

**TESTIMONY OF ERNEST D. PREATE, JR. ESQUIRE
BEFORE THE SUBCOMMITTEE ON CRIME,
TERRORISM, AND HOMELAND SECURITY**

April 22, 2008

Good Afternoon. My name is Ernie Preate, Jr.. I'm an attorney licensed to practice law in the Commonwealth of Pennsylvania and the federal District Courts in Pennsylvania and the Third Circuit Court of Appeals.

I would like to thank Chairman Scott, Ranking Member Gohmert, and the rest of the Committee for inviting me to speak to you today about the "Prison Abuse Remedies Act of 2007." I rise in support of HR 4109.

I'd like to give you a brief background of my life experiences that brings me before you today. I am a former District Attorney in Scranton, Pennsylvania, and a former Attorney General of Pennsylvania. I'm also an attorney in private practice who defends accused criminals in state and federal courts; I also litigate Civil Rights claims on behalf of inmates and former inmates. But perhaps my most important experience for purposes of this testimony is that I was once a prisoner. I pled guilty to Mail Fraud in 1995 in connection with improperly gathering less than \$20,000 in campaign contributions nearly 20 years ago. It was a violation of our state election law to take cash contributions in excess of \$100. At some of my fundraisers, some people paid in cash, most paid by check. It was wrong for me to accept the cash contributions, and I am deeply sorry to the people of Pennsylvania for my actions. As punishment, I spent nearly twelve months in federal prison.

On one hand, I thus understand the importance of a strong criminal justice system. Criminal offenders need to be held accountable for their actions, but this punishment must be imposed in accordance with Constitutional standards. From my unique perspective, the proposed bill, HR 4109, provides the proper balance between weeding out the numerous frivolous civil lawsuits filed by prisoners and ensuring that meritorious ones receive their day in Court.

Enforcement of the law is central to our system of justice and to the protection of our communities. As a prosecutor, I focused on criminal law enforcement, but it is equally important that constitutional standards and civil laws be obeyed. The rule of law applies to everyone in this country, including prisoners and officials. Therefore, to the extent that the PLRA interferes with the rule of law and undermines the protection of constitutional rights that all Americans, including prisoners, share, it should – and must – be amended.

As a prosecutor for nearly 25 years, I never fully understood the true vulnerability of prisoners, and the loss of hope that permeates most prisons and prisoners. Then I became one. And, as part of my life's work, for the last 10 years I have been graciously allowed by the Pennsylvania Department of Corrections to visit inside the walls of its prisons and to talk to both men and women about their fears and their hopes¹. Last year I visited 15 of the 26 Pennsylvania Prisons, including the old and daunting “big houses” -- Graterford, Huntington, Rockview and the death row institution, SCI-Greene. I spoke to almost 10,000 inmates, some of them I sent there myself. Thousands have written to me, not just about their individual cases or issues, but about whether laws will be changed, such as the PLRA, and the Pennsylvania Post-Conviction Relief Act,

¹ The Department and I have mutually agreed that I would not discuss individual cases, grievances or prison policies during these question and answer sessions. To be clear, I proposed some of these restrictions myself.

which, along with the Anti-Terrorism Effective Death Penalty Law (ATEDP), effectively obliterates the great Writ of Habeas Corpus. They talk to me about whether ill and aged lifers have any chance of pardon or parole, and, whether those who are truly innocent can ever be freed.

I am in a unique position to understand the real life consequences of legislation that is passed, by you and my Commonwealth. I know that most individuals, including those who crafted the PLRA, have a limited knowledge about realities of prison life, and, therefore, could not have predicted the stifling consequences of this law. It was only when I was a prisoner that I understood the critical importance of the federal courts' oversight of prisons. Based upon ALL my experiences, I can say with confidence that the PLRA is deeply flawed and its unintended consequences have done serious harm to the principle that a justice system must, after all, be fundamentally just.

A serious problem with the PLRA as currently written is that it requires a prisoner to exhaust administrative remedies in order to file a lawsuit in federal court. This means that he or she must file internal grievances through possibly 3 or 4 levels before the claim can be brought in federal court. This restriction applies in both county and state prisons.

I can tell you from my own experiences, both as an inmate and as a civil rights attorney that inmates can be very intimidated in bringing grievances. I litigated one civil rights lawsuit against the Lackawanna County Prison where a few rogue guards, after midnight, routinely, without provocation, beat and terrorized inmates, and even other guards. There was no question about the

one guard's inmate beating. The stomping boot print was clearly visible on his back. The next day, the prisoner verbally complained to the day shift officer. So did his father, a well-known businessman. The result: that night the rogue guard retaliated with a second brutal assault. With the father complaining and the assaults public and out of control, a criminal investigation and a newspaper investigation ensued. Eventually, the family hired me to pursue a lawsuit. I can't tell you the amount of my client's settlement, but I can tell you that two of the guards ultimately pled guilty and their punishment was -- probation! Probation. Think of what kind of message this sends to inmates not just in Lackawanna County but to inmates everywhere.

Intimidation of inmates is one of the problems with the PLRA's requirements that the inmate first exhaust his remedies with the inmate grievance system. In cases involving abuse by guards against inmates, requiring that the inmate first file a grievance exposes the inmate to future retaliation by the very people he is vulnerable to and are harming him. An inmate learns that the quickest route to the isolation of the "hole" is to complain about the conduct of a guard. If you think that retaliation is not a part of every day prison life, then you don't know the reality of prisons.

In the above lawsuit, we learned in depositions of other assaults. In one, the inmate was handcuffed to a pole and beaten by this rogue guard, and the beating did not stop until the warden's long time secretary, hearing of the beating, ran down two flights of stairs to the guard and put a stop to it. This inmate was so intimidated and fearful, he didn't file a grievance or even a federal lawsuit.

Moreover, in the vast amount of cases, the guard will deny having done anything wrong, and the institutional review officers will simply deny, deny, deny (at each level) finding that the guard has denied and the guard is credible. Of course, this inmate may now find himself subject to retaliatory discipline with concocted violation of prison rules, such as failing to stand for a count, cursing at or threatening a guard, or constant random searches of his person and his cell.

I know of one case litigated by a colleague of mine where the inmate filed a grievance that the guards were retaliating against him for filing a prior grievance. The inmate complained that the guards were putting pebbles in his soup. What did the prison officials do in response to this grievance? The first “investigative” act was to search the inmate’s own cell and “find” pills not prescribed to him.²

The United States Supreme Court has recently made it perfectly clear: the exhaustion requirement is non-discretionary.³ This means that if a grievance is dismissed due to procedural defects, such as the inmate filing his appeal of the grievance one day late, his case is dismissed for failure to exhaust.

In my view, the exhaustion requirement runs afoul of basic due process requirements under the U.S. Constitution for notice. Let me give you an example. In Pennsylvania, the grievance procedures, according to the Third Circuit, encompass an initial grievance and two levels of appeal, all of which have timelines⁴. Nowhere on the state forms does it say what the timelines

² Mincy v. Klem, Slip Copy, 2007 WL 1576444, M.D.Pa., May 30, 2007, Mincy v. Chemielewski, 2006 WL 3042968, M.D.Pa., October 25, 2006. Appeal of grant of summary judgment is now before the Third Circuit.

³ Woodford v. NGO, 546 U.S. 81 (2006).

⁴ Spruill v. Gillis, 372 F.3d 218 (C.A.3 (Pa.) 2004)

are for filing the initial grievance and for appealing the decision of the grievance officer to the Superintendent and the Superintendent's decision to review in Harrisburg. However, when the Superintendent is given the inmate's Appeal, at least in one of the state prisons where I have a client, it stated right on the form used for recommended action to the Superintendent: "your answer is due by (specific) date." Clearly the staff are notified of the time dates, but not inmates. This should change.

It is helpful to compare the prison grievance processes required by the PLRA to that of other legislation. In virtually every phase of administrative review, both state and federal, when decisions are made, such as Social Security denials, Workers' Compensation denials, Unemployment Compensation denials, Equal Employment Opportunity findings, it clearly states on the official finding or denial that there is a right to an appeal and the timeline for appeal of that decision. However, from what I have observed, nowhere on correctional complaint forms does it inform the inmate of his or her right to file a complaint or appeal, to whom the appeal should be directed, and, the timeline for submission of the appeal.

It is important to remember here that the education level for most inmates in Pennsylvania prisons is less than an eighth grade education. These timelines, and other grievance process information, are contained in an 18 page "policy statement" ADM-804 that is given to inmates along with 26 other official policies that the inmate must be aware of. Though it is carefully crafted by lawyers, even inmates who can barely read are expected to understand their rights and responsibilities. Again, even if an inmate has a legitimate and meritorious complaint, if it is one day late, it is never going to be redressed

I would also note that Pennsylvania has no comparable PLRA, because of its sovereign immunity statutes for state and local governments.⁵ Inmates therefore, have no ability to sue in Pennsylvania State Courts, the state or local governments for assaults by guards or other prisoners, for monetary compensation, as such events do not fall within the exceptions enumerated under the Pennsylvania sovereign immunity statutes. Therefore all such lawsuits are filed in the federal courts.

Another hazard of the grievance process is that the grievance process may be futile in terms of providing any relief or redress. What good would it do to complain, through the grievance process, a single beating by a guard? The grievance process will not provide him monetary recompense for his physical injuries. The Supreme Court in upholding a 3rd Circuit case held that a complaint of excessive force (beating by guard) must be grieved to final decision even though the administrative remedy cannot provide the inmate with the relief he could get in a section 1983 complaint (monetary recompense).⁶

A second problem with the PLRA I would like to address is the requirement that an inmate receive “physical injury” in order to be awarded compensatory damages. Most of the Circuits have defined physical injury as something more than *de minimis*. You have heard extensive previous testimony that the physical injury requirement has been used to deny redress to inmates who have been raped and sexually assaulted.⁷ This requirement also appears to unfairly restrict

⁵ 42 Pa.C.S.A. § 8522, 42 Pa.C.S.A. § 8542.

⁶ Booth v. Churner, 532 U.S. 731 (2001), *affirming* Booth v. Churner, 206 F.3d 289 (Ca.3(Pa.) 2000).

⁷ Hancock v. Payne, 2006 WL 21751 (S.D. Miss.). ⁷ Copeland v. Nunan, 205 F.3d 743 (CA 5(Tex) 2001)

damages which may be awarded to a disabled persons under the Americans with Disabilities Act (ADA).⁸

Let me give you an example from one of my own cases. I represent a paraplegic, a well known wheelchair racer. He was prescribed by his Board Certified Urologist to have clean rubber gloves and clean catheters to allow him to perform his elementary bodily functions. He was instructed to take all reasonable efforts during this process to not be in a place where he could transmit his germs to others , or where he could pick up the germs of others. He did this on his own for 10 years with only occasional urinary tract infections (UTI), which, is to be expected in such cases.

But when he went to state prison, for nearly a year he was never examined by the staff physician. He was placed in a cell with another inmate and he was not given a fresh supply of gloves and catheters for each bodily function elimination. He was told to wash the items himself. Therefore, it was not surprising that he began to develop repeated urinary tract infections.

The prison doctor, who had not seen the inmate for nearly a year since his arrival, without even examining the inmate, nor contacting his treating physician, told him that he was ordering a permanent catheter, called a Foley Catheter, to be inserted in the inmate's penis and that he carry a bag in which his urine would be collected.

My client, who was under 30, educated and in good physical shape, strongly objected. As one Board Certified Urologist testified, a Foley Catheter, increases rather than decreases the rate of UTI's. Further, prolonged use of a Foley Catheter causes a decrease muscle functioning of the

⁸ 42 U.S.C.A. § 12131 et seq.

penis and associated parts. Over time these muscles atrophy. The inmate urged the doctor to call his treating physician. The prison doctor never did call the treating physician.

As a result, the prison doctor ordered that the inmate be given a new bodily elimination regime. He could only urinate once every six hours, that each time he did so, he had to travel to the nurse's station, be examined by the nurse who would press on his stomach to see if the bladder was distended, and, only if it was, would she give him the necessary catheter and gloves. To his humiliation, she had to watch him do it himself. And if she believed he was not distended enough, she would refuse him those necessary implements. On several occasions, he was refused. The urgency to eliminate became excruciatingly painful. Several times he wet himself. His existence became so tortured that he would refuse food and drink so he wouldn't have the urgency to eliminate.

He filed a grievance begging to be allowed to catheterize himself as needed and without humiliation. He even attached a letter from his treating physician. His complaint was denied at every level, upholding the prison doctor. Thus, we filed a federal lawsuit against the doctor and prison officials, alleging discrimination against him because he was disabled. He testified that he was aware of no one else in the healthy male prison population who was prescribed such a cruel and horrendous regime, alleging he was subjected to this regime only because he was disabled, a paraplegic.

In a Motion to Dismiss, the medical provider argued that he received no physical injury. While we were able to argue some physical injuries (increased bladder infections, physical pain and incontinence) it is possible that this could be lost on summary judgment.⁹

In my view, this is a clear violation of the ADA. Non-paraplegic inmates were not prohibited from urinating and forced to an every six-hour schedule. The PLRA applies to all inmate suits in federal Courts.¹⁰ The physical injury requirement runs directly in conflict with the ADA, in that the ADA is about equal rights and emotional trauma to a disabled person and not physical injuries. In **U.S. v. Georgia**,¹¹ the Supreme Court held that a disabled inmate who is discriminated against could sue for compensatory damages. The requirement for physical injury potentially eviscerates the Americans with Disabilities Act as it applies to inmates, rendering its protections meaningless.

As a former Attorney General, I take seriously the litigation burden felt by the Courts and government officials. I was responsible for defending against inmate lawsuits prior to passage of the PLRA. However, any lessening of that burden must be carefully tailored to maintain accountability for violations of prisoners' Constitutional rights. The PLRA can be reformed without changing its most effective measure: the screening provision¹² that requires courts to review prisoners' cases prior to authorizing service on the defendants, and to *sua sponte* dismiss cases that are frivolous, malicious, fail to state a claim, or seek damages from an immune

⁹ But see **Kimman v. New Hampshire Department of Corrections**, 451 F.3d 274 (1st Cir. 2006) where the First Circuit held that the lower court must determine whether the inmate must exhaust his administrative remedies as a prerequisite to suit under the ADA.

¹⁰ 42 U.S.C.A. § 1997e sections (a) (exhaustion requirement) and (c)(1) (dismissal) both specifically state “any other Federal law” and section (e) refer to “[n]o Federal civil action”.

¹¹ 546 U.S. 151, 126 S.Ct. 877 (2006)

¹² 42 U.S.C.A. § 1997e (c)

defendant. That provision represents the key mechanism to realize the PLRA's stated purpose of reducing frivolous prisoner suits. The fixes for the PLRA proposed in HR 4109 do not interfere with this critical provision.

I also would propose to this Subcommittee that you consider including in HR 4109, a provision that during the 90 day stay options in § 3(a)(2) that use of Alternative Dispute Resolution (ADR) processes be authorized as a means of early resolution of legitimate inmate grievances.. ADR consists of Mediation, Arbitration or Early Neutral Evaluation (ENE)

To briefly explain, mediation involves negotiation moderated by a trained mediator. Arbitration is an agreement to litigate the case *de novo* before an arbitrator whose decision is binding. ENE involves sending a case to a neutral attorney with subject matter expertise. The ENE attorney can provide a non-binding evaluation and is available to assist the parties in reaching agreement. To a *pro se* prisoner, this outsider's view may well terminate a non-meritorious claim early without running up financial costs in the system and cutting inefficient use of time by parties, attorneys and courts.

ENE was started by 20 attorneys in the Northern District of California in the 1980's and is spreading across the United States. Indeed, the Federal District Court for the Western District of Pennsylvania in Pittsburgh recently adopted ENE as an ADR tool. Unfortunately, it does not cover social security or prisoner cases. By authorizing the use of these ADR programs, I believe many districts across America will adopt ADR for prisoner cases.

These ADR programs, used in other federal cases, provide an impartial and accessible forum for just, timely and economical resolution of federal legal proceedings. Our own federal courts have recognized that the ADR processes are effective and economical use of the court's resources. In particular I believe ENE would be valuable in prisoner litigation as the neutral attorney could provide a neutral look the inmate claims to see whether the claim can be best resolved without litigation.

Lastly, as a solo practitioner, I must add my voice in support have to support the other testimony regarding the unfair provisions of the PLRA limiting attorneys fees. As a solo practitioner I have learned of many meritorious cases involving First Amendment rights, and in particular retaliation against prisoners for exercising their rights. Since these cases involve only nominal damages and not physical injury, the 150% requirement makes it impossible for someone such as me to represent an inmate in a meritorious case. The inmates seldom have access to funds to pay an attorney up front, and if my recovery is limited to 150% of a nominal damage award, there is no way that I would be able to devote my time to such a case. I willingly do *pro bono* work for Pennsylvania inmates and am a registered lobbyist in Pennsylvania for criminal justice reform minded individuals and groups. But, as a solo practitioner I cannot litigate without adequate recompense for my time.

In fact, it is, in my opinion as a former Attorney General, that the 150% requirement is the single greatest contributing factor to the unwillingness of the states to settle cases, since they know they will not be required to pay the attorney's fee if only a nominal amount of a buck or two is awarded. They can afford to pay \$1.50 in attorney's fees, but not the actual fee earned by the

attorney based upon the time required for the lawsuit. Not only does the 150% requirement preclude attorneys from taking on meritorious cases involve clear rights violations, but it also can waste the court's resources because it eliminates the incentive for the government to settle the case prior to the attorney spending large hours on the case and thus raising their liability for the attorney's fee.

I urge you to support, and consider co-sponsoring HR 4109 in order to ensure that prisoners' meritorious claims can be heard in federal court. It is critical maintain the federal courts' ability to effectively oversee the corrections system and to maintain inmate belief that the system can work for them. Fixes to the PLRA are long overdue, and I commend Congressman Scott and Congressman Conyers for their leadership on this very important issue.

Respectfully Submitted,

Ernest D. Preate, Jr. Esquire
Mellon Bank Building
400 Third Avenue, Suite 300
Scranton, PA 1503
(570) 558-5970
epreate@comcast.net