b) states, in relevant part, that "the facility designated by the community program director may be a state hospital, a local treatment facility, a county jail, or any other appropriate facility, so long as the facility can continue the person's program of treatment, provide adequate security, and minimize interference with the person's program of treatment. If the facility designated by the community program director is a county jail, the patient shall be separated from the general population of the jail. In the case of a sexually violent predator, as defined in Section 6600 of the Welfare and Institutions Code, who is held pending civil process under the sexually violent predator laws, the person may be housed as provided by Section 4002. The designated facility need not be approved for 72-hour treatment and evaluation pursuant to the provisions of the Lanterman-Petris-Short Act (Part 1 (commencing with Section 5000) of Division 5 of the Welfare and Institutions Code); however, a county jail may not be designated unless the services specified above are

provided, and accommodations are provided which ensure both the safety of the person and the safety of the general population of the jail...."

20 *See Lynch v. Baxley*, 744 F.2d 1452 (11th Cir.1984).

21 The quotation in *Hubbart, supra*, 81 Cal.Rptr.2d is miscited in *Jones, supra*, as at 513.

22 The result here is not inconsistent with the result on the motion to dismiss. As stated in the latter Findings, more factual development was required, and such development took place in this motion.

23 Defendants incorrectly designate this right as arising from the Sixth Amendment. (MSJ, p. 22).

24 The undersigned has previously observed that plaintiff has sought to implicate the conditions of his confinement as a civil detainee within the Jail but not the fact of his placement in the Jail per se. *See* August 12, 2004, *Findings and Recommendations*, p. 13, footnote 8.

25 "The board of supervisors shall supervise the official conduct of all county officers, and officers of all districts and other subdivisions of the county, and particularly insofar as the functions and duties of such county officers and officers of all districts and subdivisions of the county related to the assessing, collecting, safekeeping, management, or disbursement of public funds. It shall see that they faithfully perform their duties...." Cal. Govt.Code § 25303, in relevant part.

26 The grounds on which defendants' motion were denied do not affect the fact that judgment should be entered for defendants. Of course, to the extent defendant "Board of Supervisors" is sued as an entity, in lieu of individuals, qualified immunity would not apply. However, the undersigned has found no constitutional violation in the first instance.

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