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Regarding The National Prison Rape Elimination Commission Report and Standards

Before the House Judiciary Subcommittee on

Crime, Terrorism, and Homeland Security

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We are attorneys with the Prisoners' Rights Project of the Legal Aid Society of New York, which represents New York State and City prisoners in class action and test case litigation, advocates for them with prison and jail agencies, and advises them of their legal rights. Along with the law firm of Debevoise & Plimpton, LLP, which is working with us *pro bono***,** we are counsel in *Amador, et al., v. Andrews, et al.,* 03 Civ. 0650 (KTD) (GWG), a federal civil rights action challenging as unconstitutional the ongoing and persistent sexual abuse of women prisoners by male staff in the New York State prisons. This case seeks change in the administrative policies that have effectively granted immunity to the correction officers who prey upon women prisoners and have permitted sexual abuse to continue for years without remedy. In addition, it seeks damages from the abusers. We appreciate this opportunity to testify about the recommendations of the National Prison Rape Elimination Commission, and in particular its recommendation to eliminate the exhaustion requirement of the Prison Litigation Reform Act ("PLRA"), 42 U.S.C. § 1997e(a), for survivors of prison sexual abuse. We further suggest that the exhaustion requirement be eliminated for prisoner litigation generally, since problems similar to those experienced by the plaintiffs in *Amador* can arise in other kinds of meritorious prisoner litigation.

The National Prison Rape Elimination Commission was created to address the failure of many prisons and jails to take meaningful action to remedy the problem of sexual abuse in prison. During the time in which the Commission was developing its proposed standards the abuse at Abu Ghraib was reported, highlighting the potential for abuse inside prisons when appropriate supervision and safeguards are not in place. Appropriate supervision and safeguards to ensure the basic human rights of prisoners is no less essential in prisons in the United States.

Through our experience interviewing hundreds of women prisoners as well as through discovery in *Amador*, we have learned that the procedures to address staff sexual abuse within the New York State Department of Correctional Services ("NYSDOCS" or the "Department") are seriously deficient, enabling abuse to continue unabated. Our experience representing women prisoners has made obvious the need for clear and stringent standards to force prisons to take the steps necessary to prevent, detect, and address staff sexual abuse.

We are frankly concerned that the standards proposed by the Commission do not go far enough. For example, they do not mandate the use of investigative tools that can corroborate prisoners' complaints, which are necessary to prevent investigators from uniformly crediting the word of staff over that of a convicted felon.[1] However, we believe the standards are a critical step in the right direction. We also wholeheartedly endorse the Commission's recognition that these standards can serve only as one part of our nation's effort to remedy the troubling problem of prison sexual abuse. The courts must also be available to prisoners to vindicate their rights. As called for by the Commission, Congress must restore the ability of prisoners to protect their rights against such abuse through the courts. We therefore call on Congress to repeal the exhaustion provision of the PLRA. It is the need for this reform on which we focus in our testimony.

We have come to the realization the PLRA exhaustion requirement needs to be repealed the hard way, having seen the meritorious claims of the women prisoners in *Amador* derailed for more than six years, and maybe permanently. Rather than having the opportunity to make their

[1] By way of example, the standards do not require the use of video cameras in secluded areas where sexual abuse tends to take place. Instead they ask prison officials only to review whether such cameras are needed. They also do not require prior complaints of abuse involving a staff member to be considered as corroborative evidence of current allegations, just that they be reviewed. *Compare* Federal Rules of Evidence 415.

case in court, these women have been forced to follow a seemingly endless detour through a surreal land where obfuscation and dishonesty are rewarded, all in the name of the PLRA's exhaustion requirement.

The PLRA requires prisoners to exhaust "available" administrative remedies before they initiate a lawsuit. The stated purpose of this requirement is to ensure that prison administrators have notice and an opportunity to address complaints, thereby avoiding potentially needless litigation; to allow for the development of a factual record; and to discourage the filing of frivolous lawsuits. *See, e.g,, Jones v. Bock*, 549 U.S. 199, 219 (2007). As shown by *Amador*, despite these seemingly reasonable goals, the PLRA's exhaustion requirement has been turned into an instrument of injustice, creating a virtually insurmountable barrier to those seeking to protect their most basic human rights.

Amador v. Andrews: Prison Officials Tell Prisoners One Thing, the Court Another

In 2003, seventeen women brought the *Amador* lawsuit on behalf of all women prisoners in NYSDOCS custody, alleging that they had suffered sexual abuse, including forcible rape, coerced sexual activity, oral and anal sodomy, and pregnancies caused by Department staff, and that the Department's policies and procedures enabled such abuse to occur. This suit was filed after a three-year investigation by The Legal Aid Society, and after unsuccessful efforts by Legal Aid to get NYSDOCS to take action against officers against whom there had been repeated complaints of sexual predation by women prisoners.

The plaintiffs allege that unless a woman prisoner has physical proof of staff sexual abuse, her complaint of abuse results in NYSDOCS taking *no* action against the officer involved. Rather, they claim that NYSDOCS allows such officers to continue to guard women prisoners,

even alone at night in a housing area, and even when NYSDOCS has received multiple similar complaints of sexual abuse about the officers. For these reasons, these women challenge NYSDOCS' policies and procedures, including their failure adequately to screen, train, supervise, investigate and discipline staff so as to protect the women in their custody from sexual abuse. These women have also sought damages for the assaults they suffered.

All of the women represented in the lawsuit had done exactly what they were told to do by prison officials to complain about staff sexual abuse.[2] All of the women complained about their assault to the Sex Crimes Unit of the NYSDOCS Inspector General's Office (SCU), an office established for the very purpose of investigating complaints of sexual abuse. The Department provides written instructions to *all* women prisoners entering their custody telling them that if they are sexually assaulted they should complain to the SCU or to any staff member with whom they feel comfortable speaking and that, regardless of who they complain to, the SCU will investigate. Postings, notices and directives reiterate these instructions. Many of the plaintiffs additionally complained to the officer's supervisor, to the deputy superintendent for security, or to the superintendent of the facility. Each of these women was told that her complaint, regardless of how it was lodged, would be forwarded to the SCU for investigation. None of these women were ever told that she must also file a grievance.

Despite their own forthright instructions to women prisoners about how to complain about staff sexual abuse, NYSDOCS supervisors came into court and said that a grievance was needed to satisfy the PLRA's exhaustion requirement. Their position is belied not only by their

[2] By following the prison's procedures, these women followed the command of the PLRA, which the Supreme Court has held requires "proper exhaustion," and that "it is the prison's requirements . . . that define the boundaries of proper exhaustion." *Jones v. Bock*, 549 U.S. 199, 218 (2007).

repeated instructions to women prisoners, but by their own staff's actions and beliefs. The director of the grievance program when the SCU was created made clear that the grievance program had no actual authority to take action on sexual abuse complaints but served merely as a "pass-through" to the SCU. All staff questioned in the case testified that the SCU deals with complaints of staff sexual abuse, not the grievance program. And, most tellingly, *all* of the grievances about staff sexual abuse received by the Department were forwarded to the SCU for "*any action* to be taken." The Department's two-faced position--telling women prisoners one thing about how to complain about sexual abuse but then demanding that prisoners have filed a grievance as part of their litigation position--illustrates just how prison officials can try to capitalize on the PLRA to shield themselves from litigation, even about as serious an issue as staff sexual abuse.

The District Court's Ruling in *Amador* and Its Impact Barring Litigation Challenging Prison Policies and Procedures

Despite the efforts of plaintiffs to exhaust their administrative remedies as required by the PLRA, in 2007, more than four years after the case was filed, the federal District Court ruled that *none* of the plaintiffs exhausted her administrative remedies sufficiently to challenge NYSDOCS' policies and procedures. *Amador v. Andrews,* 2007 WL 4326747 (S.D.N.Y., Dec. 4, 2007).

With respect to the plaintiffs who complained to the SCU, the District Court disregarded the undisputed evidence that NYSDOCS told them they can complain to the SCU; that no Department staff ever told them to file a grievance about their abuse; and that the Department takes no action on grievances about sexual abuse, except to say they are being investigated by the SCU. Rather, the District Court found that under the PLRA, plaintiffs--who had complained

to the SCU, but had not filed grievances-- had not exhausted their administrative remedies and therefore could not pursue claims for injunctive relief or for money damages arising from their abuse. Their cases were dismissed.

The District Court's appalling application of the PLRA did not stop there. Three women had also filed grievances, not because they believed the Department's grievance program had anything to do with complaints of staff sexual abuse, but because, in an abundance of caution and in an effort to avert a battle over exhaustion, lawyers like us told them to do so. The District Court dismissed the injunctive claim of Shenyell Smith, the one grievant remaining in custody, for failure to exhaust under the PLRA, because, according to the District Court, she failed sufficiently to connect her sexual abuse to specific Departmental officials and their actions or inactions.[3]

Shenyell Smith is one of the women who filed a grievance under counsel's instruction. She set out the core issues behind the injunctive claims of this lawsuit and met the PLRA's purported aim of giving the prison administrators notice and opportunity to address her

[3] The District Court's decision allowed Shenyell Smith's damages claim to go forward against the officer that she claimed had abused her. The District Court dismissed the injunctive and damages claims of the two other grievants on mootness grounds because they had been released from prison during the more than four years it took the District Court to decide to dismiss their claims. The court subsequently issued an unpublished opinion on plaintiffs' motion for reconsideration reinstating the damages claims of five plaintiffs. It reinstated the damages claims of the two grievants whose claims had been dismissed on mootness grounds, and it reinstated the damages claims of three plaintiffs who were not subject to the PLRA exhaustion requirement because they had been released before they filed suit. None of these women, however, were allowed to pursue their injunctive claims, which means that if the court's ruling stands, there will be no challenge to the continuation of the practices and omissions that made the abuse of these women possible.

complaint. She stated:

> CO [name] raped me. He's still working on this unit. The state is letting him get away with doing this type of stuff to an inmate. This CO has had so many accusations made towards him for harassment & more over the past 10 years & I'm not saying that all of them are true but one must realize & see that something is definitely wrong.

The District Court's holding that this plain statement by a prisoner of what had happened to her and what she had heard about the officer is inadequate to satisfy the PLRA exhaustion requirement effectively immunizes the Department from challenges to its policies and procedures. Whether in a grievance or in a complaint to the SCU, it is not practically possible for a prisoner such as Ms. Smith to identify the correctional policies and procedures that enabled her assault because she is are not privy to such information. Prisoners are simply not informed of correctional policies and procedures for training and supervising officers, let alone the standards used for investigating complaints and disciplining officers.

In this case, the Department's claim that Ms. Smith's grievance is inadequate is particularly absurd, since it has specifically taken the position that no information about how investigations into sexual abuse are conducted can be shared with prisoners.[4] Without such information—which Legal Aid obtained only in the course of a lengthy investigation and through use of the state Freedom of Information Law—no one can "connect" a specific act of sexual abuse to the actions or inactions of specific supervisory officials in the prison system.

[4] The Department's counsel asserted, "Can you imagine the consequence if we simply told the inmates how DOCS conducts its investigations?" Counsel additionally claimed that even publicly available information could "create crippling security concerns if given to inmates." Letter from Assistant Attorney General Daniel Schulze to Plaintiffs' Counsel, September 1, 2005 at p. 2.

Even if information about policies and procedures had been available, it is unreasonable to require a prisoner to draft an administrative complaint identifying who in the departmental hierarchy is personally responsible for the specific acts or omissions that cased or permitted her rape. The District Court's opinion effectively requires a typically un-counseled and often uneducated prisoner to formulate complex legal theories of supervisory liability in order to exhaust potential injunctive claims and to do so within the three-week window required by the Department's grievance directive.

The District Court's interpretation of the PLRA exhaustion requirement is particularly draconian when applied to victims of sexual assault, demanding that women often in the throes of Post Traumatic Stress Disorder parse the Department's opaque complaint mechanism. The vast majority of women prisoners, including most plaintiffs in *Amador*, suffered sexual or physical abuse prior to their incarceration. As a result, they were particularly vulnerable to trauma arising from a sexual assault. But, even if these women had been in a position to disregard all of the directions given to them by the Department and figure out that a grievance were required, the District Court's decision demands that they use a grievance program that is uniformly understood to be a non-confidential complaint mechanism despite the very real risk that doing so would expose them to retaliation from prison staff. The women in *Amador* came forward despite repeated threats of violence and abuse, destruction of their property, and false disciplinary infractions.

Unlike many other types of problems in prison, sexual abuse requires special reporting procedures in order to encourage victims to come forward. The need for multiple confidential reporting systems was discounted by the District Court, but is recognized by the Commission's recommendations. But allowing prisoners to choose among multiple reporting channels and

allowing them to complain via the safest and most confidential mechanism available is contrary to the PLRA's exhaustion requirement--at least as it was interpreted by the District Court in *Amador*.

The Current Status of *Amador*

Last month, six years after the case was filed, plaintiffs argued their appeal from the District Court's decision before the Court of Appeals for the Second Circuit, having been granted expedited interlocutory review despite the District Court's refusal to certify its decision for appeal.

At oral argument, the New York State Attorney General's Office pressed for an interpretation of the exhaustion requirement even more extreme than that articulated by the District Court. The Attorney General's Office challenged the sufficiency of the grievance of Stephanie Dawson, one of the plaintiffs whose claims for injunctive relief had been dismissed on mootness grounds. Counsel argued that her grievance--which complained about the Department's failure to train, supervise and discipline its officers[5]--provided inadequate detail to exhaust her injunctive claims, because, for example, it did not specify precisely *how* the Department failed to train its officers.[6] We await a decision from the Court of Appeals.

The Lessons of *Amador*

Even if plaintiffs prevail on appeal, *Amador* illustrates how the PLRA effectively deprives prisoners of needed access to the courts, thereby insulating prison officials from any

[5] This prisoner was able to propound these legal theories because this portion of her grievance was dictated to her by us.

[6] We are unable to provide a cite for this argument because the transcript has not yet been provided.

challenge to their policies and procedures. Six years have passed since this case was filed, and the merits of the case are nowhere near being heard. The application of the exhaustion requirement in *Amador* highlights the appalling degree to which the PLRA has contravened the very goals that it was intended to achieve. Instead, it has rewarded prison administrators who set up opaque or complex requirements for addressing prison complaints.[7] The exhaustion requirement has spawned a whole new area of satellite litigation and concomitant delay, and—as here—the dismissal of claims based on tricks and technicalities. Most importantly, it has closed the courthouse doors to prisoners, preventing meritorious claims from proceeding to protect essential rights guaranteed by the United States Constitution.

The PLRA exhaustion requirement has especially pernicious effects with regard to complaints of staff sexual abuse. Claims of sexual abuse should be treated confidentially. Prisoners are not allowed to access to information about complaints of abuse by other women about the same staff member, nor to information about policies and procedures relating to investigations of these complaints. As a result, no prisoner can possibly have the information needed to connect her own experience regarding sexual abuse with larger patterns of sexual abuse, or with deficiencies in training, supervision, investigation, and discipline. In essence, the exhaustion requirement has a become a "free pass" that permits systemic deficiencies to go unaddressed for years, if at all.

[7] To be clear, there was nothing wrong with NYDOCS setting up a special arrangement for receiving prisoners' sexual abuse complaints. Indeed, this was a constructive and beneficial action. The problem is the "bait and switch" tactic which prison officials adopted in the litigation, and the District Court accepted--namely that prisoners who followed prison officials' instructions had failed to exhaust because they did not pursue a grievance procedure that has no authority over sexual abuse complaints.

There is no reason to believe that the decision in *Amador* is an anomaly. To the contrary, unlike most prisoners in this country, the plaintiffs in *Amador* have had the benefit of counsel with the experience and the funds to press their claims. Most prisoners, however, proceed *pro se*, and are therefore forced to confront this morass of confusion and obfuscation created by the PLRA without assistance. As a result, hundreds of prisoners' claims for relief under the Constitution are dismissed each year for lack of exhaustion, before the merits are even heard. The impact of the PLRA's exhaustion requirement cannot be overstated: it has effectively prevented any meaningful judicial review of prison officials' actions to those deliberately isolated from public view. As a result, it has allowed the types of abuse that appalled this nation in Abu Ghraib to occur in our own country without legal redress.

The National Prison Rape Elimination Commission has recognized the need for reform in this area, calling on Congress to "amend the administrative exhaustion provision and physical injury requirement in the Prison Litigation Reform Act to remove unreasonable barriers to courts for victims of sexual abuse." National Prison Rape Elimination Commission Report, Appendix C, Recommendations to Congress, I. We and the women we represent urgently press for repeal of the PLRA's exhaustion requirement, so that prisoners can use the court system to protect themselves from sexual assaults, policies and procedures facilitating sexual assaults, and all other acts that violate their Constitutional rights.

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