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Jail Administration

Dear Reader:

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We hope this information will be useful to you; reference to it will assist you with many of the questions that will arise in your tenure with county government. However, the *Tennessee Code Annotated* and other relevant laws or regulations should always be consulted before any action is taken based upon the contents of this document.

Please feel free to contact us if you have questions or comments regarding this information or any other CTAS website material.

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Jail Administration

Reference Number: CTAS-184

The responsibilities related to the care and custody of prisoners held in county facilities are obligations imposed by law upon county sheriffs, sheriffs being the individuals who have been elected by the people of the various counties to perform these and other law enforcement functions.

Cooper v. State, 106 S.W.3d 688, 691 (Tenn. Ct. App. 2003).

At the common law, the custody of jails, of right belonged, and was annexed, as an incident, to the office of sheriff. The safe keeping of prisoners involved much peril and responsibility, and it was esteemed unsafe to commit them to the care of any less a personage than the sheriff himself, whose office was one of very ancient date, and of great trust and authority, and who might bring to his assistance the posse comitatus or power of the county.

He had the appointment of the keepers of jails, and was to put in such for whom he would answer; for being an immediate officer of the King's Court, and amenable for escapes, and subject to amercements if he had not the bodies of prisoners in court, it was esteemed against all reason that another should have the keeping and custody of the jail. His right was favored, and could only be abridged by act of Parliament. Even the King's grant to another, of the custody of prisoners, was, after 5 H. 4, void. The care of Gaols, cited in Milton's case, 460, 34 a; 4 Bac. Ab. (Gaol and Gaoler, A.), 29.

These rules of law and principles govern the present case. The sheriff's common law right cannot be abridged, or given to another, unless the purpose so to do be clearly expressed by the Legislature; and this is not done here. The intendment of the law is in favor of the sheriff's right; and public policy requires that he should be the keeper of all prisons. It would be unsafe to commit so important a trust to another, unless for some imperative reason.

Felts v. City of Memphis, 39 Tenn. 650 (1859).

Tennessee case law makes it clear that the sheriff, by virtue of his office, is the jailor and is entitled to the custody of the jail. *Metropolitan Government of Nashville and Davidson County v. Poe*, 383 S.W.2d 265, 273 (Tenn. 1964) citing *Felts v. City of Memphis*, 39 Tenn. 650 (1859) and *State ex rel. Bolt v. Drummond*, 128 Tenn. 271, 160 S.W. 1082 (1913). See also *State v. Cummins*, 42 S.W. 880, 881 (Tenn. 1897) (From time immemorial the jail has, of right, belonged to the office of sheriff. It was so in Tennessee at the adoption of all the constitutions.); *Collier v. Montgomery County*, 54 S.W. 989, 990 (Tenn. 1900) (We think it plain that the sheriff cannot, against his will, be deprived of the custody of the jail, so far as it is necessary for the detention of prisoners who have been committed for safekeeping, or who are under sentence of death, or who are awaiting trial or a transfer to state or other prisons, or who are detained merely as witnesses; in short, all such prisoners as have not been convicted and sentenced to the workhouse under the provisions of the acts providing that system.).

Pursuant to T.C.A. § 8-8-201(a)(3), it is the duty of the sheriff to take charge and custody of the jail of the sheriff's county and of the prisoners therein; receive those lawfully committed and keep them personally, or by deputies or jailer, until discharged by law; be constantly at the jail or have someone there with the keys to liberate the prisoners in case of fire. See also T.C.A. § 41-4-101. *Madewell v. Garmon*, 484 F.Supp. 823, 824 (E.D. Tenn 1980) (Tennessee law appears to place direct responsibility on a sheriff for the operations of his jail.); *Willis v. Barksdale*, 625 F.Supp. 411, 414 (W.D. Tenn. 1985) (The sheriff is an official popularly elected by county residents who has the statutory responsibility for safekeeping all prisoners within the jail.). However, the sheriff may be deprived of custody of the jail if it is jointly operated by two or more contiguous counties pursuant to an interlocal agreement. T.C.A. §§ 8-8-201(a)(3), 41-4-141.

Jail Management

Reference Number: CTAS-1333

Facilities shall maintain fiscal records which clearly indicate the total cost for operating the facility according to the county's accounting principles. Such records shall have an itemized breakdown of the total operating expenses, such as wages and salaries, food, and operating supplies. Rules of the Tennessee Corrections Institute, Rule 1400-1-.05(1).

The Rules of the Tennessee Corrections Institute, Rule 1400-1-.06(3). requires that facilities have a personnel policy manual made available to each employee, and which provides information on the following subjects:

- (a) Description of organizational structure;
- (b) Position descriptions;
- (c) Personnel rules and regulations;
- (d) Recruitment procedures;
- (e) Equal employment opportunity provisions;
- (f) Work hours;
- (g) Personnel records;
- (h) Employee evaluation;
- (i) In-Service training;
- (j) Hostage policy; and,
- (k) Use of force.

The facility administrator or designee shall visit the facility's living and activity areas at least weekly. Rules of the Tennessee Corrections Institute, Rule 1400-1-.07(16).

Facilities shall have sufficient staff, including designated supervisor, to provide, at all times, the performance of functions relating to the security, custody, and supervision of inmates as needed to operate the facility in conformance with the Standards of the Tennessee Corrections Institute. Rules of the Tennessee Corrections Institute, Rule 1400-1-.07(20).

Jail Record Keeping

Tennessee Code Annotated § 10-7-504(m)(1) states information and records that are directly related to the security of any government building shall be maintained as confidential and shall not be open to public inspection. For purposes of this subsection (m), "government building" means any building that is owned, leased, or controlled, in whole or in part, by the state of Tennessee or any county, municipality, city or other political subdivision of the state of Tennessee. Such information and records shall include, but are not limited to:

- (A) Information and records about alarm and security systems used at the government building, including codes, passwords, wiring diagrams, plans and security procedures and protocols related to the security systems;
- (B) Security plans, including security-related contingency planning and emergency response plans;
- (C) Assessments of security vulnerabilities;
- (D) Information and records that would identify those areas of structural or operational vulnerability that would permit unlawful disruption to, or interference with, the services provided by a governmental entity; and
- (E) Surveillance recordings, whether recorded to audio or visual format, or both, except segments of the recordings may be made public when they include an act or incident involving public safety or security or possible criminal activity. In addition, if the recordings are relevant to a civil action or criminal prosecution, then the recordings may be released in compliance with a subpoena or an order of a court of record in accordance with the Tennessee rules of civil or criminal procedure. The court or administrative judge having jurisdiction over the proceedings shall issue appropriate protective orders, when necessary, to ensure that the information is disclosed only to appropriate persons. Release of any segment or segments of the recordings shall not be construed as waiving the confidentiality of the remaining segments of the audio or visual tape.

Information made confidential by this subsection (m) shall be redacted wherever possible and nothing in this subsection (m) shall be used to limit or deny access to otherwise public information because a file or document contains confidential information.

Facilities shall maintain current and accurate custody records on all inmates committed to or assigned to the facility, which shall include but are not limited to the following:

- (a) Intake/booking information;
- (b) Court generated background information;
- (c) Cash and property receipts;
- (d) Reports of disciplinary actions, grievances, incidents, or crime(s) committed while in custody;
- (e) Disposition of court hearings;
- (f) Records of program participation;
- (g) Work assignments; and,
- (h) Classification records.

Inmates shall have reasonable access to information in their records. Access is only limited due to safety or security concerns for the inmate, other inmates, or the facility. Further, inmate records shall be safeguarded from unauthorized and improper disclosure. Rules of the Tennessee Corrections Institute, Rule 1400-1-.14(6), (7), and (8).

The Rules of the Tennessee Corrections Institute, Rule 1400-1-.14(9) requires as part of the inmate accounting system, facilities shall maintain on a daily basis the following information:

- Admissions
 - Adult – Juvenile
 - Male – Female
 - Race
 - Charge
- Releases
 - Adult – Juvenile
 - Male – Female
 - Race
 - Charge
- Inmate Population
 - Sentenced – Non-sentenced
 - Adult – Juvenile
 - Male – Female
 - Felons – Misdemeanants
 - Race

Facilities shall keep records on each inmate specifying:

- (a) Date of confinement;
- (b) Length of sentence;
- (c) Reduction of sentences provided by statutes; and,
- (d) Release date. Rules of the Tennessee Corrections Institute, Rule 1400-1-.14(10).

The Rules of the Tennessee Corrections Institute, Rule 1400-1-.14(11), (12) and (13) require that facilities shall maintain written policy and procedures for releasing inmates from the facility which include but are not limited to, the following:

- (a) Identification of outstanding warrants, wants, or detainers;
- (b) If released into the custody of another officer, appropriate credentials must be reviewed;
- (c) Positive identification of the inmate by the releasing officer;
- (d) Verification of release papers;
- (e) Completion of release arrangements, including notification of the parole authorities in the jurisdiction of release, if required;
- (f) Return of personal property including cash. All items shall be inventoried on a receipt and witnessed by the releasing officer. This receipt shall be kept in the permanent records of the facility;
- (g) Provision of a listing of available community resources; and,
- (h) Provision of medication as directed by the health authority.

Further, all inmates released from the facility shall sign a receipt for property, valuables and cash returned at the time of release. All items shall be carefully inventoried on the receipt and witnessed by the releasing officer. The receipt shall be kept in the permanent records of the facility.

Changing Sex Designation on Certain Government Records

Under Tenn. Code Ann. § 68-3-203(d), “[t]he sex of an individual shall not be changed on the original certificate of birth as a result of sex change surgery.” This Office has previously opined that a court could conclude, on the basis of § 68-3-203(d), that “a person’s sex under Tennessee law is determined at birth” and that “sex reassignment surgery would not alter the sex of a person for purposes of marriage.” Tenn. Att’y Gen. Op. 88-43 (Feb. 29, 1988). See also Tenn. Code Ann. § 4-21-102(20) (added by 2011 Tenn. Pub. Acts, ch. 278, § 2) (for purposes of Tennessee Human Rights Act, “sex” means and refers only to the designation of an individual person as male or female as indicated on the individual’s birth certificate”).

Changing the designation of a person’s sex on existing police booking sheets, warrants, and other court records would require the alteration of such records. A court would likely conclude, based on § 68-3-203(d), that where the designation of a person’s sex has been made on police booking sheets, warrants, and other court records in accordance with the person’s birth certificate, the police booking sheets, warrants, and other court records may not be altered as a result of sex-change surgery. See Op.

Tenn. Atty. Gen. No. 14-70, July 16, 2014.

Duty to Build and Maintain Jail

Reference Number: CTAS-1334

It is the duty of the county legislative body to erect a jail and to keep it in order and repair at the expense of the county, and it may levy a special tax for this purpose. T.C.A. §§ 5-7-104 and 5-7-106. *Ellis v. State*, 20 S.W. 500 (Tenn. 1892); *Henry v. Grainger County*, 290 S.W. 2 (Tenn. 1926); *Storie v. Norman*, 130 S.W.2d 101 (Tenn. 1939) (It is the duty of the county court to erect a jail and keep it in repair at the expense of the county, and it may levy a special tax for that purpose.); *Brock v. Warren County*, 713 F.Supp. 238, 243 (E.D. Tenn. 1989) (holding county liable for commissioners' failure to provide sufficient funds for a habitable jail or training of guards). A facility preventative maintenance program shall be in place. All equipment shall be in working order. Safety and security equipment shall be repaired or replaced without undue delay. The use of padlocks and/or chains to secure inmate cells or housing area doors is prohibited. Rules of the Tennessee Corrections Institute, Rule 1400-1-.05(9) and (10).

In construing the provisions of similar Alabama statutes (compare T.C.A. §§ 5-7-104, 5-7-106, and 5-7-110 with Ala. Code §§ 11-14-10 and 11-14-13), the Alabama courts have made it clear that the duty of the county to erect and maintain a county jail pertains exclusively to the physical plant of the jail. The duty to "maintain a jail" under § 11-14-10 is merely the duty to keep the "jail and all equipment therein in a state of repair and to preserve it from failure or decline." *Turquitt v. Jefferson County*, 137 F.3d 1285, 1290 (11th Cir. 1998) citing *Keeton v. Fayette County*, 558 So.2d 884, 886 (Ala. 1989). Accordingly, "the County will have violated Plaintiffs' Eighth Amendment rights if its failure to maintain the Jail constituted deliberate indifference to a substantial risk of serious harm to the prisoners." *Marsh v. Butler County*, 268 F.3d 1014, 1027 (11th Cir. 2001).

Where a municipal body is vested with this sort of fiscal obligation to a jail, its liability for insufficient funding or maintenance will depend on its knowledge of conditions at the jail. *O'Quinn v. Manuel*, 773 F.2d 605, 609 (5th Cir. 1985) (Clearly the [municipality] had a duty to fund and maintain the Jail.). In *Strandell v. Jackson County*, 634 F.Supp. 824, 830 (S.D. Ill. 1986), the court found that the allegations in the complaint, that Jackson County provided inadequate funding for its jail facility and had failed to maintain the jail facility in conformity with state law and constitutional standards, were sufficient to satisfy the "custom" requirement, and that plaintiffs had therefore stated a cause of action against the county. And in *Littlefield v. Deland*, 641 F.2d 729, 732 (10th Cir.1981), the court upheld a finding of county liability for grossly inadequate facilities for mentally ill detainees where the "nature and extent of jail facilities" were under the county commissioners' control. Even though the facilities' inadequacy had been repeatedly brought to the county commissioners' attention, the county had "pursued a policy of indifference" that justified holding the county liable for damages under 42 U.S.C. § 1983 based upon the failure of its commissioners to adequately fund the county jail.

In a more recent case, *May v. County of Trumbull*, 127 F.3d 1102 (Table) (6th Cir. 1997), the plaintiff argued "that inadequate funding of the jail and the resulting understaffing of the facility rose to the level of deliberate indifference sufficient to support § 1983 liability for Trumbull County." The Sixth Circuit held that the county's policy decisions and allocation of resources could not form the basis for municipal liability under § 1983 because the evidence presented did not show that the county "made its funding and staffing decisions with a known risk of the potential for detainees' suicides and a conscious disregard of that risk." *Id.* at *3, citing *Roberts v. City of Troy*, 773 F.2d 720, 725 (6th Cir. 1985) (holding that funding and staffing decisions, even where they did not comply with regulations, could not form the basis for a charge of deliberate indifference because intent and cause had not been demonstrated). See also *Gaston v. Ploeger*, --- F.Supp.2d ----, 2005 WL 3079099, *11 (D. Kan. 2005) (entering summary judgment in favor of county commissioners in their official capacity on plaintiff's § 1983 claims based upon inadequate funding).

Nevertheless, if the county chooses to run a jail it must do so without depriving inmates of the rights guaranteed to them by the federal Constitution. "It is well established that inadequate funding will not excuse the perpetuation of unconstitutional conditions of confinement nor will an allegedly contrary duty at state law." *Smith v. Sullivan*, 611 F.2d 1039, 1043-1044 (5th Cir. 1980) (citations omitted). See also *Newman v. State of Alabama*, 559 F.2d 283, 286, 291 (5th Cir. 1977) (It should not need repeating that compliance with constitutional standards may not be frustrated by legislative inaction or failure to provide the necessary funds.); *Williams v. Edwards*, 547 F.2d 1206, 1213 (5th Cir. 1977) (Thus lack of funds does not justify operating a prison in an unconstitutional manner.); *Laube v. Haley*, 234 F.Supp.2d 1227, 1252 (M.D. Ala. 2002) (Courts have repeatedly made clear that cost is not a defense to constitutional violations.); *Nicholson v. Choctaw County*, 498 F.Supp. 295, 311 (S.D. Ala. 1980) (The decision to withhold resources from the jail cannot be an adequate justification for depriving inmates of their

constitutional rights and of their rights under state law.).

Litigation Tax for Jail and Workhouse Construction

Reference Number: CTAS-2135

See County Litigation Taxes

Location of Jail

Reference Number: CTAS-1335

The jail, unlike most other county buildings, may be erected outside the limits of the county town but it must be within the boundaries of the county. However, if two or more counties enter into an interlocal agreement providing for a jail to serve the counties that are parties to the agreement, then a county that is a party to the agreement is not required to have a jail located within the boundaries of the county, but any jail serving more than one county must be located within the boundaries of one of the counties that is a party to the agreement. T.C.A. § 5-7-105. See Op. Tenn. Atty. Gen. No. 03-060 (May 6, 2003).

Jail Specifications

Reference Number: CTAS-1336

The county jail must be of sufficient size and strength to contain and keep securely the inmates confined therein and must contain at least two apartments, one for males and one for females. The jail must be properly heated and ventilated, and have sufficient sewerage to ensure the health and comfort of the inmates. T.C.A. § 5-7-110. See *also* Rules of the Tennessee Corrections Institute, Rule 1400-1-.04.

Article I, Section 32, of the Tennessee Constitution provides that the erection of safe and comfortable prisons, the inspection of prisons, and the humane treatment of prisoners, shall be provided for. This provision has never been construed in any reported case. However, it has been held that Article I, Section 32, of the Tennessee Constitution does not afford any greater protection than is now available for prisoners under the aegis of the Eighth Amendment of the United States Constitution. *Grubbs v. Bradley*, 552 F.Supp. 1052, 1125 (M.D. Tenn. 1982).

The Eighth Amendment clearly requires states to furnish its inmates with "reasonably adequate food, clothing, shelter, sanitation, medical care, and personal safety." *Newman v. Alabama*, 559 F.2d 283, 291 (5th Cir. 1977). Those areas are generally considered as the "core" areas entitled to Eighth Amendment protections. They are the basic necessities of civilized life, and are, during lawful incarceration for conviction of a crime, wholly controlled by prison officials. Inmates must necessarily rely upon prison officials and staff to ensure that those basic necessities are met.

A corollary to the state's obligation to provide inmates with constitutionally adequate shelter is the requirement of minimally adequate living space that includes "reasonably adequate ventilation, sanitation, bedding, hygienic materials, and utilities (i.e., hot and cold water, light, heat, plumbing)." *Ramos v. Lamm*, 639 F.2d 559, 568 (10th Cir. 1980), *cert. denied*, 450 U.S. 1041, 101 S.Ct. 1759, 68 L.Ed.2d 239 (1981). Other courts have held that adequate shelter must include adequate provisions for fire safety. *Leeds v. Watson*, 630 F.2d 674, 675-76 (9th Cir. 1980); *Ruiz v. Estelle*, 503 F.Supp. 1265, 1383 (S.D. Tex. 1980), *aff'd in part, rev'd in part and remanded*, 679 F.2d 1115 (1982); *Gates v. Collier*, 349 F.Supp. 881, 888 (N.D. Miss. 1972), *aff'd*, 501 F.2d 1291 (5th Cir. 1974).

On the other hand, constitutionally adequate housing is not denied simply by uncomfortable temperatures inside cells, unless it is shown that the situation endangers inmates' health. *Smith v. Sullivan*, 553 F.2d 373, 381 (5th Cir. 1977). Similarly, high levels of noise are not, without more, violations of the Eighth Amendment. *Hutchings v. Corum*, 501 F.Supp. 1276, 1293 (W.D. Mo. 1980). As noted by the Supreme Court in *Rhodes*, the Constitution simply does not require complete comfort and does not prohibit double celling *per se*. 452 U.S. at 349, 101 S.Ct. at 2400, 69 L.Ed.2d at 70.

The Eighth Amendment, as noted, does require the maintenance of reasonably sanitary conditions in

prisons, especially in the housing and food preparation and service areas. *Ramos, supra*, 639 F.2d at 569-72. In general, conditions must be sanitary enough so that inmates are not exposed to an unreasonable risk of disease. *Id.*; *Lightfoot v. Walker*, 486 F.Supp. 504, 524 (E.D. Wis. 1980). Inmates must be furnished with materials to keep their cells clean, *Ramos*, 639 F.2d at 570, and for the maintenance of personal hygiene. *Sweet v. South Carolina Department of Corrections*, 529 F.2d 854, 860 n. 11 (4th Cir. 1975).

Id. at 1122 - 1123.

Cell Square Footage Requirements

T.C.A. 41-4-140(f) provides that local correctional facilities shall meet the square footage requirements for single occupancy or multi-occupancy cells contained in the minimum standards required by the Tennessee Corrections Institute that were in effect at the time of the construction of the facility, or it may elect to conform to a more recent minimum standards required by the American Correctional Association in order to accommodate a larger inmate population. Also provides that a local correctional facility constructed before the effective date of any minimum standards required by the Tennessee Corrections Institute shall be exempt from the square footage requirements described in this subsection (f), unless the exemption poses a serious life, safety, or security hazard as determined by the Board of Control of the Tennessee Corrections Institute. Enacted as Public Chapter 535 (March 12, 2014). Each facility relying on regular access to additional living space to comply with minimum cell size requirements under Rules of the Tennessee Corrections Institute, Rule 1400-1-.04 shall maintain a written policy regarding the number of hours of access to additional living space outside an inmate's cell that inmates will be allowed. This policy should take into consideration any relevant factors regarding inmates, including but not limited to inmate classifications. Records shall be maintained on the number of hours per day inmates have access to additional living areas in such facilities. Rules of the Tennessee Corrections Institute, Rule 1400-1-.05(11).

Replacement of Jail

Reference Number: CTAS-1337

Whenever, in the opinion of a majority of the members of the county legislative body, two-thirds of them being present, the site of a jail is unhealthy, insecure or inconvenient in its location to the county, the town, or inhabitants of the town in which it is situated, or the interest and convenience of the town would be promoted by the removal of any of the same, the members may order a sale of the site and of the whole or part of the materials used in its construction; and they may also order that a more eligible, convenient, healthy or secure site be purchased and cause to be erected thereon a new jail better suited to the convenience of the town, and to secure the safe custody, health and comfort of inmates. T.C.A. § 5-7-111. *Henry v. Grainger County*, 290 S.W. 2 (Tenn. 1926) (By statute provision is made for the sale of a courthouse or jail under certain circumstances and the purchase of another site and the erection of a new building.); *Jackson v. Gardner*, 639 F.Supp. 1005 (E.D. Tenn. 1986) (holding that the county must reduce the jail population and build a new workhouse).

Appointment of Jailer

Reference Number: CTAS-1338

Under the common law the sheriff had the right to appoint a jailer. *Felts v. City of Memphis*, 39 Tenn. 650 (1859). The right of the sheriff to appoint a jailer has been codified in T.C.A. § 41-4-101, wherein it states that the sheriff is authorized to appoint a jailer for whose acts the sheriff is civilly responsible.

Under Tennessee law, "[t]he sheriff of the county ... may appoint a jailer, for whose acts the sheriff is civilly responsible." Tenn.Code Ann. § 41-4-101 (1997). Jailers are charged with the following responsibilities: to receive and safely keep convicts on their way to the state or federal penitentiary, to file and keep safe under the sheriff's direction the mittimus or process by which a prisoner is committed or discharged from jail, to determine within their discretion what type of precautions to take for guarding against escape and to prevent the importation of drugs, to provide support, to furnish adequate food and bedding, to enforce cleanliness in the jails, to convey letters from prisoners to their counsel and others, and to admit persons having business with the prisoner.

Sowards v. Loudon County, 203 F.3d 426, 436 (6th Cir. 2000). See also *United States v. Hill*, 60 F. 1005, 1009 (6th Cir. 1894) (... the Tennessee statute makes the sheriff civilly responsible for the acts of the jailer whom he appoints.). See also *Davis v. Hardin County*, 2002 WL 1397276, *3 - *4 (W.D. Tenn. 2002), for a discussion of the differences between deputies and jailers for the purposes of the Tennessee Governmental Tort Liability Act.

See Jailer Qualifications

Jailer Qualifications and Training Requirements

Reference Number: CTAS-1241

It is the duty of the sheriff to take charge and custody of the jail and of the prisoners therein. The sheriff is charged with keeping the prisoners personally or by deputies or jailer until they are lawfully discharged. T.C.A. § 8-8-201(a)(3). Pursuant to T.C.A. § 41-4-101 the sheriff has the authority to appoint a jailer for whose acts the sheriff is civilly responsible. *See Davis v. Hardin County*, 2002 WL 1397276, *3 - *4 (W.D. Tenn. 2002), for a discussion of the differences between deputies and jailers for the purposes of the Tennessee Governmental Tort Liability Act.

The Tennessee Corrections Institute defines a jailer as "one who is charged by an institution to detain or guard inmates." Rules of the Tennessee Corrections Institute, Rule 1400-1-.03 (40). The attorney general has opined that a jailer is one whose primary duty is to confine and control persons held in lawful custody. Op. Tenn. Atty. Gen. 85-222 (July 29, 1985).

Minimum Qualifications

(a) After July 1, 2006, any person employed as a jail administrator, jailer, corrections officer, or guard in a county jail or workhouse shall:

1. Be at least eighteen (18) years of age;
2. Be a citizen of the United States;
3. Be a high school graduate or possess its equivalency, which shall include a general educational development (GED) certificate;
4. Not have been convicted of, or pleaded guilty to, or entered a plea of nolo contendere to any felony charge or to any violation of any federal or state laws or municipal ordinances relating to force, violence, theft, dishonesty, gambling, liquor, controlled substances or controlled substance analogues;
5. Not have been released or discharged under any other than honorable discharge from any of the armed forces of the United States;
6. Have the person's fingerprints on file with the Tennessee bureau of investigation;
7. Have passed a physical examination by a licensed physician;
8. Have a good moral character as determined by a thorough investigation conducted by the sheriff's office; and
9. Have been certified by a Tennessee licensed health care provider qualified in the psychiatric or psychological field as being free from any impairment, as set forth in the current edition of the Diagnostic and Statistical Manual of Mental Disorders (DSM) of the American Psychiatric Association at the time of the examination, that would, in the professional judgment of the examiner, affect the person's ability to perform an essential function of the job, with or without a reasonable accommodation.

(b)

1. Requirements for minimum qualifications as set forth in subsection (a) shall be mandatory and binding upon any municipality, county or political subdivision of this state.
2. Any person who appoints any applicant, who, to the knowledge of the appointer, fails to meet the minimum qualifications as set forth in subsection (a), and any person who signs the warrant or check for the payment of the salary of any person who, to the knowledge of the signer, fails to meet the minimum qualifications as set forth in this section, commits a Class A misdemeanor and upon conviction shall be subject to a fine not exceeding one thousand dollars (\$1,000).
3. This section shall not apply to any jail administrator, jailer, corrections officer, or guard hired by any municipality, county, or political subdivision of this state prior to July 1, 2006.

(c) Nothing in this chapter shall be construed to preclude an employing agency from establishing qualifications and standards for hiring and training jail or workhouse employees that exceed those set forth in this section.

TCA 41-4-144 [Acts 2006, ch. 859, § 1]

A criminal record check shall be conducted on all new facility employees, service providers with continuous access to restricted areas, contractors, and volunteers prior to their assuming duties to identify if there are criminal convictions that have a specific relationship to job performance. This criminal record check

includes comprehensive identifier information to be collected and run against law enforcement indices. If suspect information on matters with potential terrorism connections is returned on the person, this information shall be forwarded to the local Joint Terrorism Task Force or other similar agency. Rules of the Tennessee Corrections Institute, Rule 1400-1-.06(2).

Minimum Qualifications – Waivers

The Board of Control of the Tennessee Corrections Institute is empowered to and shall establish criteria for determining whether to waive the minimum qualifications required to be a jail administrator, workhouse administrator, jailer, corrections officer, or guard in a county jail or workhouse, as provided in T.C.A. § 41-4-144.

The board shall not grant waivers for any person hired as a jail administrator, workhouse administrator, jailer, corrections officer, or guard in any county jail or workhouse who has been dishonorably discharged from the military, has any mental impairment which affects the person's ability to perform any essential function of the job with or without a reasonable accommodation, has a conviction for domestic assault or a felony conviction.

The board's decision to grant waivers is appealable to the chancery court.

T.C.A. § 41-7-106.

Oath

Jail deputies must take the same oaths as the sheriff, which are certified, filed, and endorsed in the same manner as the sheriff's. T.C.A. § 8-18-112.

Training Requirements

Prior to assuming duties, all detention facility employees, support employees and non-facility support staff shall receive orientation training regarding the functions and mission of the facility under the supervision of a qualified detention officer. This training may be accomplished thorough classroom instruction, supervised on-the-job training, an individual review of policies and procedures, or any combination of the three and shall include:

- (a) Facility policies and procedures;
- (b) Suicide prevention;
- (c) Use-of-force;
- (d) Report writing;
- (e) Inmate rules and regulations;
- (f) Key control;
- (g) Emergency plans and procedures;
- (h) Cultural diversity;
- (i) Communication skills; and,
- (j) Sexual misconduct. Rules of the Tennessee Corrections Institute, Rule 1400-1-.06(4).

A facility training officer (FTO) shall coordinate the staff development and training program. This person shall have specialized training for that position (assigned as a primary or additional duty). The FTO shall complete the Training for Trainer (3T) course and attend the annual FTO Conference conducted by the Tennessee Corrections Institute. Rules of the Tennessee Corrections Institute, Rule 1400-1-.06(5)..

All support employees who have minimal inmate contact shall receive at least sixteen hours of facility training during their first year of employment. All employees in this category shall receive an additional sixteen hours of facility training each subsequent year of employment. Rules of the Tennessee Corrections Institute, Rule 1400-1-.06(6).

All non-facility support staff who have regular or daily inmate contact, shall receive a minimum of four hours continuing annual training, which may include:

- (a) Security procedures and regulations;
- (b) Supervision of inmates;
- (c) Signs of suicide risk;
- (d) Suicide precautions;
- (e) Use-of-force regulations and tactics;
- (f) Report writing;
- (g) Inmate rules and regulations;
- (h) Key control;
- (i) Rights and responsibilities of inmates;
- (j) Safety procedures;
- (k) All emergency plans and procedures;

- (l) Interpersonal relations;
- (m) Social/cultural lifestyles of the inmate population;
- (n) Cultural diversity;
- (o) CPR/first aid;
- (p) Counseling techniques;
- (q) Sexual harassment/sexual misconduct awareness;
- (r) Purpose, goals, policies, and procedures for the facility and the parent agency;
- (s) Security and contraband regulations;
- (t) Appropriate conduct with inmates;
- (u) Responsibilities and rights of employees;
- (v) Universal precautions;
- (w) Occupational exposure;
- (x) Personal protective equipment;
- (y) Bio-hazardous waste disposal; and,
- (z) Overview of the correctional field. Rules of the Tennessee Corrections Institute, Rule 1400-1-.06(7).

All detention facility employees, including part-time employees, whose primary duties include the industry, custody, or treatment of inmates shall be required during the first year of employment to complete a basic training program consisting of a minimum of forty hours and provided or approved by the Tennessee Corrections Institute. Rules of the Tennessee Corrections Institute, Rule 1400-1-.06(8).

All detention facilities employees, including part-time employees, whose primary duties include the industry, custody, or treatment of inmates shall be required to complete an annual in-service program designed to instruct them in specific skill areas of facility operations. This annual in-service shall consist of forty hours with at least 16 of these hours provided or approved by the Tennessee Corrections Institute. The remaining twenty-four hours may be provided by the facility if course content is approved and monitored by the Tennessee Corrections Institute. Rules of the Tennessee Corrections Institute, Rule 1400-1-.06(9).

A minimum number of hours of training and any additional courses for basic and in-service training shall be in compliance with the requirements established by the Tennessee Corrections Institute Board of Controls. Rules of the Tennessee Corrections Institute, Rule 1400-1-.06(10).

All facility employees who are authorized to use firearms and less lethal weapons shall receive basic and ongoing in-service training in the use of these weapons. Training shall include decontamination procedures for individuals exposed to chemical agents. All such training shall be recorded with the dates completed and kept in the employee's personnel file. Rules of the Tennessee Corrections Institute, Rule 1400-1-.06(11).

Facilities shall maintain records on the types and hours of training completed by each correctional employee, support employee and non-facility support staff. Rules of the Tennessee Corrections Institute, Rule 1400-1-.06(12).

Bond

There is no general law requirement that deputy sheriffs who work in the jail be bonded. However, in 2013, the Legislature amended T.C.A. § 8-19-101 to require county governments to obtain and maintain blanket surety bond coverage for all county employees not covered by individual bonds referenced elsewhere in statute. The minimum amount of such blanket bonds is one hundred fifty thousand dollars. T.C.A. § 8-19-101(e).

Certain Persons Disqualified as Bondsmen

Reference Number: CTAS-2139

The following persons or classes shall not be bail bondsmen or agents of bail bondsmen or surety companies and shall not directly or indirectly receive any benefits from the execution of any bail bond: jailers, attorneys, police officers, convicted felons, committing magistrates, municipal or magistrate court judges, clerks or deputy clerks, sheriffs, deputy sheriffs and constables, and any person having the power to arrest or having anything to do with the control of federal, state, county or municipal prisoners. T.C.A. 40-11-128. T.C.A. 40-11-313(a) states that it is unlawful for any person while serving as a constitutionally elected peace officer, or as such officer's deputy, or any duly elected or appointed county official to act as a professional bondsman, directly or indirectly.

Jail Policies and Procedures

Reference Number: CTAS-2187

Tennessee's Minimum Standards for Local Correctional Facilities, 1400-1-.05(3) and (4) mandates that each jail shall have written policies and procedures governing the facility's operations. They shall be reviewed at least annually and updated as needed. These policies and procedures shall be approved by the sheriff, chief, or warden and shall be made available to all employees. Further, there shall be written plans developed in advance for dealing with emergencies such as escape, prisoner disturbances, assaults on employees, hostage taking, and emergency evacuation plans. These shall be incorporated into the facility's manual. Each employee shall be familiar with these plans.

TCA 10-7-504(a)(14) states: All riot, escape and emergency transport plans which are incorporated in a policy and procedures manual of county jails and workhouses or prisons operated by the department of correction or under private contract shall be treated as confidential and shall not be open for inspection by members of the public.

Persons Confined to Jail

Reference Number: CTAS-1339

The sheriff is charged with receiving those persons lawfully committed to the jail and with keeping them until they are lawfully discharged. T.C.A. § 8-8-201(a)(3). This includes federal as well as state prisoners. *United States v. Hill*, 60 F. 1005, 1009 (6th Cir. 1894).

In addition to convicts sentenced to imprisonment in the county jail, the jail may be used as a prison for the safekeeping or confinement of the following persons:

1. Persons committed for trial for public offenses;
2. Inmates sentenced to imprisonment in the penitentiary, until their removal to the penitentiary;
3. Persons committed for contempt or on civil process;
4. Persons committed on failure to give security for their appearance as witnesses in any criminal cases;
5. Persons charged with or convicted of a criminal offense against the United States;
6. Insane persons, pending transfer to the insane hospital, or other disposition; and
7. All other persons committed thereto by authority of law.

T.C.A. § 41-4-103(a).

A county jail must accept all persons arrested pursuant to law by the sheriff or municipal police officers. Op. Tenn. Atty. Gen. No. 02-015 (Feb. 6, 2002). Additionally, the jailer is required to receive all persons arrested by officers of the Tennessee Department of Homeland Security and TVA peace officers. T.C.A. §§ 38-3-114 and 38-3-120. The jailer cannot refuse acceptance of an arrestee who complains about a medical problem or has an obvious injury needing medical attention. Op. Tenn. Atty. Gen. No. 02-015 (Feb. 6, 2002). A county jailer cannot require an arresting city police officer to take a prisoner for medical examinations prior to being accepted by the jailer; after a mittimus has been issued the jailer must receive the prisoner. Op. Tenn. Atty. Gen. No. U91-01 (1991).

The attorney general has opined that the sheriff does not have the authority to refuse to accept a prisoner accompanied by a valid mittimus, even when the jail has reached its design capacity, nor does the sheriff have the authority to refuse to accept a person arrested for a violation of state law prior to the issuance of a mittimus. Op. Tenn. Atty. Gen. No. 89-65 (April 28, 1989); Op. Tenn. Atty. Gen. No. 94-041 (March 31, 1994) (Likewise, this office is not aware of any grounds, absent an emergency medical situation or superseding court order, that would authorize a sheriff to refuse to accept a person arrested for a state violation for a temporary holding prior to the individual's appearance before a magistrate and the issuance of a mittimus.). *See also State v. Mitchell*, 593 S.W.2d 280, 282 (Tenn. 1980); *Wynn v. State*, 181 S.W.2d 332, 334 (Tenn. 1944) (The criminal statutes and rules permit "a temporary holding without a mittimus."). A mittimus is a court order that directs an officer to convey an individual to the jail and directs the jailer to receive and keep the individual. A mittimus is the authorization for commitment to a county jail.

Written policy and procedure shall ensure that inmates shall not be subjected to discrimination based on race, national origin, color, creed, sex, economic status or political belief. When both males and females are housed in the same facility, available services and programs shall be comparable. Rules of the Tennessee Corrections Institute, Rule 1400-1-.05(8). The Rules of the Tennessee Corrections Institute, Rule 1400-1-.17(3) further states that inmates with disabilities, including temporary disabilities, shall be housed and managed in a manner that provides for their safety and security. Housing used by inmates with disabilities, including temporary disabilities, shall be designed for their use and shall provide for

integration with other inmates. Program and service areas shall be accessible to inmates with disabilities.

Emergency Detention of a Person with a Mental Illness or Serious Emotional Disturbance

Reference Number: CTAS-2140

T.C.A. 33-6-401 (as amended by Public Acts 2000, Chapter 947, section 1) permits for emergency detention: IF AND ONLY IF **(1)** a person has a mental illness or serious emotional disturbance, AND **(2)** the person poses an immediate substantial likelihood of serious harm under § 33-6-501 because of the mental illness or serious emotional disturbance, THEN **(3)** the person may be detained under § 33-6-402 to obtain examination for certification of need for care and treatment.

T.C.A. 33-6-402 (as amended by Public Acts 2000, Chapter 947, Section 1) states that if an officer authorized to make arrests in the state, a licensed physician, a psychologist authorized under § 33-6-427(a), or a professional designated by the commissioner under § 33-6-427(b) has reason to believe that a person is subject to detention under § 33-6-401, then the officer, physician, psychologist, or designated professional may take the person into custody without a civil order or warrant for immediate examination under § 33-6-404 for certification of need for care and treatment.

T.C.A. 33-6-425 (as amended by Public Acts 2000, Chapter 947, Section 1) states that no defendant shall be detained at a jail or other custodial facility for the detention of persons charged with or convicted of criminal offenses, unless the defendant is under arrest for the commission of a crime.

Convicts En Route to the Penitentiary

Reference Number: CTAS-1340

It is the duty of the jailer to receive and safely keep, without any fee therefor, all convicts on their way to the penitentiary, whenever the sheriff or other officer in charge of such convicts may deem it necessary. T.C.A. § 41-4-104. *Sowards v. Loudon County*, 203 F.3d 426, 436 (6th Cir. 2000) (Jailers are charged with the following responsibilities: to receive and safely keep convicts on their way to the state or federal penitentiary,).

Delayed Commitment to the Department of Correction

Reference Number: CTAS-1341

Pursuant to T.C.A. § 8-8-201(a)(36), it is the duty of the sheriff to promptly turn over and transfer custody of any inmate sentenced to the Department of Correction who is being housed in the sheriff's local jail awaiting transfer when called upon to do so by a state official pursuant to T.C.A. § 40-35-212 or T.C.A. § 41-8-106. However, during times when the state prison population exceeds 95 percent of the relevant designated capacity, the governor may declare that a state of overcrowding emergency exists. T.C.A. § 41-1-503. Pursuant to T.C.A. § 41-1-504, upon declaring that an overcrowding emergency exists, the governor is required to invoke one or both of the following powers to reduce overcrowding:

1. Direct the board in writing to reduce the release eligibility dates of all male or female inmates, or both, excluding any inmate convicted by a court of escape, by a percentage sufficient to enable the board to consider immediately and to release on supervised parole enough inmates to reduce the in-house population of appropriate state correctional facilities to 90 percent of the relevant designated capacity.
2. Direct the commissioner in writing to notify all state judges and sheriffs that commitment to the department of felons who have been on bail prior to their convictions shall be stayed or otherwise delayed until up to 60 days after the in-house population of appropriate correctional facilities has been reduced to 90 percent of the relevant designated capacity either through normal release, contract sentencing, or the power granted in T.C.A. § 41-1-504(a)(1), or all such methods. Tenn. Attny. Gen 08-103 (May 6, 2008)

T.C.A. § 41-1-504(a)(1) and (a)(2). *State v. Lock*, 839 S.W.2d 436 (Tenn. Crim. App. 1992) (The governor can order the delay in prisoners being transferred from a local jail to a Department of Correction facility.).

The governor's directive invoking the power granted pursuant to T.C.A. § 41-1-504(a)(2) may include any conditions the governor may wish to impose as to which inmates or types of inmates will immediately be

accepted by the Department of Correction or which inmates or types of inmates will be subject to the delayed intake directive, or both. The commissioner must transmit any conditions imposed by the governor to the judges and sheriffs in the notification that intake to the department has been delayed. T.C.A. § 41-1-506(a). The governor does not have the authority to direct that the commitment of an inmate be delayed any longer than six months from the date of sentencing or the date of the final judgment of the highest state appellate court to which an appeal is taken, whichever date is later. T.C.A. § 41-1-506(b). During times in which the power to delay the intake of inmates is invoked, a judge may order the sheriff to take the inmate into local custody to await removal to the Department of Correction. T.C.A. § 41-1-506(c). Notwithstanding any other provision of law to the contrary, during the time that the power of restricted intake has been invoked pursuant to T.C.A. § 41-1-504(a)(2), no sheriff may convey an inmate to the Department of Correction unless authorized to do so. No sheriff shall be deemed to have violated any duty of office by not conveying such inmate when notified to do so. T.C.A. § 41-1-506(e).

Notwithstanding any other provision of law to the contrary, all prisoners sentenced to the Department of Correction whose commitments are delayed pursuant to Title 41, Chapter 1, Part 5, or pursuant to the order of a federal court, and who are being held by the county pending such commitment, may, at the discretion of the sheriff or workhouse superintendent, participate in appropriate academic, vocational and work-related programs that are available to persons sentenced to local jails or workhouses, and may be awarded time reduction credits as authorized by Title 41, Chapter 2, Part 1, for participation in such programs. T.C.A. § 41-1-510.

Removal to the State Penitentiary

Reference Number: CTAS-1342

In counties where, because of the insufficiency of the county jail or for any other cause, the court may be of opinion that the safekeeping of the convicts may require it, the court may order the immediate removal of convicts to the penitentiary or to the nearest branch prison, at the cost of the state, before the expiration of the time allowed to remove such convicts. Every such convict shall, as soon as possible after conviction, be safely removed and conveyed to the penitentiary or to one of the branch prisons by the person appointed by the commissioner of correction for that purpose. T.C.A. § 40-23-107. *Dover v. Rose*, 709 F.2d 436, 437 n.1 (6th Cir. 1983) (State trial judges in Tennessee have the authority to transfer prisoners in county jails to the state penitentiary or the nearest branch prison "where, because of the insufficiency of the county jail, or for any other cause, the court may be of opinion that the safekeeping of the convicts may require it,") *citing Chisom v. State*, 539 S.W.2d 831, 833 (Tenn. Crim. App.1976) (Clearly, the trial judge was within his authority to commit the defendant, a convicted rapist, to the penitentiary pending the outcome of any attendant appellate proceedings in his case.). *See Burt v. State*, 454 S.W.2d 182 (Tenn. Crim. App. 1970) (holding that transfer of convict to state penitentiary prior to final determination of appeal does not raise a constitutional question). *But see State v. Grey*, 602 S.W.2d 259 (Tenn. Crim. App. 1980) (holding that the trial court was without authority to transfer a pretrial detainee to the state penitentiary).

Federal Prisoners

Reference Number: CTAS-1343

The jailer is liable for failing to receive and safely keep all persons delivered under the authority of the United States to the like pains and penalties as for similar failures in the case of persons committed under authority of the state. However, the marshal or person delivering such prisoner under authority of the United States is liable to the jailer for fees and the subsistence of the prisoner while so confined, which shall be the same as provided by law for prisoners committed under authority of the state. The jailer will also collect from the marshal 50 cents a month for each prisoner, under the resolution of the first Congress, and pay the same to the county trustee forthwith, to be accounted for by the trustee as other county funds. T.C.A. § 41-4-105. *United States v. Hill*, 60 F. 1005, 1009 (6th Cir. 1894) (holding that where the sheriff is civilly responsible for the safe keeping of prisoners committed to his care, and any party aggrieved may sue on his official bond in the name of the state, the United States may, in such an action, recover, for allowing the escape of a prisoner under indictment by a federal grand jury, the expenses of the arrest and keeping of the prisoner, and money expended in recapturing him).

Pursuant to 18 U.S.C. 4002, for the purpose of providing suitable quarters for the safekeeping, care, and subsistence of federal prisoners, the United States attorney general may contract, for a period not exceeding three years, with the proper state or county authorities for the imprisonment, subsistence, care, and proper employment of federal prisoners. Federal prisoners may be employed only in the manufacture of articles for, the production of supplies for, the construction of public works for, and the maintenance and care of the institutions of the state or political subdivision in which they are imprisoned.

The rates to be paid for the care and custody of said persons must take into consideration the character of the quarters furnished, sanitary conditions, and quality of subsistence and may be such as will permit and encourage the proper authorities to provide reasonably decent, sanitary, and healthful quarters and subsistence for such persons.

Detention of Juveniles

Reference Number: CTAS-1344

A child alleged to be dependent or neglected may not be detained in a jail or other facility intended or used for the detention of adults charged with criminal offenses or of children alleged to be delinquent. T.C.A. § 37-1-116(d). A child alleged to be delinquent or unruly may be detained in a jail or other facility for the detention of adults only if:

1. Other facilities listed in T.C.A. § 37-1-116(a)(3) are not available;
2. The detention is in a room separate and removed from those for adults; and
3. It appears to the satisfaction of the court that public safety and protection reasonably require detention, and it so orders.

T.C.A. § 37-1-116(a)(4). *See State v. Carroll*, 36 S.W.3d 854, 862 (Tenn. Crim. App. 1999) ("Tenn.Code. Ann. § 37-1-116 (1996) explicitly limits appropriate places of detention for juveniles, as opposed to custody of juveniles ...").

The sheriff or other official in charge of a jail or other facility for the detention of adult offenders or persons charged with crime must immediately inform the court if a person who is or appears to be under 18 years of age is received at the facility, and must bring the person before the court upon request or deliver the person to a detention or shelter care facility designated by the court. T.C.A. § 37-1-116(b).

Pursuant to T.C.A. § 37-1-116(e), no child may be detained or otherwise placed in any jail or other facility for the detention of adults, except as provided in T.C.A. § 37-1-116(c) and (h). A juvenile may be temporarily detained for as short a time as feasible, not to exceed 48 hours, in an adult jail or lockup, if:

1. The juvenile is accused of a serious crime against persons, including criminal homicide, forcible rape, mayhem, kidnapping, aggravated assault, robbery and extortion accompanied by threats of violence;
2. The county has a low population density not to exceed 35 people per square mile;
3. The facility and program have received prior certification by the Tennessee Corrections Institute as providing detention and treatment with total sight and sound separation from adult detainees and prisoners, including no access by trustees;
4. There is no juvenile court or other public authority or private agency as provided in T.C.A. § 37-1-116(f) able and willing to contract for the placement of the juvenile; and
5. A determination is made that there is no existing acceptable alternative placement available for the juvenile.

T.C.A. § 37-1-116(h).

The attorney general has opined "that a juvenile offender who has attained the age of majority before being convicted of an offense by a juvenile court may not be held in an adult facility, such as the local jail. Such a defendant may only be held in a juvenile detention facility ... and may not be held beyond the defendant's nineteenth birthday, regardless of whether the offense is a misdemeanor or a felony." Op. Tenn. Atty. Gen. No. 04-038 (March 12, 2004).

If a case is transferred to another court for criminal prosecution, the child may be transferred to the appropriate officer or detention facility in accordance with the law governing the detention of persons charged with crime. T.C.A. § 37-1-116(c). After a petition has been filed in juvenile court alleging delinquency based on conduct that is designated a crime or public offense under the laws, including local ordinances, of this state, the court, before hearing the petition on the merits, may transfer the child to the sheriff of the county to be held according to law and to be dealt with as an adult in the criminal court of competent jurisdiction. T.C.A. § 37-1-134(a).

Juvenile Detention Facilities

Reference Number: CTAS-1345

Notwithstanding the provisions of T.C.A. § 37-1-116 to the contrary, in any facility that meets the following requisites of separateness, juveniles who meet the detention criteria of T.C.A. § 37-1-114(c) may be held in a juvenile detention facility that is in the same building or on the same grounds as an adult

jail or lockup provided that no juvenile facility constructed or developed after January 1, 1995, may be located in the same building or directly connected to any adult jail or lockup facility complex:

1. Total separation between juvenile and adult facility spatial areas such that there could be no haphazard or accidental contact between juvenile and adult residents in the respective facilities;
2. Total separation in all juvenile and adult program activities within the facilities, including recreation, education, counseling, healthcare, dining, sleeping and general living activities;
3. Separate juvenile and adult staff, including management, security staff and direct care staff, such as recreational, educational and counseling. Specialized services staff, such as cooks, bookkeepers and medical professionals who are not normally in contact with detainees or whose infrequent contacts occur under conditions of separation of juveniles and adults, can serve both; and
4. In the event that state standards or licensing requirements for secure juvenile detention facilities are established, the juvenile facility must meet the standards and be licensed or approved as appropriate.

T.C.A. § 37-1-116(i)(1).

In determining whether the criteria set out above are met, the following factors will serve to enhance the separateness of juvenile and adult facilities:

1. Juvenile staff are employees of or volunteers for a juvenile service agency or the juvenile court with responsibility only for the conduct of the youth serving operations. Juvenile staff are specially trained in the handling of juveniles and the special problems associated with this group;
2. A separate juvenile operations manual, with written procedures for staff and agency reference, specifies the function and operation of the juvenile program;
3. There is minimal sharing between the facilities of public lobbies or office/support space for staff;
4. Juveniles do not share direct service or access space with adult offenders within the facilities, including entrance to and exits from the facilities. All juvenile facility intake, booking and admission processes take place in a separate area and are under the direction of juvenile facility staff. Secure juvenile entrances (sally ports, waiting areas) are independently controlled by juvenile staff and separated from adult entrances. Public entrances, lobbies and waiting areas for the juvenile detention program are also controlled by juvenile staff and separated from similar adult areas. Adult and juvenile residents do not make use of common passageways between intake areas, residential spaces and program/service spaces;
5. The space available for juvenile living, sleeping and the conduct of juvenile programs conforms to the requirements for secure juvenile detention specified by prevailing case law, prevailing professional standards of care, and by state code; and
6. The facility is formally recognized as a juvenile detention center by the state agency responsible for monitoring, reviewing or certifying of juvenile detention facilities.

T.C.A. § 37-1-116(i)(2).

Commitment of Defendant to Jail

Reference Number: CTAS-1346

It is the duty of the sheriff in whose custody the defendant is at the rendition of the judgment, or afterwards legally comes, to execute the judgment of imprisonment by committing the defendant, as soon as possible, to jail or to the warden of the penitentiary according to the exigency of the writ. T.C.A. § 40-23-103. With respect to a sentence of confinement to be served in the state penitentiary, the Tennessee Court of Criminal Appeals has interpreted "as soon as possible" to mean as soon as space is available at the penitentiary and that the courts should interpret "as soon as possible" in its most literal sense. *Carver v. State*, 2003 WL 21663688 (Tenn. Crim. App. 2003.).

A criminal sentence commences on the day the defendant legally comes into the custody of the sheriff for the execution of the judgment of imprisonment. *Kelly v. State*, 61 S.W.3d 341 (Tenn. Crim. App. 2000). See also *State v. Chapman*, 977 S.W.2d 122 (Tenn. Crim. App. 1997) (The sheriff is obligated to execute the judgment of imprisonment by committing the defendant and to keep a confined prisoner in his or her custody.); *Wilson v. State*, 882 S.W.2d 361, 364 (Tenn. Crim. App. 1994) (In this jurisdiction, a sentence commences "on the day on which the defendant legally comes into the custody of the sheriff for execution of the judgment of imprisonment." Furthermore, it is the duty of the sheriff "to execute the judgment of imprisonment by committing the defendant, as soon as possible, to jail.").

Sheriffs do not have the authority, as does the governor, to delay the commitment of inmates to their institutions. T.C.A. § 41-1-506(e); Op. Tenn. Atty. Gen. No. 89-65 (April 28, 1989). However, pursuant to

T.C.A. § 55-10-402(f) the sheriff may delay the commitment of an individual convicted of a violation of T.C.A. § 55-10-401 (driving under the influence of an intoxicant or drug) if space is not immediately available in the jail. If, in the opinion of the sheriff, space will not be available to allow an offender convicted of a violation of T.C.A. § 55-10-401, to commence service of the sentence, the sheriff shall use alternative facilities for the incarceration of the offender. *Kelly v. State*, 61 S.W.3d 341 (Tenn. Crim. App. 2000) (“[T]he State's delay of four years in executing [petitioner's] sentence and its failure to attempt the location of alternative facilities was, if not affirmatively improper, certainly grossly negligent.”).

As used in T.C.A. § 55-10-402(f), “alternative facilities” include, but are not limited to, vacant schools or office buildings or any other building or structure that would be suitable for housing DUI offenders for short periods of time on an as-needed basis and licensed through the department of mental health and substance abuse services for the state.

Place of Confinement - Felony Offenders

Reference Number: CTAS-1347

A defendant convicted of a felony in this state is sentenced in accordance with Title 40, Chapter 35. T.C.A. § 40-35-104(a).

A defendant who is convicted of a felony and who is sentenced to a total sentence of at least one year but not more than three years shall not be sentenced to serve such sentence in the Department of Correction, if the legislative body for the county from which the defendant is being sentenced has either contracted with the department or has passed a resolution that expresses an intent to contract for the purpose of housing convicted felons with such sentences. If the sentencing court concludes that incarceration is the appropriate sentencing alternative, such defendant must be sentenced to the local jail or workhouse and not to the department. T.C.A. § 40-35-104(b)(1).

A defendant who is convicted of a felony and who is sentenced to at least one year but not more than six years shall not be sentenced to serve such sentence in the department if the defendant is being sentenced from a county with a population of not less than 477,811 according to the 1980 federal census or any subsequent federal census, and the legislative body for any such county has contracted with the department or has passed a resolution that expresses an intent to contract for the purpose of housing convicted felons with such sentences. If the sentencing court concludes that incarceration is the appropriate sentencing alternative, such defendant must be sentenced to the local jail or workhouse and not to the department. T.C.A. § 40-35-104(b)(2).

“Although one serving a sentence of three years or less (and six years or less in a county having a population not less than 477,811 in the 1980 census) may not be sentenced to the Department of Correction if the county has a contract with the Department, there is not authority for a sentence over six years to be served in a local jail or workhouse.” *State v. Beard*, 2005 WL 2546964, n. 3 (Tenn. Crim. App. 2005).

In *State v. McDaniel*, 2002 WL 1732334 (Tenn. Crim. App. 2002), the defendant was convicted of two counts of manufacturing a Schedule II controlled substance. He was sentenced to concurrent three-year sentences. The trial court ordered that the defendant have split confinement with supervised probation after serving one year in the Tennessee Department of Correction. The defendant appealed this sentence, arguing, among other things, that his sentence should be served at the county workhouse pursuant to T.C.A. § 40-35-104(b)(1). The Tennessee Court of Criminal Appeals affirmed the judgment of the trial court. Finding no evidence in the record of a contract between the county and the Department of Correction to house convicted felons, or a resolution of the county legislative body that convicted felons be housed in the county jail, the court held that there was no basis to conclude that the defendant's sentence should not be served in the Department of Correction. *Id.*

In imposing a sentence, the court determines under what conditions a sentence will be served as provided by law. A defendant may be sentenced to the Department of Correction unless prohibited by T.C.A. § 40-35-104(b). T.C.A. § 40-35-212(a). The court retains full jurisdiction over the manner of the defendant's sentence service unless the defendant receives a sentence in the Department of Correction. T.C.A. § 40-35-212(c). Notwithstanding the provisions of T.C.A. § 40-35-212(c), the court retains full jurisdiction over a defendant sentenced to the Department of Correction during the time the defendant is being housed in a local jail or workhouse awaiting transfer to the department. Such jurisdiction continues until the time the defendant is actually transferred to the physical custody of the Department of Correction. T.C.A. § 40-35-212(d).

If the minimum statutory punishment for any offense is imprisonment in the penitentiary for one year, but in the opinion of the court the offense merits a lesser punishment, the defendant may be sentenced to the local jail or workhouse for any period less than one year, except as otherwise provided. T.C.A. §

40-35-211(2). See also T.C.A. § 40-20-103.

If a defendant is convicted of an offense designated as a felony but the court imposes a sentence of less than one year in the local jail or workhouse, the defendant is considered a felon but is sentenced as in the case of a misdemeanor and, therefore, is entitled to sentence credits under T.C.A. § 41-2-111. Upon such defendant becoming eligible for work release, furlough, trusty status or related rehabilitative programs as specified in T.C.A. § 40-35-302(d), the defendant may be placed in such programs by the sheriff or administrative authority having jurisdiction over the local jail or workhouse. T.C.A. § 40-35-211(3).

If confinement is directed, the court shall designate the place of confinement as a local jail or workhouse if required pursuant to T.C.A. § 40-35-104(b), or, if the sentence is eight years or less and combined with periodic or split confinement not to exceed one year, the court shall designate the place of confinement as a local jail or workhouse. If confinement in a local jail or workhouse is not mandated by T.C.A. §§ 40-35-104(b), 40-35-306 or 40-35-307, all convicted felons sentenced after November 1, 1989, to continuous confinement for a period of one year or more shall be sentenced to the Department of Correction. After November 1, 1989, if a court sentences or has sentenced a defendant to a local jail or workhouse when such court was not authorized to do so by this chapter, it shall be deemed that such sentence was a sentence to the department, and the commissioner of correction shall have the authority to take such a defendant into the custody of the department. T.C.A. § 40-35-314(a). "This code section clearly requires that any sentence of confinement over eight years is to be served in the Tennessee Department of Correction." *Carver v. State*, 2003 WL 21663688, *4 (Tenn. Crim. App. 2003)

Report by Sheriff to Department of Correction

Reference Number: CTAS-1348

Pursuant to T.C.A. § 40-23-113, whenever any person sentenced to the custody of the Department of Correction has been detained in the jail or workhouse pending arraignment, trial, sentencing or appeal, the sheriff must prepare and transmit with the defendant, at the time of commitment to the Department of Correction, a short report furnishing such information pertaining to the defendant's behavior while in local custody as may be requested by the department. Notwithstanding any other provision of the law to the contrary, no person sentenced to the custody of the Department of Correction shall be committed or conveyed to the department unaccompanied by the completed report required by T.C.A. § 40-23-113.

Filing of Mittimus

Reference Number: CTAS-1349

The mittimus or process by which any prisoner is committed or discharged from jail, or an attested copy thereof, must be filed and retained at the sheriff's office by the sheriff or the jailer under the sheriff's direction. T.C.A. § 41-4-106. "A mittimus is an affidavit to the sheriff or jailer as to the defendant's sentence. A mittimus serves to direct the jailer or sheriff as to a prisoner's commitment or discharge and is kept by the sheriff, or jailer, under the sheriff's direction." *Taylor v. State*, 2005 WL 578825 (Tenn. Crim. App. 2005); *Carr v. Mills*, 2000 WL 1520267 (Tenn. Crim. App. 2000).

Booking

Reference Number: CTAS-1350

The comptroller of the treasury, in consultation with the Tennessee Bureau of Investigation, the Tennessee Sheriffs' Association, the Tennessee Association of Chiefs of Police, and the Tennessee Corrections Institute, have developed standardized booking procedures, which include:

1. A photograph of the arrestee;
2. Two sets of fingerprints. If fingerprints are maintained manually, two sets properly completed and mailed to the Tennessee Bureau of Investigation; If fingerprints are transmitted electronically, maintain one hard copy of fingerprints with arrest report as well as acknowledgement from TBI that fingerprints were received and accepted;
3. Delivery to the appropriate local law enforcement agency of a completed judgment order signed by a judge to be used by the local law enforcement agency for completion of an R-84 Disposition Card, except as follows: A local law enforcement agency and a clerk of court can collaborate on an automated process for the electronic submission of final dispositions for criminal cases to the Tennessee Bureau of Investigation. After a law enforcement agency and a clerk of court have implemented an automated process for the electronic submission of final dispositions for criminal cases, and have had the process certified by the Tennessee Bureau of Investigation, all final dispositions shall be reported electronically. Upon implementation of an automated process for the

electronic submission of final dispositions for criminal cases, the delivery to the local law enforcement agency of a completed judgment order signed by a judge to be used by the local law enforcement agency for completion of an R-84 Disposition Card, and the submission by the local law enforcement agency of a completed R-84 Disposition Card to the Tennessee Bureau of Investigation are no longer required;

4. An arrest report; and
5. Delivery to the appropriate court clerk office of a warrant or capias for offense containing the state control number assigned by the law enforcement agency upon the arrest of an individual to be recorded in the court information system of the court clerk's office.

T.C.A. § 8-4-115(a)(1).

Upon establishment of an automated system for final disposition reporting, clerks of court must submit final disposition reports electronically to the Tennessee Bureau of Investigation. Jurisdictions that submit final disposition reports electronically will cease submitting R-84 Disposition Cards upon advisement from the Tennessee Bureau of Investigation. The submission of an electronic final disposition report shall have the same force and effect as the submission of a R-84 Disposition Card. T.C.A. § 8-4-115(g).

Any automated court information system being used or developed on or after July 1, 2005, including, but not limited to, the Tennessee Court Information System (TnCIS) being designed pursuant to T.C.A. § 16-3-803(h) must ensure that an electronic file of final disposition data will be reported to the Tennessee Bureau of Investigation. The form, general content, time, and manner of submission of the electronic file of final disposition data will comply with the rules and regulations prescribed by the Tennessee Bureau of Investigation. T.C.A. § 8-4-115(h).

Fingerprinting

Reference Number: CTAS-1351

It is the duty of the sheriff to take or cause to be taken two full sets of fingerprints of each person arrested whether by warrant or capias for an offense that results in such person's incarceration in a jail facility or the person's posting of a bond to avoid incarceration. Two full sets of fingerprints must be sent to the Tennessee Bureau of Investigation. Upon receipt of the fingerprints, the Tennessee Bureau of Investigation is required to retain one set of the fingerprints as provided in T.C.A. § 38-6-103 and send one set of the fingerprints to the Federal Bureau of Investigation. T.C.A. § 8-8-201(a)(35)(A). *See also* T.C.A. § 38-3-122(a) (duty of arresting officer to take fingerprints). Notwithstanding the provisions of T.C.A. § 8-8-201(a)(35) (duty of sheriff) or T.C.A. § 38-3-122 (duty of arresting officer) to the contrary, it is the duty of the law enforcement agency responsible for maintaining the arrested person's booking records to take the two full sets of fingerprints as required by such sections. T.C.A. § 8-4-115(a)(2).

A person who is issued a citation pursuant to T.C.A. § 40-7-118 or T.C.A. § 40-7-120 shall not, for purposes of T.C.A. § 8-8-201(a)(35), be considered to have been arrested, and the agency issuing the citation shall not be required to take the fingerprints of such person. T.C.A. § 8-8-201(a)(35)(B). *See also* T.C.A. § 38-3-122(b).

Where individuals are arrested multiple times for a violation of T.C.A. § 39-17-310, the offense of public intoxication, the arresting officer shall note on the arrest report that fingerprints are on file for this individual pursuant to T.C.A. § 38-3-122(a). T.C.A. § 8-4-115(a)(3).

Compliance with these standardized booking procedures shall be the basis for the comptroller of the treasury determining compliance with the fingerprinting requirements of T.C.A. §§ 8-8-201(a)(35) and 38-3-122. The Tennessee Corrections Institute and the Tennessee Law Enforcement Training Academy are required to train correctional personnel in municipal, county and metropolitan jurisdictions in the application of these standardized booking procedures. T.C.A. § 8-4-115(a)(4).

Audit by Comptroller

The comptroller of the treasury is required to audit or cause to be audited on an annual basis the sheriff's office to determine whether or not the sheriff's office is in compliance with the requirements of T.C.A. § 8-4-115, including but not limited to two full sets of classifiable fingerprints taken at arrest and maintenance by the arresting agency of at least an 85 percent retention rate by the Tennessee Bureau of Investigation of such fingerprints. If the comptroller of the treasury determines that a particular sheriff's office is not in compliance with T.C.A. §§ 8-8-201(a)(35), 38-3-122 and 8-4-115, the comptroller is required to notify the sheriff and the POST Commission of such noncompliance within 30 days of the determination. T.C.A. § 8-4-115(c)(1).

Show Cause Hearing

The sheriff shall show cause to the POST Commission within 30 days of notification why the sheriff should not be found to be in noncompliance with the requirements of T.C.A. §§ 8-8-201(a)(35) and 38-3-122. If the sheriff does not respond or show good cause within 30 days, the POST Commission is required to decertify the sheriff and impound the salary supplement provided for the sheriff in T.C.A. § 38-8-111. The POST Commission is then required to notify the comptroller of the treasury and both the sheriff and county commission of such action. T.C.A. § 8-4-115(c)(2).

The burden shall be on the sheriff to demonstrate compliance to the POST Commission, and if the sheriff is found to be in compliance with the provisions of T.C.A. § 8-4-115 within 60 days after decertification, the POST Commission is required to rescind the decertification order and cause any salary supplement impounded to be returned to the sheriff except for one-twelfth of the annual supplement. T.C.A. § 8-4-115(c)(3).

Removal from Office

In addition to any ouster proceeding under the provisions of Title 8, Chapter 47, the sheriff may be removed from office in accordance with the provisions of T.C.A. § 8-4-115. The comptroller of the treasury is required to forward a copy of reports of noncompliance with the provisions of T.C.A. § 8-4-115 by the sheriff to the district attorney general having jurisdiction and to the attorney general and reporter. The district attorney general and the attorney general and reporter must each review the report and determine if there is sufficient cause for further investigation. If further investigation indicates willful misfeasance, malfeasance or nonfeasance by the sheriff, the district attorney general shall proceed pursuant to Title 8, Chapter 47, to remove the sheriff from office. T.C.A. § 8-4-115(d). At least annually the comptroller of the treasury's office is required to send to each county mayor and sheriff a notice advising them of the provisions of T.C.A. § 8-4-115, including the penalty for noncompliance with T.C.A. §§ 8-8-201(a)(35), 38-3-122 and 38-8-111(g). T.C.A. § 8-4-115(d).

Purchase of Fingerprint System

Prior to purchasing an electronic fingerprint imaging system, the sheriff must obtain certification from the Tennessee Bureau of Investigation that the equipment is compatible with the Tennessee Bureau of Investigation's system and the Federal Bureau of Investigation's integrated automated fingerprint identification system. T.C.A. § 8-4-115(e).

Funding

The county legislative body is required by law to appropriate funds for the sheriff's office, including funds for personnel and supplies that are sufficient to comply with the provisions of T.C.A. § 8-4-115. T.C.A. § 8-4-115(b).

In order to comply with state and federal fingerprinting requirements, except in Davidson County, 20 percent of the funds received by a sheriff's office pursuant to T.C.A. § 39-17-420 must be set aside and earmarked for the purchase, installation, and maintenance of and line charges for an electronic fingerprint imaging system that is compatible with the Federal Bureau of Investigation's integrated automated fingerprint identification system. Prior to the purchase of the equipment, the sheriff must obtain certification from the Tennessee Bureau of Investigation that the equipment is compatible with the Tennessee Bureau of Investigation's and Federal Bureau of Investigation's integrated automated fingerprint identification system. Once the electronic fingerprint imaging system has been purchased, the sheriff's office may continue to set aside up to 20 percent of the funds received pursuant to T.C.A. § 39-17-420 to pay for the maintenance of and line charges for the electronic fingerprint imaging system. T.C.A. § 39-17-420(g)(1).

Instead of purchasing the fingerprinting equipment, a local law enforcement agency may enter into an agreement with another law enforcement agency that possesses the equipment for the use of the equipment. The agreement may provide that the local law enforcement agency may use the fingerprinting equipment to identify people arrested by that agency in exchange for paying an agreed upon portion of the cost and maintenance of the fingerprinting equipment. If no agreement exists, it shall be the responsibility of the arresting officer to obtain fingerprints and answer for the failure to do so. T.C.A. § 39-17-420(g)(1). See *also* Op. Tenn. Atty. Gen. 01-088 (May 24, 2001).

Subject to the approval of the General Assembly, a portion of the funds derived from the additional privilege tax levied on all criminal cases instituted in this state as provided for in T.C.A. § 67-4-602(g) may be appropriated to the Tennessee Bureau of Investigation for the purchase, installation, maintenance, and line charges of electronic fingerprint imaging systems. T.C.A. § 8-4-115(f).

Telephone Call

Reference Number: CTAS-1352

Pursuant to state law, no person under arrest by any officer or private citizen shall be named in any book, ledger or any other record until such time that the person has successfully completed a telephone call to an attorney, relative, minister or any other person that the person shall choose, without undue delay. One hour shall constitute a reasonable time without undue delay. However, if the arrested person does not choose to make a telephone call, then the person shall be booked or docketed immediately. T.C.A. § 40-7-106(b).

Pursuant to state regulations, a telephone must be available within the receiving or security area at the time of booking. The detainee must be allowed to complete at least one telephone call to the person of his or her choice. Rules of the Tennessee Corrections Institute, Rule 1400-1-.14(4).

In *State v. Claybrook*, 736 S.W.2d 95 (Tenn. 1987), the Tennessee Supreme Court held that the failure to allow the defendant to make a telephone call as prescribed by T.C.A. § 40-7-106(b) did not render his statement to a law enforcement officer involuntary. The court stated that the failure to comply with the statute did not require that the defendant's statement be suppressed. "The failure to afford to a defendant the phone call required by this statute is but one factor to be considered in determining the voluntariness of the defendant's statement and whether the conduct of the officers has overcome the will of the accused. Automatic suppression of the statement is not called for." *Id.* at 103.

There is no constitutional right to make a telephone call upon arrest or completion of booking. *Cannon v. Montgomery County*, 1998 WL 354999 (E.D. Pa. 1998). See also *Dietzen v. Mork*, 101 F.3d 110 (Table) (7th Cir. 1996) (declining to hold that an arrestee has an absolute constitutional right to a telephone call); *State Bank of St. Charles v. Camic*, 712 F.2d 1140, 1145 n. 2 (7th Cir.) ("[T]here is no constitutional requirement that a phone call be permitted upon completion of booking formalities."), *cert. denied*, 464 U.S. 995 (1983); *Hodge v. Ruperto*, 739 F.Supp. 873, 876 (S.D. N.Y. 1990) (There is no constitutional requirement that a detainee be permitted a telephone call upon completion of booking formalities.). The right to make a telephone call occurs only when certain constitutional rights are implicated, for example the right to consult with counsel. *Dietzen*, 101 F.3d 110, citing *Tucker v. Randall*, 948 F.2d 388, 390-391 (7th Cir. 1991).

In *Harrill v. Blount County*, 55 F.3d 1123 (6th Cir. 1995), the plaintiff, an arrestee, brought a § 1983 action against the county and sheriff's deputies. The plaintiff argued that T.C.A. § 40-7-106(b) created a federal constitutional right under the 14th Amendment Due Process Clause and that the booking officer's refusal to allow her to call her father immediately after her arrest violated her federal rights. The Sixth Circuit Court of Appeals stated that this argument was in error. The court noted that a state statute cannot "create" a federal constitutional right. While some state statutes may establish liberty or property interests protected by the Due Process Clause, the court found that this statute creates neither a federally protected liberty or property interest. The court stated that the right to make a phone call immediately upon arrest is not a recognized property right, nor is it a traditional liberty interest recognized by federal law. The violation of a right created and recognized only under state law is not actionable under § 1983. *Id.* at 1125. The court further found that because T.C.A. § 40-7-106(b) does not set forth a federal right actionable under § 1983, it cannot be used to destroy the defendants' claim of qualified immunity. Thus, the court stated, the defendants did not violate the plaintiff's clearly established federal rights, and therefore they have qualified immunity from plaintiff's § 1983 claims. *Id.* at 1126. *But see Carlo v. City of Chino*, 105 F.3d 493, 495-500 (9th Cir. 1997) (holding that the California statute mandating a post-booking telephone call created a liberty interest protected by the 14th Amendment of the United States Constitution).

Courts have ruled that persons making telephone calls from telephones in the booking area of a county jail do not have a reasonable expectation of privacy in making the telephone call. Accordingly, telephone calls made from the booking area may be monitored. *State v. Erwin*, 2001 WL 314340, *6 (Tenn. Crim. App. 2001)); *People v. Ross*, 2000 WL 33388690, *2-3 (Mich. App. 2000) (same).

Intake

Reference Number: CTAS-1353

Pursuant to state regulations, each jail must have a space where inmates are received, searched, showered, and issued clothing (if provided by the facility) prior to assignment to the living quarters. New facilities shall provide space inside the security perimeter, separate from inmate living areas and administrative offices, for inmate processing as inmates are received and discharged from the facility. This space shall have the following components:

- Pedestrian and/or vehicle sally port;
- Telephone facilities for inmate use;
- Temporary holding rooms which have fixed benches to seat inmates; and

- A shower, toilet and sink.

Rules of the Tennessee Corrections Institute, Rule 1400-1-.04(11).

An intake form must be completed for every person admitted to the jail and must contain the following information, unless otherwise prohibited by statute:

1. Picture;
2. Booking number;
3. Date and time of intake;
4. Name and aliases of person;
5. Last known address;
6. Date and time of commitment and authority therefore;
7. Names, title, signature and authority therefore;
8. Specific charges;
9. Sex;
10. Age;
11. Date of birth;
12. Place of birth;
13. Race;
14. Occupation;
15. Last place of employment;
16. Education;
17. Name and relationship of next of kin;
18. Address of next of kin;
19. Driver's license and social security numbers;
20. Disposition of vehicle, where applicable;
21. Court and sentence (if sentenced inmate);
22. Notation of cash and property;
23. Bonding company;
24. Amount of bond;
25. Date of arrest;
26. Warrant number;
27. Court date and time;
28. Cell assignment;
29. Fingerprints; and,
30. Criminal history check.

Rules of the Tennessee Corrections Institute, Rule 1400-1-.14(2).

The admitting officer must assure himself or herself that each prisoner received is committed under proper legal authority. Rules of the Tennessee Corrections Institute, Rule 1400-1-.14(3). See T.C.A. §§ 8-8-201(a)(3) and 41-4-103(a).

Inventory Searches

Reference Number: CTAS-1354

Pursuant to state regulations, cash and personal property must be taken from the prisoner upon admission, listed on a receipt form in duplicate, and stored securely pending the prisoner's release. The receipt must be signed by the receiving officer and the prisoner, the duplicate given to the prisoner and the original kept for the record. If the prisoner is in an inebriated state, there must be at least one witness to verify this transaction. As soon as the prisoner is able to understand what he is doing, he must sign and be given the duplicate of the receipt. Rules of the Tennessee Corrections Institute, Rule 1400-1-.14(5).

The constitutional propriety of inventory searches of arrestees is not novel. In *Illinois v. Lafayette*

(1983), 462 U.S. 640, the Supreme Court of the United States addressed the question of whether it was constitutionally permissible under the Fourth Amendment to the United States Constitution to inventory the personal effects of a person arrested prior to incarceration without a warrant. The court held such warrantless routine inventory process proper as an incident to booking and incarceration of the arrested person. The justification was determined to rest not on probable cause but upon consideration of orderly police administration. The court stated at page 646 the following:

"At the station house, it is entirely proper for police to remove and list or inventory property found on the person or in the possession of an arrested person who is to be jailed. A range of governmental interests supports an inventory process. It is not unheard of for persons employed in police activities to steal property taken from arrested persons; similarly, arrested persons have been known to make false claims regarding what was taken from their possession at the station house. A standardized procedure for making a list of inventory as soon as reasonable after reaching the stationhouse not only deters false claims but also inhibits theft or careless handling of articles taken from the arrested person. Arrested persons have also been known to injure themselves--or others--with belts, knives, drugs, or other items on their person while being detained. Dangerous instrumentalities--such as razor blades, bombs, or weapons--can be concealed in innocent-looking articles taken from the arrestee's possession. The bare recital of these mundane realities justifies reasonable measures by police to limit these risks--either while the items are in police possession or at the time they are returned to the arrestee upon his release. Examining all the items removed from the arrestee's person or possession and listing or inventorying them is an entirely reasonable administrative procedure."

State v. Raines, 1988 WL 125031, *2 (Ohio App. 1988). See also *State v. Crutcher*, 989 S.W.2d 295, 301 (Tenn. 1999) (noting that law enforcement authority in cases of incarceration "extends to performing a detailed 'inventory search' of all personal effects in the arrestee's possession") (citing *Illinois v. Lafayette*, 462 U.S. 640, 648, 103 S.Ct. 2605, 77 L.Ed.2d 65 (1983)).

Both the arrestee and the property in his immediate possession may be searched at the jail, and if evidence of a crime is discovered, it may be seized and admitted in evidence. Likewise, the arrestee's clothing or other belongings may be seized upon arrival at the jail and later may be subjected to laboratory analysis, and the test results may be admissible at trial. *United States v. Edwards*, 415 U.S. 800, 803-804, 94 S.Ct. 1234, 1237, 39 L.Ed.2d 771 (1974).

[O]nce the accused is lawfully arrested and is in custody, the effects in his possession at the place of detention that were subject to search at the time and place of his arrest may lawfully be searched and seized without a warrant even though a substantial period of time has elapsed between the arrest and subsequent administrative processing, on the one hand, and the taking of the property for use as evidence, on the other. This is true where the clothing or effects are immediately seized upon arrival at the jail, held under the defendant's name in the 'property room' of the jail, and at a later time searched and taken for use at the subsequent criminal trial. The result is the same where the property is not physically taken from the defendant until sometime after his incarceration.

Id. at 807-808, 94 S.Ct. at 1239.

The Tennessee Court of Criminal Appeals has held that no warrant is necessary to search a defendant after he is arrested and transported to jail. *State v. McDougle*, 681 S.W.2d 578, 584 (Tenn. Crim. App. 1984), citing *United States v. Edwards*, 415 U.S. 800, 803, 94 S.Ct. 1234, 1237, 39 L.Ed.2d 771 (1974). In *Morelock v. State*, 1996 WL 454996, *4 (Tenn. Crim. App. 1996), the court noted that this "type of inventory or booking search has been routinely upheld in many courts on grounds that those arrested have no privacy interest in items taken from them incident to arrest." See also *State v. Cothran*, 115 S.W.3d 513, 526 (Tenn. Crim. App. 2003), citing *State v. Crutcher*, 989 S.W.2d 295, 301 (Tenn. 1999) (noting that law enforcement authority in cases of incarceration "extends to performing a detailed 'inventory search' of all personal effects in the arrestee's possession"). Cf. *United States v. McCroy*, 102 F.3d 239, 241 (6th Cir. 1996); *United States v. Akins*, 995 F.Supp. 797, 811 (M.D. Tenn. 1998).

Pat Down Searches

Reference Number: CTAS-1355

Pursuant to state regulations, each jail must have a written policy and procedure providing for searches of facilities and inmates to control contraband. Each newly admitted inmate must be thoroughly searched for weapons and other contraband immediately upon arrival in the jail, regardless of whether the arresting officer has previously conducted a search. A record must be maintained on a search administered to a newly admitted inmate. The procedure must differentiate between the searches allowed (pat down, strip, or orifice) and identify when these may occur and by whom such searches may be made. Inmates must

be searched by jail personnel of the same sex except in emergency situations. Rules of the Tennessee Corrections Institute, Rule 1400-1-.07(2) through (6).

While the Fourth Amendment generally requires that the issuance of a warrant, supported by probable cause, precede any search, the Supreme Court has recognized several exceptions to the warrant requirement, including so-called "stationhouse" searches of individuals arrested by the police. See *Illinois v. Lafayette*, 462 U.S. 640, 645-46, 103 S.Ct. 2605, 77 L.Ed.2d 65 (1983); *Mary Beth G. v. City of Chicago*, 723 F.2d 1263, 1270 (7th Cir.1983). As this Court has stated, however, "custodial searches incident to arrest must still be reasonable ones.... This type of police conduct must [still] be tested by the Fourth Amendment's general proscription against unreasonable searches and seizures." *Id.* at 1270-71 (quotations omitted).

Stanley v. Henson, 337 F.3d 961, 963 (7th Cir. 2003).

The United States Supreme Court has held "that searches and seizures that could be made on the spot at the time of arrest may legally be conducted later when the accused arrives at the place of detention." *United States v. Edwards*, 415 U.S. 800, 803, 94 S.Ct. 1234, 1237, 39 L.Ed.2d 771 (1974). The police may search an arrestee and inventory his personal effects at the station house following an arrest, prior to confining him. *Illinois v. Lafayette*, 462 U.S. 640, 103 S.Ct. 2605, 77 L.Ed.2d 65 (1983).

Strip Searches (Visual Body Cavity Search)

Reference Number: CTAS-1356

As used in T.C.A. § 40-7-119, "strip search" means having an arrested person remove or arrange some or all of the person's clothing so as to permit a visual inspection of the genitals, buttocks, anus, female breasts or undergarments of the person. No person arrested for a traffic, regulatory or misdemeanor offense, except in cases involving weapons or a controlled substance, shall be strip searched unless there is reasonable belief that the individual is concealing a weapon, a controlled substance, a controlled substance analogue or other contraband. T.C.A. § 40-7-119(a) and (b). Public Chapter 848 (May 15, 2012) amends Tenn. Code Ann. §§ 40-7-119(b) and 40-7-121(a) by adding under Section 29 controlled substance analogue to list of items that may be searched for during a body cavity search.

In *Timberlake by Timberlake v. Benton*, 786 F.Supp. 676 (M.D. Tenn. 1992), the district court noted that, while T.C.A. § 40-7-119 explicitly sets guidelines for custodial searches of arrested persons, it does not set rules for the location of the search or the manner in which a search is to be conducted. The court stated that this "oversight is critical since the law governing the reasonableness of strip searches is founded upon such factors." *Id.* at 695. Regarding municipal liability, the district court stated that the failure to set a policy governing such a highly intrusive police action can render a municipality's actions as culpable as if they had a policy permitting unreasonable searches themselves. "A local governing body does not shield itself from liability by acting through omission. Thus, when a city provides no guidance to its officers regarding such intrusive actions as strip searches, it must face the consequences of its inaction by being subject to suit." *Id.* at 696, citing *Marchese v. Lucas*, 758 F.2d 181, 189 (6th Cir. 1985), cert. denied, 480 U.S. 916, 107 S.Ct. 1369, 94 L.Ed.2d 685 (1987) (sheriff's failure to train and ratification of unconstitutional behavior subjects county to suit).

Pursuant to state regulations, each jail must have a written policy and procedure providing for searches of facilities and inmates to control contraband. Each newly admitted inmate must be thoroughly searched for weapons and other contraband immediately upon arrival in the jail, regardless of whether the arresting officer has previously conducted a search. A record must be maintained on a search administered to a newly admitted prisoner. The procedure must differentiate between the searches allowed (pat down, strip, or orifice) and identify when these may occur and by whom such searches may be made. Inmates must be searched by jail personnel of the same sex except in emergency situations. All orifice searches must be done under medical supervision. The jail's policy and procedures must require that all inmates, including trustees, be searched thoroughly by jail personnel whenever the inmates enter or leave the security area. Rules of the Tennessee Corrections Institute, Rule 1400-1-.07(2) - (6).

"Courts have repeatedly held that strip searches that include visual inspection of the anal and genital areas are inherently invasive." *Calvin v. Sheriff of Will County*, --- F.Supp.2d ----, 2005 WL 3446194, *5 (N.D. Ill. 2005).

In *United States v. Robinson*, 414 U.S. 218, 94 S.Ct. 467, 38 L.Ed.2d 427 (1973), the Court adopted a presumption that a "full search" incident to custodial arrest and aimed toward the discovery of weapons and contraband would be reasonable under the Fourth Amendment, but warned that "extreme or patently abusive" searches might not be. 414 U.S. at 227-236, 94 S.Ct. at 473-77. *United States v. Edwards*, 415 U.S. 800, 94 S.Ct. 1234, 39 L.Ed.2d 771 (1974), authorized warrantless searches of the clothing of arrestees who were confined overnight. As in

Robinson, the court in *Edwards* reaffirmed that custodial searches incident to arrest must be reasonable. Neither Robinson nor Edwards specifically addressed "the circumstances in which a strip search of an arrestee may or may not be appropriate." *Illinois v. Lafayette*, 462 U.S. at 646 n.2, 103 S.Ct. at 2609 n.2.

Fann v. City of Cleveland, 616 F.Supp. 305, 310-311 (D.C. Ohio 1985).

The United States Supreme Court's opinion in *Bell v. Wolfish*, 441 U.S. 520, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979), is the seminal strip search case. In *Bell*, the Court held that strip and visual body cavity searches may, in certain instances, be conducted on inmates with less than probable cause.

The application of the Fourth Amendment to warrantless strip searches has been developed largely in cases involving such searches in prisons and in schools. In *Bell v. Wolfish*, 441 U.S. 520, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979), the Supreme Court held that visual body cavity inspections during strip searches of pre-trial detainees and convicted prisoners after they had contact with outsiders were not "unreasonable" searches under the Fourth Amendment. The searches were conducted at the "federally operated short-term custodial facility in New York City designed primarily to house pretrial detainees." *Id.* at 523, 99 S.Ct. 1861. The Court stated that applying "[t]he test of reasonableness under the Fourth Amendment... [i]n each case ...requires a balancing of the need for the particular search against the invasion of personal rights that the search entails. Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted." *Id.* at 559, 99 S.Ct. 1861. It pointed out that a "detention facility is a unique place fraught with serious security dangers. Smuggling of money, drugs, weapons, and other contraband is all too common an occurrence." *Id.*

Reynolds v. City of Anchorage, 379 F.3d 358, 362 (6th Cir. 2004).

Despite holding that particular policy constitutional, *Bell* did not validate a blanket policy of strip searching pretrial detainees. Rather, *Bell* held that pretrial detainees retain constitutional rights, including the Fourth Amendment's protection against unreasonable searches and seizures, which are subject to limitations based on the fact of confinement and the institution's need to maintain security and order.

Calvin v. Sheriff of Will County, --- F.Supp.2d ----, 2005 WL 3446194, *4 (N.D. Ill. 2005) (citations omitted).

Courts, beginning with *Bell*, have consistently held that institutional security is a legitimate law enforcement objective, and may provide a compelling reason for a strip search absent reasonable suspicion of individualized wrongdoing. Courts have given prisons latitude to premise searches on the type of crime for which an inmate is arrested. When the inmate has been charged with only a misdemeanor or traffic violation, crimes not generally associated with weapons or contraband, however, courts have required that officers have a reasonable suspicion that the individual inmate is concealing contraband.

Id. at *5 (citation omitted).

Misdemeanor Arrestees

Reference Number: CTAS-1357

Under the law regarding strip searches of persons arrested on a misdemeanor charge it is well established that the Fourth Amendment requires that strip and visual body cavity searches must be justified by at least a reasonable suspicion that the arrestee is concealing contraband or weapons.

In *Masters v. Crouch*, 872 F.2d 1248 (6th Cir. 1989), the Sixth Circuit Court of Appeals held that "authorities may not strip search persons arrested for traffic violations and nonviolent minor offenses solely because such persons ultimately will intermingle with the general population at a jail when there [are] no circumstances to support a reasonable belief that the detainee will carry weapons or other contraband into the jail." *Id.* at 1255.

It is objectively reasonable to conduct a strip search of one charged with a crime of violence before that person comes into contact with other inmates. There is an obvious threat to institutional security. However, normally no such threat exists when the detainee is charged with a traffic violation or other nonviolent minor offense.

The decisions of all the federal courts of appeals that have considered the issue reached the same conclusion: a strip search of a person arrested for a traffic violation or other minor offense not normally associated with violence and concerning whom there is no individualized reasonable suspicion that the arrestee is carrying or concealing a weapon or other contraband, is unreasonable.

Id. See, e.g., *Skurstenis v. Jones*, 236 F.3d 678, 682 (11th Cir. 2000) (holding jail policy violated the Fourth Amendment because it did not require reasonable suspicion as a predicate to strip searching newly admitted detainees); *Shain v. Ellison*, 273 F.3d 56, 64-66 (2d Cir. 2001) (holding county's policy of conducting strip searches of misdemeanor arrestees remanded to local jail following arraignment, absent reasonable suspicion that arrestees were carrying contraband or weapons, violated the Fourth Amendment); *Weber v. Dell*, 804 F.2d 796, 802 (2d Cir. 1986) (holding that the Fourth Amendment precludes jail officials from performing strip/body cavity searches of arrestees charged with misdemeanors or other minor offenses unless the officials have a reasonable suspicion that the arrestee is concealing weapons or other contraband based on the crime charged, the particular characteristics of the arrestee, and/or the circumstances of the arrest); *Giles v. Ackerman*, 746 F.2d 614 (9th Cir. 1984), *cert. denied*, 471 U.S. 1053, 105 S.Ct. 2114, 85 L.Ed.2d 479 (1985) (holding jail policy requiring all persons booked into the county jail to be strip searched unconstitutional); *Mary Beth G. v. City of Chicago*, 723 F.2d 1263, 1272 (7th Cir. 1983) (holding city's policy of subjecting women, but not men, who had been arrested and detained on misdemeanor charges, to a strip search regardless of the charges against them or whether detention officers had any reasonable suspicion that a particular woman was concealing weapons or contraband, violated the Fourth Amendment); *Logan v. Shealy*, 660 F.2d 1007, 1013 (4th Cir. 1981) (holding indiscriminate strip search policy routinely applied to all detainees cannot be constitutionally justified simply on the basis of administrative ease in attending to security considerations); *Tinetti v. Wittke*, 620 F.2d 160 (7th Cir. 1980) (*per curiam*) (holding strip searches of persons arrested and detained overnight for non-misdemeanor traffic offenses without probable cause to believe that detainees are concealing contraband or weapons on their bodies are unconstitutional). *But see Dobrowolskyj v. Jefferson County*, 823 F.2d 955 (6th Cir.1987) (holding that a pretrial detainee's Fourth Amendment rights were not violated when he was searched immediately before being transferred to a situation where he would have contact with the general prison population); *Evans v. Stephens*, 407 F.3d 1272, 1278 (11th Cir. 2005) (*en banc*) ("Most of us are uncertain that jailers are required to have reasonable suspicion of weapons or contraband before strip searching-for security and safety purposes-arrestees bound for the general jail population. Never has the Supreme Court imposed such a requirement.").

In other situations, at least one court has found that it is not *per se* unconstitutional to strip search pretrial detainees charged with minor, nonviolent offenses. In *Richerson v. Lexington Fayette Urban County Gov't*, 958 F.Supp. 299, (E.D. Ky. 1996), the federal district court, while noting that a blanket policy allowing strip searches of all pretrial detainees during the booking/intake process, including those detained on minor misdemeanor charges or traffic offenses, is unconstitutional, held:

[W]here pretrial detainees, including those charged with minor, nonviolent offenses, are kept in a detention center's general population prior to arraignment, and are thereafter ...put in a position where exposure to the general public presents a very real danger of contraband being passed to a detainee, a policy of strip searching the detainees upon their return from the courthouse and prior to their being placed back in the general population of the detention center is both justified and reasonable. The detention center's legitimate security interests outweigh the detainees' privacy interests in such a situation.

Id. at 307. See also *Black v. Franklin County*, 2005 WL 1993445 (E.D. Ky. 2005).

Felony Arrestees

Reference Number: CTAS-1358

It is unclear whether the strip search of an arrestee charged with a felony offense is *per se* constitutional when it is based solely on the offense charged (i.e., absent a reasonable suspicion that the arrestee is carrying or concealing a weapon or other contraband.) In one case, the Sixth Circuit Court of Appeals, the circuit under which Tennessee falls, found that the strip search of a felony arrestee was constitutional even though reasonable suspicion was lacking. However, other federal circuits do not agree and this issue has not been decided by the United States Supreme Court.

In *Dufrin v. Spreen*, 712 F.2d 1084 (6th Cir. 1983), the court held that the visual body cavity search conducted at a county jail by a female jailer did not violate the Fourth Amendment rights of a female inmate who had been arrested for felonious assault. Finding the search constitutional, the court noted: "It is enough here that (a) the arrestee was formally charged with a felony involving violence, (b) that her detention was under circumstances which would subject her potentially to mingle with the jail population as a whole, and (c) that the search actually conducted was visual only, and was carried out discreetly and in privacy." *Id.* at 1089.

In *Black v. Franklin County*, 2005 WL 1993445 (E.D. Ky. 2005), the district court found that the strip search of an arrestee did not violate the constitutional rights of the arrestee who was charged with driving on a suspended license, possession of a controlled substance in the first degree, and possession of a

controlled substance in the third degree. *Id.* at *9.

Both the First and Fifth Circuit Courts of Appeal have approved of strip searches based upon the nature of the crime charged. *See Roberts v. Rhode Island*, 239 F.3d 107, 112 (1st Cir. 2001) ("The reasonable suspicion standard may be met simply by the fact that the inmate was charged with a violent felony."); *Watt v. City of Richardson Police Dep't*, 849 F.2d 195, 198 (5th Cir. 1988) ("Reasonableness under the fourth amendment must afford police the right to strip search arrestees whose offenses posed the very threat of violence by weapons or contraband drugs that they must curtail in prisons."). *Cf. Giles v. Ackerman*, 746 F.2d 614, 617 (9th Cir. 1984) ("Reasonable suspicion may be based on such factors as the nature of the offense, the arrestee's appearance and conduct, and the prior arrest record.").

In contrast, the Ninth Circuit Court of Appeals, in *Kennedy v. Los Angeles Police Dept.*, 901 F.2d 702 (9th Cir.1990) (as amended), found the Los Angeles Police Department's blanket policy of performing strip and body cavity searches on all felony arrestees was unconstitutional. However, the court noted that a body cavity search could be justified where officials had "reasonable suspicion" to conduct a particular search. *Id.* at 715. *See also Fuller v. M.G. Jewelry*, 950 F.2d 1437, 1446 (9th Cir. 1991) (Applying *Kennedy*, the court again found that the policy of the Los Angeles Police Department to subject all felony arrestees to strip/visual body cavity searches was unconstitutional.).

One federal district court has held that it is unconstitutional to strip search arrestees charged with a nonviolent, nonweapon, nondrug felony offense, absent a reasonable suspicion that the arrestee is carrying or concealing a weapon or other contraband. *Tardiff v. Knox County*, 397 F.Supp.2d 115 (D. Me. 2005).

While the First Circuit has not directly addressed the appropriate test for the validity of a strip search during the booking process at a local jail and incident to a felony arrest, this Court concludes that, with respect to detainees charged with a non-violent, non-weapon, non-drug felony, the particularized reasonable suspicion test is applicable, rather than strip searches of all felony arrestees being authorized based solely on the fact that they had been arrested on a charge categorized under state law as a felony. *Swain*, 117 F.3d at 7 ("[I]t is clear that at least the reasonable suspicion standard governs strip and visual body cavity searches in the arrestee context..."). This conclusion is based in part on the First Circuit's clear statements about constitutional protections applicable to individuals who are the subject of a governmentally initiated strip search. The law in this Circuit does not countenance a policy permitting strip searches of all non-violent, non-weapon, non-drug felony detainees upon arrival at a local correctional facility simply because they stand accused of a felony. The distinction between felony and misdemeanor detainees alone fails to address the likelihood that a detainee would be concealing drugs, weapons, or other contraband. *See Tennessee v. Garner*, 471 U.S. 1, 14, 105 S.Ct. 1694, 85 L.Ed.2d 1, (1985) ("[T]he assumption that a 'felon' is more dangerous than a misdemeanor [is] untenable."). Moreover, a non-violent, non-weapon, non-drug felony charge fails to create a presumption of reasonable suspicion required to perform a strip search.

Though the crime for which a detainee is charged is an important factor for consideration, it does not independently establish reasonable suspicion necessary under the Fourth Amendment. Officers should evaluate whether the crime charged involves violence, drugs, or some other feature from which an officer could reasonably suspect that an arrestee was hiding weapons or contraband as well as other factors like the circumstances of the arrest and the particular characteristics of the arrestee. When these factors are considered, it is possible that the strip search of many accused felons may be legitimate. Nevertheless, strip searching all individuals charged with felony crimes that do not involve violence, weapons, or drugs as part of the booking process at a local jail is unconstitutional.

Id. at 130-131. *See also Dodge v. County of Orange*, 282 F.Supp.2d 41, 85 (S.D. N.Y. 2003), *app. dismissed, case remanded on other grounds*, 103 Fed.Appx. 688, 2004 WL 1567870 (2d Cir. 2004) (finding county policy was unconstitutional insofar as it called for strip searching all newly-admitted detainees arrested on suspicion of a felony); *Sarnicola v. County of Westchester*, 229 F.Supp.2d 259, 270 (S.D. N.Y.2002) (holding that the mere arrest for felony drug charges does not permit strip search absent reasonable suspicion that the individual is secreting drugs or other contraband within body cavities).

Body Cavity Searches

Reference Number: CTAS-1359

State law defines a "body cavity search" as an inspection, probing or examination of the inside of a person's anus, vagina or genitals for the purpose of determining whether such person is concealing evidence of a criminal offense, a weapon, a controlled substance, a controlled substance analogue or other contraband. T.C.A. 40-7-121(a). Pursuant to state law, no person shall be subjected to a body cavity

search by a law enforcement officer or by another person acting under the direction, supervision or authority of a law enforcement officer unless the search is conducted pursuant to a search warrant issued in accordance with Rule 41 of the Tennessee Rules of Criminal Procedure. T.C.A. 40-7-121(b).

Furthermore, a body cavity search conducted pursuant to T.C.A. 40-7-121 must be performed by a licensed physician or a licensed nurse. T.C.A. 40-7-121(g). A law enforcement officer who conducts or causes to be conducted a body cavity search in violation of T.C.A. 40-7-121, and the governmental entity employing such officer, shall be subject to a civil cause of action as now provided by law. T.C.A. 40-7-121(f).

Note: The provisions of T.C.A. 40-7-121 do not apply to a body cavity search conducted pursuant to a written jail or prison security procedures policy if the policy requires such a search at the time it was conducted. T.C.A. 40-7-121(e).

Procedures shall differentiate between the searches allowed (orifice, pat, or strip) and identify when these shall occur and by whom such searches may be conducted. All orifice (body cavity) searches shall be done under medical supervision. Inmates shall be searched by facility employees of the same sex, except in emergency situations. The TCI reference rule should read 1400-1-.07(5). Rules of the Tennessee Corrections Institute, Rule 1400-1-.07(6).

In *Bell v. Wolfish*, 441 U.S. 520, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979)], the Supreme Court considered the propriety of body cavity searches of pretrial detainees as well as convicted prisoners under a Fourth Amendment standard, though it appeared to assume, rather than decide, that this was the proper standard. *Id.* at 558. Several years after the Supreme Court decided *Bell*, it held that a prison inmate lacks a reasonable expectation of privacy in his prison cell and thus cannot sustain a Fourth Amendment claim regarding a search of his cell. *Hudson v. Palmer*, 468 U.S. 517, 526, 104 S.Ct. 3194, 82 L.Ed.2d 393 (1984). But *Hudson* did not disturb *Bell's* application of the Fourth Amendment to searches of a detainee's or inmate's person, and courts have continued to apply the Fourth Amendment when assessing the propriety of strip searches and body cavity searches of arrestees, pretrial detainees, and convicted prisoners.

Thompson v. County of Cook, 2005 WL 1950363, * (N.D. Ill. 2005) (citing cases).

"Whether a body cavity search is 'reasonable' under the Fourth Amendment requires a balancing of the need for the particular search against the invasion of personal rights that the search entails. Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted." *Levoy v. Mills*, 788 F.2d 1437, 1439 (10th Cir. 1986), citing *Bell v. Wolfish*, 441 U.S. 520, 559, 99 S.Ct. 1861, 1884, 60 L.Ed.2d 447 (1979). In *Levoy*, the Court did not formulate a particular standard of suspicion to warrant an anal body cavity search, but it did hold that the government must demonstrate a legitimate need to conduct such a search. *Id.* See also *Calvin v. Sheriff of Will County*, --- F.Supp.2d ---, 2005 WL 3446194, *4 (N.D. Ill. 2005) (In balancing the Fourth Amendment rights of an inmate with the interests of a penal institution with respect to a search, a court must consider four factors: (1) the scope of the particular intrusion; (2) the manner in which it is conducted; (3) the place in which it is conducted; and (4) the justification for initiating it.).

Case law suggests that "[t]he more intrusive the search, the closer governmental authorities must come to demonstrating probable cause for believing that the search will uncover the objects for which the search is being conducted." *Nelson v. Dicke*, 2002 WL 511449 (D. Minn. 2002), citing *Jones v. Edwards*, 770 F.2d 739, 741 (8th Cir. 1985) (quoting *Mary Beth G. v. City of Chicago*, 723 F.2d 1263, 1273 (7th Cir. 1983)). See also *Levoy v. Mills*, 788 F.2d 1437, 1439 (10th Cir. 1986) (It is an established Fourth Amendment principle that "the greater the intrusion, the greater must be the reason for conducting a search."). When weighing the competing interests in a Fourth Amendment challenge, greater intrusiveness in a search must be offset by greater justification for the search. *State v. Wallace*, 642 N.W.2d 549, 559 (Wis. App. 2002), citing *Security and Law Enforcement Employees, Dist. Council 82 v. Carey*, 737 F.2d 187, 208 (2d Cir. 1984) ("[T]he greater the intrusion, the greater must be the reason for conducting a search." (citation omitted)); *United States v. Quintero-Castro*, 705 F.2d 1099, 1100 (9th Cir. 1983) ("[A]s a search becomes more intrusive, it must be justified by a correspondingly higher level of suspicion of wrongdoing." (citation omitted)).

When determining the reasonableness of a body cavity search, courts also consider the manner in which the search was conducted. "To make this determination, courts consider issues such as privacy, hygiene, the training of those conducting the searches, and whether the search was conducted in a professional manner." *Isby v. Duckworth*, 175 F.3d 1020, 1999 WL 236880, *2 (7th Cir. 1999). See also *Hill v. Koon*, 977 F.2d 589, *1 (Table) (9th Cir. 1992) ("This circuit has established that three requirements must be satisfied in order for a digital body cavity search of an inmate to be constitutional under the Fourth Amendment. First, there must be reasonable suspicion to believe that the person searched is concealing contraband. In addition to reasonable suspicion, there must also be a valid penological need for the

search. Finally, the search must be conducted in a reasonable manner. This requires considering whether the search was performed in private by trained personnel under hygienic conditions.”).

In *Evans v. Stephens*, 407 F.3d 1272, 1281 (11th Cir. 2005), the Eleventh Circuit Court of Appeals found the manner in which a body cavity search was conducted violated the suspects’s Fourth Amendment right’s. However, the court did not hold that body cavity searches that penetrate orifices are *per se* unconstitutional. *Id.* at 1281, n. 11.

Clothing Exchange

Reference Number: CTAS-1360

Pursuant to state regulations, each jail must have a space where inmates are received, searched, showered, and issued clothing (if provided by the facility) prior to assignment to the living quarters. Rules of the Tennessee Corrections Institute, Rule 1400-1-.04(11).

Inmates shall be issued clothing within a reasonable time frame that is properly fitted and suitable for the climate and shall include the following:

1. Clean socks;
2. Clean undergarments;
3. Clean outer garments; and
4. Footwear.

Clean prisoner's personal clothing (if available) may be substituted for institutional clothing at the discretion of the jail administrator. Prisoner clothing, whether personal or institutional, must be exchanged and cleaned at least twice weekly unless work, climatic conditions or illness necessitate more frequent change. Rules of the Tennessee Corrections Institute, Rule 1400-1-.15(2) and Rule 1400-1-.15(8).

In *Stanley v. Henson*, 337 F.3d 961 (7th Cir. 2003), the Seventh Circuit Court of Appeals found that a jail’s clothing-exchange procedure, which required a female arrestee to change into a jail uniform in a small room in the presence of a female officer, was reasonable and did not violate the arrestee's Fourth Amendment search and seizure rights. The court noted that the observed clothing-exchange policy employed by the jail was a rational approach to achieving the objective of preventing the smuggling of weapons or other contraband into the general jail population, a rather substantial concern given the nature of the jail system, and to ensure that a full and complete inventory was accomplished. *Id.* at 966-967.

Authority to Take Bail--Appeal

Reference Number: CTAS-2138

Under T.C.A. § 40-11-106:

(a) If bail has been set, any sheriff, any magistrate or other officer having authority to admit to bail in the county where the defendant is arrested, confined or legally surrendered may take bail in accordance with the provisions of §§ 40-11-101 -- 40-11-144 and release the defendant to appear as directed by the officer setting bail. The sheriff or peace officer shall give a numbered receipt to the defendant to mandate an accounting for the bail so taken and within a reasonable time deposit the bail with the clerk of the court having jurisdiction of the offense.

(b) (1) Under this part, it is the responsibility of the sheriff or judicial commissioner to determine the sufficiency of the surety and validity of any bond, and once a sheriff or judicial commissioner has taken bail under this subsection (b), that action shall be presumed to be valid. Once a sheriff or judicial commissioner has taken bail or refused to take bail, the jurisdiction of the court having jurisdiction of the offense shall be limited to the issue of whether the sheriff or judicial commissioner has abused discretion. A surety which meets the requirements of § 40-11-122(1) or (2) shall be deemed sufficient if it is certified by the circuit court clerk of the county where the defendant resides to the sheriff, magistrate, or other appropriate officer in the county where the defendant was arrested, confined or legally surrendered.

(2) However, any defendant, claiming that a sheriff or judicial commissioner has acted arbitrarily or capriciously, may, by motion, file an appeal to the court having jurisdiction of the offense. Upon appeal, it is the court’s duty to determine whether the sheriff or judicial commissioner has acted arbitrarily or capriciously.

(3) This subsection (b) shall not be used to prevent a commercial bonding agency from posting bond for any individual when the commercial bondsman has previously been approved and authorized to make

bonds and the bondsman has been so authorized by the presiding judge.

(c) Before the sheriff, magistrate or other officer admits to bail and releases a defendant who is arrested for any kidnapping offense involving a hostage or victim, the releasing authority shall make all reasonable and diligent efforts to notify the hostage or victim of the alleged offense that the defendant has been admitted to bail and is being released. If the hostage or victim is under the age of eighteen (18) or otherwise unavailable, the releasing authority shall make all reasonable and diligent efforts to notify the family, if any, of the hostage or victim that the defendant is being released.

Collection of Biological Specimens for DNA Analysis

Reference Number: CTAS-1361

When a court sentences a person convicted of violating or attempting to violate T.C.A. § 39-13-502 (aggravated rape), T.C.A. § 39-13-503 (rape), T.C.A. § 39-13-504 (aggravated sexual battery), T.C.A. § 39-13-505 (sexual battery), T.C.A. § 39-13-522 (rape of a child) or T.C.A. § 39-15-302 (incest), or when a juvenile court adjudicates a person to be a delinquent child for violating or attempting to violate T.C.A. § 39-13-502 (aggravated rape), T.C.A. § 39-13-503 (rape), T.C.A. § 39-13-504 (aggravated sexual battery), T.C.A. § 39-13-505 (sexual battery), T.C.A. § 39-13-522 (rape of a child) or T.C.A. § 39-15-302 (incest), it shall order the person to provide a biological specimen for the purpose of DNA analysis. Public Chapter 965 (effective May 10, 2012) amends Tenn. Code Ann. § 40-35-321(e)(3) by expanding the list of violent felony offenses that result in a defendant who is arrested for the commission of such offense being required to undergo DNA testing. The offenses added by this bill are: aggravated vehicular homicide; criminally negligent homicide; reckless homicide; vehicular homicide; and voluntary manslaughter. If the person is not incarcerated at the time of sentencing, the order shall require the person to report to the probation division of the department charged by law with the supervision of probationers, which shall gather the specimen. If a probation officer is not available to gather the specimen, the court may designate a person to do so. The cost of taking, processing and storing the specimen shall be paid by the defendant and shall be collected by the probation officer in the same manner as other fees. If the person is incarcerated at the time of sentencing, the order shall require the chief administrative officer of the institution of incarceration to designate a qualified person to gather the specimen. The biological specimen is to be forwarded by the approved agency or entity collecting the specimen to the Tennessee Bureau of Investigation, which shall maintain it as provided in T.C.A. § 38-6-113. The court shall make the providing of such a specimen a condition of probation or community correction if either is granted. T.C.A. § 40-35-321(b).

If a person convicted of violating or attempting to violate T.C.A. § 39-13-502 (aggravated rape), T.C.A. § 39-13-503 (rape), T.C.A. § 39-13-504 (aggravated sexual battery), T.C.A. § 39-13-505 (sexual battery), T.C.A. § 39-13-522 (rape of a child) or T.C.A. § 39-15-302 (incest) and committed to the custody of the commissioner of correction for a term of imprisonment has not provided a biological specimen for the purpose of DNA analysis, the commissioner or the chief administrative officer of a local jail shall order the person to provide a biological specimen for the purpose of DNA analysis before completion of the person's term of imprisonment. The biological specimen shall be forwarded by the approved agency or entity collecting such specimen to the Tennessee Bureau of Investigation, which shall maintain it as provided in T.C.A. § 38-6-113. No person shall be released on parole or otherwise unless and until such person has provided such a specimen as required by law. T.C.A. § 40-35-321(c).

When a court sentences a person convicted of any felony offense committed on or after July 1, 1998, it shall order the person to provide a biological specimen for the purpose of DNA analysis. If the person is not incarcerated at the time of sentencing, the order shall require the person to report to the probation division of the department charged by law with the supervision of probationers, which shall gather the specimen. If a probation officer is not available to gather the specimen, the court may designate a person to do so. The cost of taking, processing and storing the specimen shall be paid by the defendant and shall be collected by the probation officer in the same manner as other fees. If the person is incarcerated at the time of sentencing, the order shall require the chief administrative officer of the institution of incarceration to designate a qualified person to gather the specimen. The biological specimen shall be forwarded by the approved agency or entity collecting such specimen to the Tennessee Bureau of Investigation, which shall maintain it as provided in T.C.A. § 38-6-113. The court shall make the providing of such a specimen a condition of probation or community correction if either is granted. T.C.A. § 40-35-321(d)(1).

If a person convicted of any felony offense and committed to the custody of the commissioner of correction for a term of imprisonment has not provided a biological specimen for the purpose of DNA analysis, the commissioner or the chief administrative officer of a local jail shall order the person to

provide a biological specimen for the purpose of DNA analysis before completion of the person's term of imprisonment. The biological specimen shall be forwarded by the approved agency or entity collecting such specimen to the Tennessee Bureau of Investigation, which shall maintain it as provided in T.C.A. § 38-6-113. T.C.A. § 40-35-321(d)(2).

In August 2006, the Tennessee State Supreme Court released its opinion in *State v. Scarborough*, 201 S.W.3d 607 (Tenn. 2006), holding that the collection of blood from a convicted and incarcerated defendant for DNA analysis and identification purposes pursuant to Tennessee's DNA collection statute was a search for Fourth Amendment Purposes. *Id.* at 616. However, the Court determined that "searches of incarcerated felons undertaken pursuant to Tennessee's DNA collection statute pass constitutional muster when they are reasonable under all of the circumstances." After careful analysis, the Court summarized:

Id. at 621. Applying the totality of the circumstances test, the Court concluded that the drawing of blood and the subsequent DNA analysis, conducted pursuant to the Tennessee DNA collection statute, was reasonable and did not violate that defendant's rights under the Fourth Amendment or the Tennessee Constitution.

Although the Tennessee Supreme Court in *Scarborough* justified the statutorily mandated searches of convicted prisoners, the first justification for such searches was a finding, beyond a reasonable doubt, that those persons had committed criminal offenses. The legislation under consideration broadens the range of persons required to provide a DNA sample to include any person arrested for the commission of a violent felony, based on a probable cause determination by a magistrate or grand jury that probable cause exists for the arrest.

In this office's earlier opinion, it was noted that, when a person is arrested and detained upon probable cause to believe he has committed a crime, he loses the right of privacy from routine searches of the cavities of his body and his jail cell during his detention. *See Bell v. Wolfish*, 441 U.S. 520, 559-560, 99 S.Ct. 1861, 1884-1885, 60 L.Ed.2d 447 (1979) (balancing the interest in maintaining security in a detention facility against the privacy interests of the detained person).

The Court in *Purdy* recognized that courts across the country have upheld laws requiring convicted prisoners to provide biological specimens for DNA analysis, but distinguished the status of convicted prisoners from that of mere arrestees:

Arrestees and persons in custody may not qualify as the "general public," but neither do they have the same status as convicted felons. *See Rise v. Oregon*, 59 F.3d 1556, 1560 (9th Cir. 1995) (noting that convicted felons "do not have the same expectation of privacy in their identifying genetic material that free persons and mere arrestees have: once a person is convicted of certain felonies "his identity has become a matter of state interest and he has lost any legitimate expectation of privacy in the identifying information derived from the blood sampling"). There is an obvious and significant distinction between the DNA profiling of law-abiding citizens. . . .

34 J.L. Med. & Ethics at 181.

Undeniably, the collection of DNA and the development of a database whereby unsolved crimes may be revitalized promotes the interests of justice and security. However, based on the current state of the law, the constitutionality of requiring one accused and arrested, yet not convicted of a crime, remains questionable. Accordingly, it is the opinion of this office that Senate Bill 1196/House Bill 867 is constitutionally suspect. Tenn. Attny. Gen. 07-45 (April 9, 2007)

Classification of Inmates

Reference Number: CTAS-1362

The jailer is authorized to evaluate inmates for purposes of classification, management, care, control and cell assignment. T.C.A. § 41-4-103(b). Pursuant to state regulations each jail must have a written plan for prisoner classification. The plan must specify the criteria and procedures for classifying prisoners in terms of level of custody required, housing assignment and participation in correctional programs. The plan shall include a process for review and appeal of classification decisions. This plan ensures total sight, sound or physical contact separation between male and female inmates and between adults and juveniles being tried as adults. Rules of the Tennessee Corrections Institute, Rule 1400-1-.17(2) and (3).

Inmates with disabilities, including temporary disabilities, shall be housed and managed in a manner that provides for their safety and security. Housing used by inmates with disabilities, including temporary disabilities, shall be designed for their use and shall provide for integration with other inmates. Program and service areas shall be accessible to inmates with disabilities. Rules of the Tennessee Corrections

Institute, Rule 1400-1-.17(4).

"The courts accord wide-ranging deference to correction officials in adopting and administering policies that, in the officials' judgment, are needed to preserve internal order and discipline and to maintain institutional security." *Utley v. Tennessee Dept. of Correction*, 118 S.W.3d 705, 713 (Tenn. Ct. App. 2003) citing *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 126, 97 S.Ct. 2532, 2538, 53 L.Ed.2d 629 (1977); *Bell v. Wolfish*, 441 U.S. 520, 548, 99 S.Ct. 1861, 1879, 60 L.Ed.2d 447 (1979); *Jaami v. Conley*, 958 S.W.2d 123, 125 (Tenn. Ct. App. 1997) (recognizing prison officials' broad authority regarding prisoner classification). "Accordingly, the courts consistently decline to substitute their judgment for that of prison officials when it comes to difficult and sensitive matters of prison administration." *Utley* at 713, citing *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 353, 107 S.Ct. 2400, 2407, 96 L.Ed.2d 282 (1987).

The classification of prisoners is a matter largely within the discretion of prison officials. A prisoner has no right to any particular security classification level. *Makoka v. Cook*, 2002 WL 31730880, *2 (Tenn. Ct. App. 2002) citing *Olim v. Wakinekona*, 461 U.S. 238, 245, 103 S.Ct. 1741, 1745 (1983); *Montayne v. Haymes*, 427 U.S. 236, 242-243, 96 S.Ct. 2543, 2547 (1976); *Beard v. Livesay*, 798 F.2d 874, 876 (6th Cir.1986). "[P]risoners have no liberty interest in the procedure affecting his or her classification because the resulting restraint does not impose an atypical and significant hardship in relation to the ordinary incidents of prison life. *Henderson v. Mills*, 2005 WL 2104958, *6 (Tenn. Ct. App. 2005), citing *Sandin v. Conner*, 515 U.S. 472, 482, 115 S.Ct. 2293, 132 L.Ed.2d 418 (1995). See also *Jaami v. Conley*, 958 S.W.2d 123, 125 (Tenn. Ct. App. 1997) (Though regulations for the classification of prisoners normally take into account the inmate's crime and sentence, their primary purpose is not punishment, but security. A state prison inmate has no right to a particular classification under state law, and prison officials must have broad discretion, free from judicial intervention, in classifying prisoners in terms of their custodial status.); *Thompson v. County of Medina*, 29 F.3d 238 (6th Cir. 1994) (Pretrial detainees challenging county's failure to properly classify inmates according to seriousness of charged crimes failed to adequately allege that classification system violated their Eighth Amendment right to personal safety, absent any claim that they ever suffered injury as result of jail's classification system or showing of causal link between alleged fights and assaults among other inmates and classification system.); *Burciaga v. County of Lenawee*, 123 F.Supp.2d 1076, 1078 (E.D. Mich. 2000) (Although neither the court nor the parties have found binding precedent squarely on point, the overwhelming weight of persuasive authority holds that unless the state has an intent to punish, or at least displays an indifference toward potential harm to an inmate, pretrial detainees have no due process right to be housed separately from sentenced inmates. Conversely, neither the state nor its agents may place a pretrial detainee in certain housing conditions if their intent is to punish that detainee or if their decision is made in a manner that is deliberately indifferent to the safety of that detainee.) (citations omitted).

The state, by its own actions, may create liberty interests protected by the due process clause. *Beard v. Livesay*, 798 F.2d 874, 876 (6th Cir. 1986) citing *Hewitt v. Helms*, 459 U.S. 460, 469, 103 S.Ct. 864, 870, 74 L.Ed.2d 675 (1983); *Bills v. Henderson*, 631 F.2d 1287, 1291 (6th Cir.1980). In *Olim v. Wakinekona*, 461 U.S. 238, 249, 103 S.Ct. 1741, 1747, 75 L.Ed.2d 813 (1983), the United States Supreme Court described when the action of a state will create such an interest. The state creates a protected liberty interest by placing substantive limitations on official discretion. *Olim* at 249. *Doe v. Sullivan County*, 956 F.2d 545, 557 (6th Cir. 1992) (This court has stated that "where substantive limitations have in fact been placed on the discretion of prison officials in classifying inmate's [sic] security status, a protectible liberty interest has been created."). "If the decisionmaker is not 'required to base its decisions on objective and defined criteria,' but instead 'can deny the requested relief for any constitutionally permissible reason or for no reason at all,' *ibid.*, the State has not created a constitutionally protected liberty interest." *Connecticut Board of Pardons v. Dumschat*, 452 U.S. 458, 466-467, 101 S.Ct. 2460, 2465, 69 L.Ed.2d 158 (1981) (BRENNAN, J., concurring). See *Vitek v. Jones*, 445 U.S. 480, 488-491, 100 S.Ct. 1254, 1261-1262, 63 L.Ed.2d 552 (1980) (summarizing cases). "Prison administrators therefore should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgement are needed to preserve internal order and discipline and to maintain institutional security." *Bell v. Wolfish*, 441 U.S. 520, 547, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979).

Segregation of Sexes

Reference Number: CTAS-1363

Pursuant to T.C.A. § 41-4-110, male and female prisoners, except husband and wife, cannot be kept in the same cell or room in the jail. There are no reported cases in Tennessee that address this section of the code. However, it is beyond controversy that male and female prisoners may lawfully be segregated within a prison system. "Gender-based prisoner segregation and segregation based upon prisoners' security levels are common and necessary practices." *Klinger v. Dept. of Corrections*, 107 F.3d 609, 615 (8th Cir.

1997). "Indeed, the physical differences between male and female inmates may require different regulation in order to promote safety and hygiene." *Ahkeen v. Parker*, 2000 WL 52771 (Tenn. Ct. App. 2000). Nevertheless, the Eighth Amendment does not require the separate placement of inmates based on sex. *Galvan v. Carothers*, 855 F.Supp. 285 (D. Alaska 1994) (The placement of a female inmate in an all-male prison wing did not constitute cruel and unusual punishment.); *Dimarco v. Wyoming Department of Corrections*, 300 F.Supp.2d 1183, 1192-1194 (D. Wyo. 2004) (The placement of an intersexual inmate, who was of alleged female gender but was anatomically situated as a male due to the presence of a penis, in segregated confinement for a period of 438 days, with concomitant severely limited privileges, solely because of the condition and status of ambiguous gender was not a violation of the Eighth Amendment prohibition against cruel and unusual punishment where the safety of the inmate and other inmates was secured by placing the inmate in administrative segregation, and the inmate was provided the basic necessities of food, shelter, clothing and medical treatment.); *Lucrecia v. Samples*, 1995 WL 630016 (N.D. Cal. 1995) (The transfer of a transsexual inmate to an all-male facility and her housing in an all-male cell did not violate the due process clause where the inmate failed to demonstrate the infringement of a liberty interest.).

Supervision of Inmates

Reference Number: CTAS-1364

The sheriff or other person must remain in the jail every night from 8 o'clock p.m. to 6 o'clock a.m. T.C.A. § 41-4-113.

All prisoners must be personally observed by a staff member at least once every hour on an irregular schedule. More frequent observation must be provided for prisoners who are violent, suicidal, mentally ill or intoxicated, and for prisoners with other special problems or needs. The time of all such checks must be logged, as well as the results. The facility must have a system to physically count prisoners and record the results on a 24 hour basis. *At least one formal count shall be conducted for each shift.* Rules of the Tennessee Corrections Institute, Rule 1400-1-.16(2) and Rule 1400-1-.16(3).

Incidents that involve or endanger the lives or physical welfare of custodial officers or prisoners must be recorded in a daily log and retained. Such incidents shall include, at a minimum:

1. Death;
2. Attempted suicide;
3. Escape;
4. Attempted escape;
5. Fire;
6. Riot;
7. Battery on a staff member or inmate;
8. Serious infectious disease within facility; and
9. Sexual Assault.
 - A. An investigation shall be conducted and documented whenever a sexual assault or threat is reported; and
 - B. Victims of sexual assault are referred under appropriate security provisions to a community facility for treatment and gathering evidence.

Rules of the Tennessee Corrections Institute, Rule 1400-1-.16(4).

Pursuant to state regulations, prisoners are not permitted to supervise, control, assume or exert authority over other prisoners. Rules of the Tennessee Corrections Institute, Rule 1400-1-.16(6). It has been held that the failure to provide adequate personnel to ensure security at the jail and the continued use of inmate trustees to carry out sensitive tasks such as carrying the keys and distributing drugs violates the Eighth Amendment. *Nicholson v. Choctaw County*, 498 F.Supp. 295, 309 (S.D. Ala. 1980); *Gates v. Collier*, 501 F.2d 1291, 1308 (5th Cir. 1974) (holding trusty system, which utilized unscreened inmates violated state law, and which allowed inmates to exercise unchecked authority over other inmates, constituted cruel and unusual punishment in violation of the Eighth Amendment). *See also Dawson v. Kendrick*, 527 F.Supp. 1252, 1289-1290 (S.D. W.Va. 1981) (finding that the inadequacy of the jail's staffing and the systematic inadequacy of supervision at the jail placed prisoners in reasonable fear for their safety and well being and that the understaffing practice was not rationally connected to a legitimate governmental interest; holding that the failure to retain a trained staff of sufficient numbers gave rise to an unreasonable risk of violence in the jail and constituted a violation of the 14th Amendment as to pretrial detainees and the Eighth Amendment as to convicted prisoners).

Monitoring of Inmates by Guards of the Opposite Sex

Reference Number: CTAS-1365

Pursuant to state regulations, facilities that are used for the confinement of females must have a trained female officer on duty or on call when a female is confined in the facility to perform the following functions: (1) searches, and (2) health and welfare checks. Rules of the Tennessee Corrections Institute, Rule 1400-1-.16(5).

Numerous courts "have viewed female inmates' privacy rights vis-a-vis being monitored or searched by male guards as qualitatively different than the same rights asserted by male inmates vis-a-vis female prison guards." *Colman v. Vasquez*, 142 F.Supp.2d 226, 232 (D. Conn. 2001) (Female inmate assigned by prison to special unit for victims of sexual abuse retained limited right to bodily privacy under Fourth Amendment, and thus could maintain an action against prison officials for subjecting her to pat down search by male guards based on violations of Fourth Amendment.). See also *Hill v. McKinley*, 311 F.3d 899, 904 (8th Cir. 2002) ("Thus, we hold that Hill's Fourth Amendment rights were violated when the defendants allowed her to remain completely exposed to male guards for a substantial period of time after the threat to security and safety had passed."); *Jordan v. Gardner*, 986 F.2d 1521, 1530-1531 (9th Cir. 1993) (en banc) (holding that the prison's policy, which required male guards to conduct random, nonemergency, suspicionless clothed body searches on female prisoners, constituted cruel and unusual punishment in violation of the Eighth Amendment); *Lee v. Downs*, 641 F.2d 1117, 1120 (4th Cir.1981) (upholding jury verdict for violation of privacy interests of female inmate who was forced to undress in the presence of male guards).

The United States Supreme Court has held that "the Fourth Amendment proscription against unreasonable searches does not apply within the confines of the prison cell." See *Hudson v. Palmer*, 468 U.S. 517, 526-528, 104 S.Ct. 3194, 3200-3201, 82 L.Ed.2d 393 (1984) (upholding, against Fourth Amendment challenge, a policy permitting random cell searches) ("A right of privacy in traditional Fourth Amendment terms is fundamentally incompatible with the close and continual surveillance of inmates and their cells required to ensure institutional security and internal order.").

At least one court has construed *Hudson* as holding categorically that the Fourth Amendment does not protect privacy interests within prisons. In *Johnson v. Phelan*, 69 F.3d 144 (7th Cir.1995), cert. denied, 519 U.S. 1006, 117 S.Ct. 506, 136 L.Ed.2d 397 (1996), the Seventh Circuit Court of Appeals held that "the [F]ourth [A]mendment does not protect privacy interests within prisons." *Id.* at 150. The court found that permitting female guards to monitor naked male inmates does not violate the inmates' privacy rights and does not constitute cruel and unusual punishment so long as the monitoring policy has not been adopted to humiliate or harass the inmate. *Id.* at 145-150. See also *Canedy v. Boardman*, 16 F.3d 183 (7th Cir.1994), which holds that a right of privacy limits the ability of wardens to subject men to body searches by women, or the reverse. But see *Peckham v. Wisconsin Dept. of Corrections*, 141 F.3d 694, 697 (7th Cir.1998) (narrowing *Johnson v. Phelan*, rejecting interpretation of *Canedy* and *Johnson* that Fourth Amendment does not apply to prisoners).

In 1993, the Ninth Circuit Court of Appeals observed that "prisoners' legitimate expectations of bodily privacy from persons of the opposite sex are extremely limited" and that, while inmates "may have protected privacy interests in freedom from cross-gender clothed body searches, such interests have not yet been judicially recognized. *Jordan v. Gardner*, 986 F.2d 1521, 1524-1525 (9th Cir. 1993) (en banc). However, the court held that the prison's policy, which required male guards to conduct random, nonemergency, suspicionless clothed body searches on female prisoners, constituted cruel and unusual punishment in violation of the Eighth Amendment. *Id.* at 1530-1531.

In *Somers v. Thurman*, 109 F.3d 614 (9th Cir. 1997), the Ninth Circuit considered a male inmate's claim that his Fourth and Eighth Amendment rights were violated when he was subjected to routine visual body cavity searches by female guards and when female guards watched him showering naked. At the outset, the court noted that "we have never held that a prison guard of the opposite sex cannot conduct routine visual body cavity searches of prison inmates ... [n]or have we ever held that guards of the opposite sex are forbidden from viewing showering inmates." *Id.* at 620. The court held that the guards were entitled to qualified immunity on the plaintiff's Fourth Amendment claim. Rejecting the Fourth Amendment claim the court stated: "Thus, it is highly questionable even today whether prison inmates have a Fourth Amendment right to be free from routine unclothed searches by officials of the opposite sex, or from viewing of their unclothed bodies by officials of the opposite sex. Whether or not such a right exists, however, there is no question that it was not clearly established at the time of the alleged conduct." *Id.* at 622. The court also rejected the inmates Eighth Amendment claim noting that "[c]ross-gender searches 'cannot be called inhumane and therefore do[] not fall below the floor set by the objective component of the [E]ighth [A]mendment.'" *Id.* at 623 (citation omitted). The court distinguished *Somers* from *Jordan* by noting that the "psychological differences between men and women," ... "may well cause women and

especially physically and sexually abused women, to react differently to searches of this type than would male inmates subjected to similar searches by women." *Id.*

In *Carlin v. Manu*, 72 F.Supp.2d 1177 (D. Or. 1999), female inmates in the state prison brought an action against male correctional officers alleging that skin searches performed on the female inmates in the presence of the male officers violated their Fourth and Eighth Amendment rights. The district court held that the male correctional officers were entitled to qualified immunity on the female inmates' claims that skin searches by female correctional officers in the presence of the male officers violated their Fourth and Eighth Amendment rights, since observation by male guards during strip searches of female inmates was not clearly identified as unlawful under existing constitutional law. Significant to the court's holding were the facts that although the male guards looked at female inmates they did not touch them, and the observation was an isolated event occasioned by emergency removal of female inmates to a male prison. The court concluded "that while precedent indicates that it is possible the Court of Appeals might in the future recognize a right by female inmates to be free from the presence of and viewing by male guards while they were being strip searched, that right is not now, and was not in February 1996, a 'clearly established' one which would foreclose the defendants from qualified immunity." *Id.* at 1178.

Other courts, including the Sixth Circuit, have concluded that inmates retain limited rights to bodily privacy under the Fourth Amendment. In *Cornwell v. Dahlberg*, 963 F.2d 912, 916 (6th Cir.1992) the Sixth Circuit noted that it has joined other circuits "in recognizing that a convicted prisoner maintains some reasonable expectations of privacy while in prison, particularly where those claims are related to forced exposure to strangers of the opposite sex, even though those privacy rights may be less than those enjoyed by non-prisoners." The court held that "in challenging the conditions of his outdoor strip search before several female OSR correctional officers, Cornwell raised a valid privacy claim under the Fourth Amendment ..." *Id.* The court based its conclusion on the Fourth Amendment but without mentioning *Hudson*. See also *Everson v. Michigan Dept. of Corrections*, 391 F.3d 737, 757 (6th Cir. 2004).

In an earlier case the Sixth Circuit did cite *Hudson* and noted that the United States Supreme Court has never held that the Fourth Amendment "right to privacy" encompasses the right to shield one's naked body from view by members of the opposite sex. *Kent v. Johnson*, 821 F.2d 1220, 1226 (6th Cir.1987). Nevertheless, the court concluded "that there must be a fundamental constitutional right to be free from forced exposure of one's person to strangers of the opposite sex." *Id.* The court went on to hold that "assuming that there is some vestige of the right to privacy retained by state prisoners and that this right protects them from being forced unnecessarily to expose their bodies to guards of the opposite sex, the instant complaint did state a constitutional claim upon which relief can be granted." The court also held that the male inmate had stated a claim under the Eighth Amendment by alleging that female prison guards had allowed themselves unrestricted views of his naked body in the shower, at close range and for extended periods of time, to retaliate against, punish and harass him for asserting his right to privacy. *Id.* at 1227-1228.

In a more recent case, the Sixth Circuit held that the accidental viewing of a female pretrial detainee's bare breasts by a male jailer while she was being searched by two female jailers did not violate the Fourth Amendment in the absence of any evidence that either the normal search policy was unconstitutional or that it was carried out in an unconstitutional manner. *Mills v. City of Barbourville*, 389 F.3d 568, 578-579 (6th Cir. 2004). However, the court noted that "[a]s to jail employees of the opposite gender viewing prison inmates or detainees, we have recognized that a prison policy forcing prisoners to be searched by members of the opposite sex or to be exposed to regular surveillance by officers of the opposite sex while naked--for example while in the shower or using a toilet in a cell--would provide the basis of a claim on which relief could be granted." *Id.* See also *Roden v. Sowders*, 84 Fed.Appx. 611 (6th Cir. 2003) (Strip search of male prisoner in the presence of female sergeant did not violate prisoner's Fourth Amendment privacy rights or Eighth Amendment rights. Search was reasonable under the circumstances and was reasonably related to the legitimate penological interest of security and order.); *Henning v. Sowders*, 19 F.3d 1433 (Table) (6th Cir. 1994) (Involuntary body cavity search of female inmate in the presence of male officers did not violate prisoner's Fourth Amendment privacy rights and was reasonably related to the legitimate penological interests of safety and security.); *Rose v. Saginaw County*, 353 F.Supp.2d 900 (E.D. Mich. 2005) (Jail policy of taking all the clothing from detainees confined in administrative segregation violates the Fourth and Fourteenth Amendments of the Constitution based upon the facts of the case.); *Wilson v. City of Kalamazoo*, 127 F.Supp.2d 855 (W.D. Mich. 2000) (Detaining arrestee in jail without any clothing or covering, with limited exposure to viewing by members of the opposite sex, violates detainee's right of privacy under the Fourth Amendment. The removal of detainee's underclothing was not adequately justified even if they were removed as a suicide prevention measure.); *Johnson v. City of Kalamazoo*, 124 F.Supp.2d 1099 (W.D. Mich. 2000) (Stripping male pretrial detainees to their underwear after detainees refused to answer intake question as to whether they were suicidal did not violate detainees' right of privacy under Fourth Amendment, even though disrobing occurred in presence

of female officers.).

Cell Searches

Reference Number: CTAS-1366

It is clear that prisoners have no Fourth Amendment rights against searches of their prison cells.

In *Hudson v. Palmer*, 468 U.S. 517, 104 S.Ct. 3194, 82 L.Ed.2d 393 (1984), the United States Supreme Court addressed the question of whether the Fourth Amendment applies within a prison cell. The court held that it does not.

[W]e hold that society is not prepared to recognize as legitimate any subjective expectation of privacy that a prisoner might have in his prison cell and that, accordingly, the Fourth Amendment proscription against unreasonable searches does not apply within the confines of the prison cell. The recognition of privacy rights for prisoners in their individual cells simply cannot be reconciled with the concept of incarceration and the needs and objectives of penal institutions.

Id. at 526-528, 104 S.Ct. at 3200-3201.

The *Hudson* Court upheld, against a Fourth Amendment challenge, a policy permitting random cell searches.

The uncertainty that attends random searches of cells renders these searches perhaps the most effective weapon of the prison administrator in the constant fight against the proliferation of knives and guns, illicit drugs, and other contraband. The Court of Appeals candidly acknowledged that "the device [of random cell searches] is of obvious utility in achieving the goal of prison security."

A requirement that even random searches be conducted pursuant to an established plan would seriously undermine the effectiveness of this weapon. It is simply naive to believe that prisoners would not eventually decipher any plan officials might devise for "planned random searches," and thus be able routinely to anticipate searches. The Supreme Court of Virginia identified the shortcomings of an approach such as that adopted by the Court of Appeals and the necessity of allowing prison administrators flexibility:

"For one to advocate that prison searches must be conducted only pursuant to an enunciated general policy or when suspicion is directed at a particular inmate is to ignore the realities of prison operation. Random searches of inmates, individually or collectively, and their cells and lockers are valid and necessary to ensure the security of the institution and the safety of inmates and all others within its boundaries. This type of search allows prison officers flexibility and prevents inmates from anticipating, and thereby thwarting, a search for contraband." *Marrero v. Commonwealth*, 222 Va. 754, 757, 284 S.E.2d 809, 811 (1981).

We share the concerns so well expressed by the Supreme Court and its view that wholly random searches are essential to the effective security of penal institutions.

Id. at 528-529, 104 S.Ct. at 3201-3202. *See also Block v. Rutherford*, 468 U.S. 576, 589-591, 104 S.Ct. 3227, 3234-3235, 82 L.Ed.2d 438 (1984) (holding that a county jail's practice of conducting random, irregular shakedown searches of pretrial detainees' cells in the absence of the detainees was a reasonable response by jail officials to legitimate security concerns and did not violate the Due Process Clause of the Fourteenth Amendment); *Bell v. Wolfish*, 441 U.S. 520, 555-557, 99 S.Ct. 1861, 1882-1884, 60 L.Ed.2d 447 (1979) (holding requirement that pretrial detainees remain outside their cells during routine "shakedown" inspections by prison officials did not violate the Fourth Amendment, but simply facilitated the safe and effective performance of searches); *State v. Dulsworth*, 781 S.W.2d 277 (Tenn. Crim. App. 1989) (A prisoner does not have a justifiable, reasonable or legitimate expectation of privacy that is subject to invasion by law enforcement officers, as the United States Supreme Court ruled in *Hudson v. Palmer*, 468 U.S. 517, 104 S.Ct. 3194, 82 L.Ed.2d 393 (1984)); *State v. Gant*, 537 S.W.2d 711 (Tenn. Crim. App. 1975) (We think it is recognized that, for safety and security purposes, prison officials are authorized to search a prisoner's cell without a warrant for weapons.).

Support of Inmates

Reference Number: CTAS-1367

"[W]hen the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well being." *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189, 199-200, 109 S.Ct. 998, 1005-1006, 103 L.Ed.2d 249 (1989).

The Eighth Amendment to the Constitution of the United States, reinforced by the Fourteenth

Amendment, prohibits the imposition of cruel and unusual punishment. It is much too late in the day for states and prison authorities to think that they may withhold from prisoners the basic necessities of life, which include reasonably adequate food, clothing, shelter, sanitation, and necessary medical attention.

It should not need repeating that compliance with constitutional standards may not be frustrated by legislative inaction or failure to provide the necessary funds.

On the other hand, lawful incarceration necessitates withdrawal of or limitations upon many individual privileges and rights. A prisoner does not retain constitutional rights that are inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system. Wide ranging deference must be accorded the decisions of prison administrators. They, and not the courts, must be permitted to make difficult judgments concerning prison operations.

If the State furnishes its prisoners with reasonably adequate food, clothing, shelter, sanitation, medical care, and personal safety, so as to avoid the imposition of cruel and unusual punishment, that ends its obligations under Amendment Eight.

Newman v. State of Alabama, 559 F.2d 283, 286, 291 (5th Cir. 1977) (citation omitted).

Every person committed to jail may furnish their own support under such precautions as the jailer may deem proper to adopt for the purpose of guarding against escapes and to prevent the importation of intoxicants or narcotics. If support is not furnished by the prisoner, it must be furnished by the jailer. T.C.A. § 41-4-108.

In 1978, the attorney general opined that "a sheriff does not have the authority to absolutely ban the importation of any food into the jail by prisoners, but may set up reasonable rules regarding such importation."

It would not be unreasonable, therefore, for a sheriff to regulate the importation of food if he does so for the purpose of preventing escapes or the importation of contraband. The dangers are obvious.

Case law directly on point is nonexistent. There is, however, much authority for the proposition that the courts will not interfere with the right of prison officials to enforce reasonable regulations to maintain discipline and security within prisons.

Op. Tenn. Atty. Gen. No. 78-55 (January 31, 1978).

However, in 1979, the United States Supreme Court ruled that the prohibition against pretrial detainees' receipt of packages of food and personal items from outside a federal correctional facility did not violate the Fifth Amendment, especially in view of obvious fact that such packages were handy devices for smuggling of contraband. *Bell v. Wolfish*, 441 U.S. 542, 554-555, 99 S.Ct. 1875, 1882, 60 L.Ed.2d 447 (1979).

Prison officials must be allowed to take reasonable precautions to guard against the smuggling of weapons, drugs or other contraband, the presence of which could pose a serious threat to the safety of corrections personnel and other inmates, or indeed, to the institution itself. Thus, in *Bell v. Wolfish*, 441 U.S. 542, 558-59, 99 S.Ct. 1875, 1884-85 (1979), the Supreme Court held that requiring inmates to submit to so serious an intrusion as body-cavity searches after every contact visit with a person outside the institution did not violate the Fourth Amendment.

Smith v. Fairman, 678 F.2d 52, 54 (7th Cir. 1982).

Provisions shall be made so that inmates can regularly obtain the following minimum hygiene items:

- (a) Soap;
- (b) Toothbrush;
- (c) Toothpaste or toothpowder;
- (d) Comb;
- (e) Toilet paper;
- (f) Hygiene materials for women; and,
- (g) Shaving equipment.
- (h) These items or services shall be made available at the inmate's expense unless the inmate cannot afford to pay, in which case the inmate shall be provided the item or services free of charge. Rules of the Tennessee Corrections Institute, Rule 1400-1-.15(3).

Inmates shall be allowed freedom in personal grooming except when a valid governmental interest justifies otherwise. Arrangements for haircuts shall be made available, at the inmate's expense, on a regular basis. If an inmate cannot afford this service, it shall be provided free of charge. Rules of the Tennessee Corrections Institute, Rule 1400-1-.15(5).

Non-smoking inmates shall not be exposed to second-hand smoke. Rules of the Tennessee Corrections Institute, Rule 1400-1-.16(7).

Food and Bedding

Reference Number: CTAS-1368

Pursuant to T.C.A. § 41-4-109, the jailer must furnish adequate food and bedding for the inmates. See Rules of the Tennessee Corrections Institute, Rule 1400-1-.10 and .15. See also *Leach v. Shelby County Sheriff*, 891 F.2d 1241, 1247 (6th Cir. 1989) (Tennessee law provides that the sheriff has a duty to provide adequate food and bedding, maintain cleanliness and provide toiletries and showers.); *State v. Trotter*, 218 S.W. 230 (Tenn. 1920) (It is the duty of the sheriff to see that prisoners in a county jail are supplied with wholesome drinking water, but he need not furnish such water at his own expense.); *Grubbs v. Bradley*, 552 F.Supp. 1052, 1122 (M.D. Tenn. 1982) (The Eighth Amendment clearly requires states to furnish its inmates with reasonably adequate food.). Each inmate who is detained overnight shall be provided with the following standard issue:

- One clean fire-retardant mattress in good repair;
- One clean mattress cover;
- If pillows are provided, they shall be fire-retardant and a clean pillowcase shall be provided;
- Sufficient clean blankets to provide comfort under existing temperature conditions; and,
- One clean bath-size towel. Rules of the Tennessee Corrections Institute, Rule 1400-1-.15(6).
- Further, the Rules of the Rules of the Tennessee Corrections Institute, Rule 1400-1-.15(7). requires that facilities maintain an adequate supply of bedding and towels so that the following laundry or cleaning frequencies may be adhered to: (a) Sheets, pillowcase, mattress covers, and towels shall be changed and washed at least once a week; (b) All mattresses shall be disinfected quarterly and documented; and, (c) Blankets shall be laundered monthly and sterilized before re-issue.

The failure to properly prepare and serve nutritionally adequate food to inmates who are unable, due to their confinement, to seek alternative sources of nutrition can constitute a violation of the inmates' Eighth and Fourteenth Amendment rights. *Nicholson v. Choctaw County*, 498 F.Supp. 295, 309 (S.D. Ala. 1980). See also *Trotter v. Engelsing*, 2004 WL 2567632, *3 (E.D. Mich. 2004) ("The Supreme Court has held that the Eighth Amendment imposes upon prison officials the duty to 'provide humane conditions of confinement,' and that among the obligations attendant to the discharge of that duty is to 'ensure that inmates receive adequate food, clothing, shelter, and medical care.'") citing *Farmer v. Brennan*, 511 U.S. 825, 832, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994); *Aldridge v. 4 John Does*, 2005 WL 2428761 (W.D. Ky. 2005).

The Eighth Amendment to the Constitution requires only that states provide an inmate with "nutritionally adequate food." *State v. York*, 701 N.E.2d 463, 469 (Ohio App. 1997) citing *Ramos v. Lamm*, 639 F.2d 559, 570-571 (10th Cir. 1980), cert. denied, 450 U.S. 1041, 101 S.Ct. 1759, 68 L.Ed.2d 239 (1981); *Newman v. Alabama*, 559 F.2d 283, 291 (5th Cir. 1977), rev'd in part on other grounds, *Alabama v. Pugh*, 438 U.S. 781, 98 S.Ct. 3057, 57 L.Ed.2d 1114 (1978) ("If the State furnishes its prisoners with reasonably adequate food, ... that ends its obligations under Amendment Eight."). "A well-balanced meal, containing sufficient nutritional value to preserve health, is all that is required." *Smith v. Sullivan*, 553 F.2d 373, 380 (5th Cir. 1977). "The Eighth Amendment does not require prisons to provide prisoners with more salubrious air, healthier food, or cleaner water than are enjoyed by substantial numbers of free Americans." *Carroll v. DeTella*, 255 F.3d 470, 472 (7th Cir. 2001) (citations omitted).

Food Service Operations

Food service guidelines and a menu pattern approved by a dietician, at least annually, shall be used by each facility in the preparation of meals. Menu evaluations shall be conducted, at least quarterly, by food service supervisory staff to verify adherence to the established basic dietary servings. Working inmates shall receive at least three meals every twenty-four hours with no more than fourteen hours between any two meals. At least two of these meals shall be hot. Non-working inmates shall receive at least two meals every twenty-four hours with no more than fourteen hours between any two meals. Variations may be allowed based on weekend and holiday food service demands, as long as basic nutritional goals are met. All meals shall be prepared (except when catered) and served under the direct supervision of staff. Written policy and procedure shall require that accurate records are maintained on the number of meals served per day, the actual food served, and meal schedule. Rules of the Tennessee Corrections Institute, Rule 1400-1-.10(2), (3), (4), and (6).

Inmates involved in the preparation of the food shall receive an agency-approved pre-assignment medical

screening to ensure freedom from illness transmittable by food or utensils. Facilities shall have a policy to insure those currently assigned to food service preparation duties that are identified by food service staff as having an illness or infection shall be removed from those duties. Rules of the Tennessee Corrections Institute, Rule 1400-1-.10(5).

Facilities shall inspect all food service areas on a weekly basis, including dining and food preparation areas and equipment by administrative, medical, or food service personnel. Rules of the Tennessee Corrections Institute, Rule 1400-1-.10(7).

Written policy shall require that food shall never be used as a reward or disciplinary measure. Rules of the Tennessee Corrections Institute, Rule 1400-1-.10(7).

Modified diets shall be prepared for inmates when requested by medical staff or by a physician's order and all reasonable efforts shall be made to accommodate dietary needs of a religion. Rules of the Tennessee Corrections Institute, Rule 1400-1-.10(9).

Shelf goods shall be maintained between forty-five degrees and eighty degrees Fahrenheit; refrigerated goods between thirty-five degrees and forty degrees Fahrenheit; and frozen foods at zero degrees Fahrenheit or below. Refrigerators shall be clean and contain a thermometer. All food products shall be stored at least six to eight inches off the floor on shelves or in shatter-proof containers with tight fitting lids. Rules of the Tennessee Corrections Institute, Rule 1400-1-.10(10), (12), and (13)

The preparation or storage of open food, other than a reasonable amount of commissary food, shall not be permissible in the immediate housing area. Rules of the Tennessee Corrections Institute, Rule 1400-1-.10(11)

Insecticide, cleaning agents and poisonous substances shall be plainly labeled and stored away from food. Culinary equipment (knives and other sharp instruments) shall be securely stored, inventoried and their use controlled. Stoves shall be equipped with operable hooded exhaust systems and the filters shall be kept clean. Rules of the Tennessee Corrections Institute, Rule 1400-1-.10(14), (15), and (16)

Cleanliness

Reference Number: CTAS-1369

Jailers are required by statute to enforce cleanliness in their respective jails. They are required to furnish the necessary apparatus for shaving once a week, provide bathing facilities separate for males and females, furnish hot and cold water, provide clean and sufficient bedding, and provide laundering once a week to prisoners who are not able to provide for themselves. Jailers are required to keep the jails clean, and must remove all filth from each cell once every 24 hours. T.C.A. § 41-4-111. See Rules of the Tennessee Corrections Institute, Rule 1400-1-.09 and Rule 1400-1-.15. See also *Leach v. Shelby County Sheriff*, 891 F.2d 1241, 1247 (6th Cir. 1989) (Under Tennessee law the sheriff has the responsibility of conforming to at least minimal constitutional standards in providing and maintaining adequate bedding, toiletries, and cleanliness.). Facilities shall be clean and in good repair. Floors throughout the facility shall be kept clean, dry, and free from any hazardous materials or substance. Rules of the Tennessee Corrections Institute, Rule 1400-1-.09(2)

A facility employee shall make daily sanitation and safety inspections. Dates of inspections shall be recorded and conditions noted. Any maintenance problems shall be recorded on a regular maintenance report. Rules of the Tennessee Corrections Institute, Rule 1400-1-.09(3). Additionally, facility administrators shall develop a list of articles and materials that shall be allowed in the cell area. Inmates shall be informed of this list upon admission. Rules of the Tennessee Corrections Institute, Rule 1400-1-.05(6)

It has been held that the "failure to regularly provide prisoners with clean bedding, towels, clothing and sanitary mattresses, as well as toilet articles including soap, razors, combs, toothpaste, toilet paper, access to a mirror and sanitary napkins for female prisoners constitutes a denial of personal hygiene and sanitary living conditions." *Dawson v. Kendrick*, 527 F.Supp. 1252, 1288-1289 (S.D. W.Va. 1981) (finding conditions to be violative of the 14th Amendment as to pretrial detainees and the Eighth Amendment as to convicted prisoners) (citation omitted); *Laaman v. Helgemoe*, 437 F.Supp. 269, 310 (D. N.H. 1977) (When the deprivation of basic elements of hygiene and the presence of unsanitary conditions in the cells threaten the health of the occupants, the Constitution is violated.).

The Eighth Amendment requires states to furnish its inmates with reasonably sanitary conditions, reasonably adequate ventilation, hygienic materials, and utilities (i.e., hot and cold water, light, heat, plumbing). Inmates must be furnished with materials to keep their cells clean and for the maintenance of personal hygiene. *Grubbs v. Bradley*, 552 F.Supp. 1052, 1122-1123 (M.D. Tenn. 1982). "Where reasonably sanitary conditions are not maintained, an Eighth Amendment violation may be sustained."

Jones v. Stine, 843 F.Supp. 1186, 1190 (W.D. Mich. 1994) *citing Walker v. Mintzes*, 771 F.2d 920, 928 (6th Cir.1985); *Grubbs v. Bradley*, 552 F.Supp. 1052, 1122-23 (M.D. Tenn. 1982). *See Brown v. Brown*, 46 Fed.Appx. 324 (6th Cir. 2002) (Any inconvenience that prisoner suffered due to his inability to purchase personal hygiene and toiletry items for several months because of unlawful hold on his account did not demonstrate a condition of confinement that fell beneath the minimal civilized measure of life's necessities, and therefore did not violate Eighth Amendment.); *Lunsford v. Bennett*, 17 F.3d 1574 (7th Cir. 1994) (Delay in providing inmates with requested hygiene supplies for approximately a 24- hour period found not to violate the Eighth Amendment where the record contained no evidence indicating that inmates' cells were unusually dirty or unhealthy, or that health hazards existed.); *White v. Nix*, 7 F.3d 120, 121 (8th Cir. 1993) (No Eighth Amendment violation found where inmate was housed in a screened cell for 11 days. All the cells in the cellblock were equipped with a toilet, a sink with hot and cold water, a bed and table, and each cell was wired for cable television.); *Jones v. Stine*, 843 F.Supp. 1186, 1190 (W.D. Mich. 1994) (Mere denial of cleanser and disinfectant found not to violate the Eighth Amendment where inmate had access to running water, a sponge and weekly access to a mop and duster.).

The lack of adequate ventilation and air flow can violate the minimum requirements of the Eighth Amendment if it undermines the health of inmates and the sanitation of the jail. *Hoptowit v. Spellman*, 753 F.2d 779, 784 (9th Cir. 1985) *citing Ramos v. Lamm*, 639 F.2d 559, 569 (10th Cir. 1980), *cert. denied*, 450 U.S. 1041, 101 S.Ct. 1759, 68 L.Ed.2d 239 (1981). While courts have recognized that a constitutional right to adequate ventilation exists, it does not assure the right to be free from all discomfort. *Board v. Farnham*, 394 F.3d 469, 486 (7th Cir. 2005). "Inadequate ventilation, usually in combination with other factors, may give rise to an Eighth Amendment claim. However, the problem must be extreme. Conditions such as poor ventilation, or dry air, do not fall below 'the minimal civilized measure of life's necessities,' absent medical or scientific proof that such conditions exposed a prisoner to diseases or respiratory problems which he would not otherwise have suffered." *Gibson v. Ramsey*, 2004 WL 407025, *7 (N.D. Ill. 2004) (citations omitted). *See Bomer v. Lavigne*, 101 Fed.Appx. 91 (6th Cir. 2004) (Lack of power in prisoner's cell from Friday until Monday, when electrician was scheduled to perform repair, could not support civil rights claim under Eighth Amendment where, aside from a lack of ventilation, prisoner did not allege that he was harmed by the power outage.); *Ingram v. Jewell*, 94 Fed.Appx. 271 (6th Cir. 2004) (Confiscation of electrical extension cord used by state inmate to operate fan to ventilate his cell did not violate Eighth Amendment given absence of allegation that cell ventilation was so inadequate as to fall below minimal civilized measure of life's necessities.); *Shelby County Jail Inmates v. Westlake*, 798 F.2d 1085 (7th Cir. 1986) (Sufficient evidence existed to support jury finding that ventilation in county jail was adequate and did not constitute punishment of pretrial detainees or cruel and unusual punishment of convicted inmates.); *Carver v. Knox County*, 753 F.Supp. 1370 (E.D. Tenn. 1989) (County jail intake center's lack of adequate ventilation was constitutionally impermissible under either Eighth or 14th Amendments.).

Forcing a nonsmoking prisoner with a serious medical need to share a cell with a prisoner who smokes can constitute a violation of the Eighth Amendment. *Talal v. White*, 403 F.3d 423, 427 (6th Cir. 2005). "[T]he mere existence of non-smoking pods does not insulate a penal institution from Eighth Amendment liability where, as here, a prisoner alleges and demonstrates deliberate indifference to his current medical needs and future health." *Id.* *See also Wilcox v. Lewis*, 47 Fed.Appx. 714 (6th Cir. 2002) (Alleged exposure of state prisoner, who was diagnosed with cancer, to environmental tobacco smoke (ETS) did not violate his Eighth Amendment rights where there was no evidence that ETS had anything to do with his serious medical condition, prison officials were not aware that prisoner had any serious medical need for a smoke-free environment, and each cell in prison had separate intake and exhaust ventilation system and prisoners were permitted to smoke only in their cells and in prison yard.).

"Adequate lighting is one of the fundamental attributes of 'adequate shelter' required by the Eighth Amendment." *Hoptowit v. Spellman*, 753 F.2d 779, 783 (9th Cir. 1985) (holding that the lighting at the penitentiary violated the Eighth Amendment where the evidence showed that the lighting was so poor that it was inadequate for reading and caused eyestrain and fatigue and hindered attempts to ensure that basic sanitation was maintained). It has been held that the "failure to provide security quality lighting fixtures of sufficient illumination to permit detainees and convicted inmates to read without injury to their vision constitutes a danger to the health and security of pre-trial detainees and prisoners alike." *Dawson v. Kendrick*, 527 F.Supp. 1252, 1288 (S.D. W.Va. 1981) (citation omitted). "Inadequate lighting has been recognized in a variety of contexts as constituting cruel and unusual punishment violative of the Eighth Amendment when, in the absence of a valid governmental interest, it unnecessarily threatens the physical and mental well-being of prisoners." *Id.*

Such conditions as poor plumbing and sewage systems rise to the level of a constitutional violation where they appear "in such disrepair as to deprive inmates of basic elements of hygiene and seriously threaten their physical and mental well-being." *Jones v. City and County of San Francisco*, 976 F.Supp. 896, 910

(N.D. Cal. 1997) *citing Hoptowit v. Spellman*, 753 F.2d 779, 783 (9th Cir. 1985). See also *Dawson v. Kendrick*, 527 F.Supp. 1252, 1288 (S.D. W.Va. 1981) (finding antiquated, neglected and unsanitary state of the plumbing and the plumbing fixtures was both punitive and violative of the 14th Amendment rights of the pretrial detainees and the Eighth Amendment rights of the convicted inmates; further finding that conditions constituted a breach of county officials statutory duties under state law to keep the jail in a "clean, sanitary and healthful condition" and in "constant and adequate repair"). But see *Benjamin v. Fraser*, 2003 WL 22038387 (2d Cir. 2003) (Although some showers at city jails provided water that was either too hot or too cold, such plumbing problems were not sufficiently pervasive to amount to violation of pretrial detainees' due process rights.).

Medical Care of Inmates

Reference Number: CTAS-1370

It is the duty of the county legislative body to provide medical attendance for all prisoners confined in the county jail. The county legislative body shall authorize the compensation of the county jail physician, as agreed upon in writing between the county and the attending jail physician, or as may be fixed by the county legislative body. T.C.A. § 41-4-115(a). The Tennessee Supreme Court has recognized that it is the statutory duty of the county legislative body to furnish the services of a physician to treat illnesses of inmates. *George v. Harlan*, 1998 WL 668637, *4 (Tenn. 1998). See also *Manus v. Sudbury*, 2003 WL 22888883, *4 (Tenn. Ct. App. 2003) ("By statute, county legislative bodies alone have the power and duty to provide medical care to prisoners confined in their jail."). Cf. *County Hosp. Auth. v. Bradley County*, 66 S.W.3d 888, 889 (Tenn. Ct. App. 2001); *Leach v. Shelby County Sheriff*, 891 F.2d 1241, 1250 (6th Cir. 1989) ("Contracting out prison medical care does not relieve the State of its constitutional duty to provide adequate medical treatment to those in its custody, and it does not deprive the State's prisoners of the means to vindicate their Eighth Amendment rights."); *Willis v. Barksdale*, 625 F.Supp. 411 (W.D. Tenn. 1985) (medical needs); *Andrews v. Camden County*, 95 F.Supp.2d 217, 228 (D. N.J. 2000). See also *West v. Atkins*, 487 U.S. 42, 108 S.Ct. 2250, 101 L.Ed.2d 40 (1988).

Pursuant to state regulations, provision of medical services for the jail is to be the responsibility of a designated medical authority such as a hospital, clinic, or physician. There shall be an agreement between the county and the designated medical authority responsible for providing the medical services. The designated medical authority must be notified in instances where an inmate may be in need of medical treatment and the jail must document this notification. The health authority shall meet with the Sheriff and/or facility administrator at least annually. Rules of the Tennessee Corrections Institute, Rule 1400-1-.13(2). Note: Contracting out jail medical care does not relieve the county of its constitutional duty to provide adequate medical treatment to those in its custody. *Leach v. Shelby County Sheriff*, 891 F.2d 1241, 1250 (6th Cir. 1989). Medical decisions are the sole province of the responsible health care provider and shall not be countermanded by non-medical personnel. Rules of the Tennessee Corrections Institute, Rule 1400-1-.13(3)

All health care professional staff shall comply with applicable state and federal licensure, certification, or registration requirements. Verification of current credentials shall be available upon request from the provider. Health care staff shall work in accordance with profession specific job descriptions approved by the health authority. If inmates are assessed or treated by non-licensed health care personnel, the care shall be provided pursuant to written standing or direct orders by personnel authorized to give such orders. Rules of the Tennessee Corrections Institute, Rule 1400-1-.13(4)

In *Chattanooga-Hamilton County Hospital Authority v. Bradley County*, 33 TAM 11-1, 3/10/2008, Ramsey was shot by an off-duty Bradley County law enforcement officer and was transported to Chattanooga-Hamilton County Hospital Authority for treatment. The hospital was notified by a law enforcement officer to hold Ramsey. The Hospital Authority filed suit against Bradley County for Ramsey's medical bills pursuant to T.C.A. 41-4-115. The Trial Court awarded hospital judgment for the amount of bill representing time from admittance of Ramsey until the requested hold was removed. The Tennessee Court of Appeals affirmed the trial court's decision. The Tennessee Supreme Court reversed and dismissed the case holding that simple notification by a county law enforcement agency asking a hospital to secure a patient until time of release from treatment does not operate to establish liability of a county for medical expenses under T.C.A. 41-4-115

In *Cornett v. Mathes*, 2008 WL 5110795 (E.D. Tenn., 2008) a prisoner's federal civil rights claim was dismissed for failure to state a claim for which relief could be granted. The prisoner alleged that the prison and several other defendants violated his Eighth Amendment right not to be subjected to cruel and unusual punishment when he was denied medical care in regards to an injured rib. By the prisoner's own allegation, however, he was seen by a medical provider, escorted to the emergency room for xrays, and later seen by a physician. While the prisoner's contentions may have stated a claim for medical

malpractice, no Eighth Amendment claim is stated by allegations that a medical condition has been negligently diagnosed or treated. U.S.C.A. Const.Amend. 8; 42 U.S.C.A. § 1983.

In *Crawley v. Bragg*, 2008 WL 5111116 (M.D. Tenn., 2008), the U.S. District Court of Middle Tennessee determined that a prison did not deny an inmate medical care in violation of the Eighth Amendment. The inmate did not suffer from a serious medical need. Further, even if the inmate had had a serious medical need, the prison did not act with deliberate indifference as the inmate was examined, blood work was done, and he was referred for follow-ups. U.S.C.A. Const.Amend. 8.

"The right to adequate medical care is guaranteed to convicted federal prisoners by the Cruel and Unusual Punishment Clause of the Eighth Amendment, and is made applicable to convicted state prisoners and to pretrial detainees (both federal and state) by the Due Process Clause of the Fourteenth Amendment." *Johnson v. Karnes*, 398 F.3d 868, 873 (6th Cir. 2005).

The Eighth Amendment's proscription of the failure to provide medical care to prisoners was delineated by the United States Supreme Court in *Estelle v. Gamble*, 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976), as follows:

An inmate must rely on prison authorities to treat his medical needs; if the authorities fail to do so, those needs will not be met. In the worst cases, such a failure may actually produce physical "torture or a lingering death," the evils of most immediate concern to the drafters of the Amendment. In less serious cases, denial of medical care may result in pain and suffering which no one suggests would serve any penological purpose.

The infliction of such unnecessary suffering is inconsistent with contemporary standards of decency as manifested in modern legislation codifying the common-law view that "(i)t is but just that the public be required to care for the prisoner, who cannot by reason of the deprivation of his liberty, care for himself."

We therefore conclude that deliberate indifference to serious medical needs of prisoners constitutes the "unnecessary and wanton infliction of pain," proscribed by the Eighth Amendment. This is true whether the indifference is manifested by prison doctors in their response to the prisoner's needs or by prison guards in intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed. Regardless of how evidenced, deliberate indifference to a prisoner's serious illness or injury states a cause of action under § 1983.

Id. at 103-105, 97 S.Ct. at 290-291 (citations and footnotes omitted).

Although the Eighth Amendment's protections apply specifically to post-conviction inmates, the Due Process Clause of the Fourteenth Amendment operates to guarantee those same protections to pretrial detainees as well. Where any person acting under color of state law abridges rights secured by the Constitution or United States laws, including a detainee's Eighth and Fourteenth Amendment rights, 42 U.S.C. § 1983 provides civil redress.

The Supreme Court has adopted a mixed objective and subjective standard for ascertaining the existence of deliberate indifference in the context of the Eighth Amendment: [A] prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference. The objective component of the test requires the existence of a "sufficiently serious" medical need. A sufficiently serious medical need is predicated upon the inmate demonstrating that he or she "is incarcerated under conditions imposing a substantial risk of serious harm."

The subjective component, by contrast, requires a showing that the prison official possessed "a sufficiently culpable state of mind in denying medical care." Deliberate indifference requires a degree of culpability greater than mere negligence, but less than "acts or omissions for the very purpose of causing harm or with knowledge that harm will result." The prison official's state of mind must evince "deliberateness tantamount to intent to punish." "Knowledge of the asserted serious needs or of circumstances clearly indicating the existence of such needs, is essential to a finding of deliberate indifference." Thus, "an official's failure to alleviate a significant risk that he should have perceived but did not, while no cause for commendation, cannot under our cases be condemned as the infliction of punishment."

Miller v. Calhoun County, 408 F.3d 803, 812-813 (6th Cir. 2005) (citations omitted). See also *Butler v. Madison County Jail*, 109 S.W.3d 360, 366 (Tenn. Ct. App. 2002) ("When a prisoner suffers pain needlessly and relief is readily available, they have a cause of action against those whose deliberate indifference is the cause of suffering.").

"Mere negligence, mistake or difference of medical opinion in the provision of medical care to prisoners do not rise to an Eighth Amendment deprivation under the *Estelle* standard." *Dawson v. Kendrick*, 527 F.Supp. 1252, 1306 (D.C. W.Va. 1981). See also *Butler v. Madison County Jail*, 109 S.W.3d 360, 366 (Tenn. Ct. App. 2002) (Neither negligence nor gross negligence will support a § 1983 claim.). Moreover, officials are "entitled to rely on the professional judgment of trained medical personnel with regards to a prisoner's medical history and the need for medical care." *Miltier v. Beorn*, 896 F.2d 848, 854-855 (4th Cir. 1990). "A prisoner's difference of opinion with prison physicians regarding the type of treatment he should receive does not rise to the level of a constitutional violation." *Rauh v. Ward*, 112 Fed.Appx. 692, 695 (10th Cir. 2004); *LaFlame v. Montgomery County Sheriff's Department*, 3 Fed.Appx. 346 (6th Cir. 2001) (Jail inmate's difference of opinion with doctor over his diagnosis and treatment does not state an Eighth Amendment claim.); *Westlake v. Lucas*, 537 F.2d 857, 860 n. 5 (6th Cir.1976) (same).

Furthermore, not all inadequate medical treatment rises to the level of an Eighth Amendment violation. "Thus, a complaint that a physician has been negligent in diagnosing or treating a medical condition does not state a valid claim of medical mistreatment under the Eighth Amendment. Medical malpractice does not become a constitutional violation merely because the victim is a prisoner. In order to state a cognizable claim, a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs." *Estelle*, 429 U.S. at 106, 97 S.Ct. at 292. A plaintiff must prove "objectively that he was exposed to a substantial risk of serious harm," and that "jail officials acted or failed to act with deliberate indifference to that risk," which requires actual knowledge and deliberate disregard. *Victoria W. v. Larpenter*, 369 F.3d 475, 483 (5th Cir. 2004) (citation omitted). See also *Butler v. Madison County Jail*, 109 S.W.3d 360, 366 (Tenn. Ct. App. 2002) ("In order to state a cognizable claim, a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs.") (citation omitted).

Inmates are not entitled to "unqualified access to health care." *Hudson v. McMillan*, 503 U.S. 1, 9, 112 S.Ct. 995, 1000, 117 L.Ed.2d 156 (1992). Nor are they entitled to a medical program that caters to their every whim. *Meadows v. Woods*, 1994 WL 267957, *2 (W.D. Tenn. 1994). "The right to treatment is ... limited to that which may be provided upon a reasonable cost and time basis and the essential test is one of medical necessity and not simply that which may be considered merely desirable." *Bowring v. Godwin*, 551 F.2d 44, 47-48 (4th Cir. 1977). See also *Dean v. Coughlin*, 804 F.2d 207, 215 (2d Cir.1986) ("The Constitution does not command that inmates be given the kind of medical attention that judges would wish to have for themselves....") (citation omitted); *Woodall v. Foti*, 648 F.2d 268, 272 (5th Cir. 1981) ("[T]he essential test is one of medical necessity and not one simply of desirability."); *Feliciano v. Gonzalez*, 13 F.Supp.2d 151, 208 (D.C. P.R. 1998) (Under the Eighth Amendment, the standard of care for inmates does not include the most sophisticated care that money can buy, but only that which is reasonably appropriate within modern and prudent professional standards in the field of medicine and health.). Cf. *Nicholson v. Choctaw County*, 498 F.Supp. 295, 308 (S.D. Ala. 1980) (The county is under no duty to provide prosthetic devices such as eyeglasses or dentures, or to provide routine diagnostic care for inmates. These services are not provided by the county to its free world citizens, and a person does not gain a greater right to services or benefits upon being convicted of a criminal offense.). But see *Newman v. Alabama*, 349 F.Supp. 278, 286-288 (M.D. Ala. 1972) (Upholding the right to prosthetic care for inmates in a long-term facility.).

Budgetary constraints do not justify the intentional withholding of necessary medical care. *Jones v. Johnson*, 781 F.2d 769, 770-72 (9th Cir. 1986). However, the county is required only to furnish inmates with routine and emergency medical care. The county is not required to furnish other and additional elective medical care, which is not essential to the immediate welfare of the inmates and the lack of which poses no threat to life or limb. See *Kersh v. Bounds*, 501 F.2d 585, 588-589 (4th Cir. 1974); *Jackson v. Fair*, 846 F.2d 811, 817 (1st Cir.1988) ("Although the Constitution does require that prisoners be provided with a certain minimum level of medical treatment, it does not guarantee to a prisoner the treatment of his choice."). See also *Buckley v. Correctional Medical Services, Inc.*, 125 Fed.Appx. 98 (8th Cir. 2005) (Inmate failed to establish that 20-month delay in scheduling elective elbow surgery after it was recommended was deliberate indifference to inmate's serious medical need, as required to support inmate's § 1983 action against medical provider.); *Grundy v. Norris*, 26 Fed.Appx. 588 (8th Cir. 2001) (Delay in shoulder surgery did not amount to constitutional violation where medical evidence showed that the surgery was elective and the delay was not of great concern.); *Olson v. Stotts*, 9 F.3d 1475 (10th Cir. 1993) (An 11-day delay in elective heart surgery did not constitute deliberate indifference.); *Cook v. Hayden*, 1991 WL 75648, *3 (D. Kan. 1991) ("[T]he mere delay of elective surgery does not establish a violation of an inmate's protected rights."). But see *McCabe v. Prison Health Services*, 117 F.Supp.2d 443, 450 (E.D. Pa. 1997) (The fact that a surgery is elective "does not abrogate the prison's duty, or power, to promptly provide necessary medical treatment for prisoners."); *Delker v. Maass*, 843 F.Supp. 1390, 1400 (D. Or. 1994) ("Where surgery is elective, prison officials may properly consider the costs and benefits of treatment in determining whether to authorize that surgery, but the words 'elective surgery' are not a

talisman insulating prison officials from the reach of the Eighth Amendment. Each case must be evaluated on its own merits.”).

Continuity of care is required from admission to transfer or discharge from the facility, including referral to community-based providers, when indicated. When health care is transferred to providers in the community, appropriate information shall be shared with the new providers in accordance with consent requirements. Prior to release from custody or transfer, inmates with known serious health conditions shall be referred to available community resources by the jail’s health care provider currently providing treatment. Rules of the Tennessee Corrections Institute, Rule 1400-1-.13(5).

All intersystem transfer inmates (transferred from one confinement facility to another within the same county’s jurisdiction) shall receive a health screening by health-trained or qualified health care personnel, which commences on their arrival at the facility. All findings are recorded on a screening form approved by the health authority. At a minimum, the screening includes the following:

- A review of the inmate’s medical, dental, and mental health problems;
- Current medications; and
- Current treatment plan. Rules of the Tennessee Corrections Institute, Rule 1400-1-.13(10)

Detoxification from alcohol, opiates, hypnotics, and other stimulants shall be conducted under medical supervision in accordance with local, state, and federal laws. When performed at the facility, detoxification shall be prescribed in accordance with clinical protocols approved by the health authority. Specific criteria shall be established for referring symptomatic inmates suffering from withdrawal or intoxication for more specialized care at a hospital or detoxification center. Rules of the Tennessee Corrections Institute, Rule 1400-1-.13(16)

Informed consent standards of the jurisdiction shall be observed and documented for inmate care in a language understood by the inmate. In the case of minors, the informed consent of a parent, guardian, or a legal custodian applies when required by law. Inmates routinely have the right to refuse medical interventions. When health care is rendered against the inmate’s will, it shall be in accordance with state and federal laws and regulations. Rules of the Tennessee Corrections Institute, Rule 1400-1-.13(22)

The use of inmates in medical, pharmaceutical, or cosmetic experiments is prohibited. This does not preclude inmate access to investigational medications on a case-by-case basis for therapeutic purposes in accordance with state and federal regulations. Rules of the Tennessee Corrections Institute, Rule 1400-1-.13(24).

When an inmate is paced in segregation for health concerns, health care personnel shall be informed as soon as practical and provide assessment and review as indicated by the protocols established by the health authority. Rules of the Tennessee Corrections Institute, Rule 1400-1-.13(27).

Medical/dental instruments and supplies (syringes, needles, and other sharp instruments) shall be inventoried, securely stored, and use shall be controlled. Rules of the Tennessee Corrections Institute, Rule 1400-1-.13(28).

Pregnant inmates shall have access to obstetrical services (prenatal, partum, and post-partum care) by a qualified health care provider. Rules of the Tennessee Corrections Institute, Rule 1400-1-.13(27)

Inmates with chronic medical conditions, such as diabetes, hypertension, and mental illness shall receive periodic care by a qualified health care provider in accordance with individual treatment plans that include monitoring of medications and laboratory testing. Rules of the Tennessee Corrections Institute, Rule 1400-1-.13(30)

The health authority shall develop and approve protocols for identifying and evaluating major risk management events related to inmate health care, including inmate deaths, preventable adverse outcomes, and serious medication errors. Rules of the Tennessee Corrections Institute, Rule 1400-1-.13(33).

Medical Emergencies

In case of medical emergencies, there shall be specific information readily accessible to all employees such as telephone numbers and names of persons to be contacted, so that professional medical care can be received. There shall also be available the names and telephone numbers of persons to contact in case of death. Rules of the Tennessee Corrections Institute, Rule 1400-1-.13(25).

Medical Screening

Reference Number: CTAS-1371

An initial medical screening must be performed on all inmates upon admission to the jail prior to their

placement in the general housing area. The findings shall be recorded on a printed screening form. The officer performing this duty shall check for:

1. A serious illness;
2. A comatose state;
3. Obvious wounds;
4. Prescribed medications; and,
5. Suicide risk assessment, including suicidal ideation or history of suicidal behavior or other mental health illness. Rules of the Tennessee Corrections Institute, Rule 1400-1-.13(8)

It is generally recognized that prompt medical screening is a medical necessity in pretrial detention facilities. When an inmate presents with a treatable medical problem, jail officials are required to ensure that the inmate receives proper medical treatment. See *Neal v. Swigert*, 2005 WL 1629779, *3 (S.D. Ohio 2005) (Conducting a rectal examination on an inmate complaining of urological problems during an initial medical screening does not amount to cruel and unusual punishment.); *Aaron v. Finkbinder*, 793 F.Supp. 734, 737 (E.D. Mich. 1992) (Sheriff's deputy who booked insulin-dependent diabetic prisoner was not deliberately indifferent to prisoner's medical needs, even though he failed to record on prisoner's medical screening chart that prisoner needed to be provided with insulin, where he called and advised clinic that prisoner was diabetic and in need of insulin.).

The nonconsensual testing of inmates for tuberculosis is constitutional. *Karlovetz v. Baker*, 872 F.Supp. 465 (N.D. Ohio 1994), citing *Dunn v. White*, 880 F.2d 1188 (10th Cir.1989) (holding that a nonconsensual test for HIV does not violate a prisoner's constitutional rights). It has been held that a prison's failure to test all incoming inmates for tuberculosis and other serious communicable diseases violates noninfected inmates' Eighth Amendment rights. *LaReau v. Manson*, 651 F.2d 96, 109 (2nd Cir.1981); *Gates v. Collier*, 501 F.2d 1291 (5th Cir. 1974) (same). Cf. *Zaire v. Dalsheim*, 698 F.Supp. 57, 60 (S.D. N.Y. 1988) (holding that the forcible administration of inoculations for diphtheria-tetanus administered solely for the protection of the prisoner and other inmates, and not for purposes such as illicit punishment or nonconsensual psychotherapy, did not violate the constitution), *aff'd*, 904 F.2d 33 (2d Cir. 1990); *Ormond v. State*, 599 So.2d 951, 957-958 (Miss. 1992) (holding that the state's interest in eliminating the spread of infectious disease among closely confined jail population outweighed any privacy interest of defendant; accordingly, taking defendant to health department for treatment of his gonorrhea did not violate the inmate's privacy interest).

Pursuant to Tennessee law, the sheriff is authorized to hire a female registered nurse and a male registered nurse who are authorized to make complete physical examinations of all persons committed to the custody of the sheriff for the purpose of preventing the spread of any contagious disease. Such physical examinations may include the taking of blood tests and Pap smear tests and any other tests that are approved and recommended by the county health officer. All females committed to the custody of the sheriff are to be examined only by the female registered nurse hired for that purpose, and all males committed to the custody of the sheriff are to be examined by the male nurse hired for that purpose. T.C.A. § 41-4-138. See *Haywood County v. Hudson*, 740 S.W.2d 718, 719 (Tenn. 1987); *George v. Harlan*, 1998 WL 668637, *4 (Tenn. 1998) ("It appears to this Court that the services of nurses to prevent the spread of disease, and the services of a physician to treat illnesses are separate and distinct functions, the furnishing of the former being a statutory duty of the sheriff, and the furnishing of the latter being a statutory duty of the county legislative body.").

HIV Testing of Persons Convicted of Sexual Offenses-Release of Test Results

Reference Number: CTAS-2134

TCA 39-13-521 provides for:

(a) When a person is initially arrested for violating § 39-13-502, § 39-13-503, § 39-13-506, § 39-13-522, § 39-13-531 or § 39-13-532 that person shall undergo human immunodeficiency virus (HIV) testing immediately, or not later than forty-eight (48) hours after the presentment of the information or indictment, with or without the request of the victim. A licensed medical laboratory shall perform the test at the expense of the person arrested. The person arrested shall obtain a confirmatory test when necessary and shall be referred to appropriate counseling.

(b) (1) The licensed medical laboratory shall report the results of the HIV test required under this section immediately to the victim.

(2) The result of any HIV test required under this section is not a public record and shall be available only to:

(A) The victim;

(B) The parent or guardian of a minor or incapacitated victim;

(C) The attending physician of the person tested and of the victim;

(D) The department of health;

(E) The department of correction;

(F) The person tested; and

(G) The district attorney general prosecuting the case.

(c) If the arrestee is convicted, the court shall review the HIV test results prior to sentencing.

(d) (1) For purposes of this section, "HIV" means the human immunodeficiency virus or any other identified causative agent of acquired immunodeficiency syndrome.

(2) For purposes of this section, "HIV test" means a test of an individual for the presence of human immunodeficiency virus, or for antibodies or antigens that result from HIV infection, or for any other substance specifically indicating infection with HIV. The department of health shall promulgate rules designating the proper test method to be used for this purpose.

(3) Nothing in this section shall be construed to require the actual transmission of HIV in order for the court to consider it as a mandatory enhancement factor.

(e) Upon the conviction of the defendant for a violation of § 39-13-513, § 39-13-514 or § 39-13-515, the court shall order the convicted person to submit to an HIV test. The test shall be performed by a licensed medical laboratory at the expense of the defendant. The defendant shall obtain a confirmatory test when necessary. The defendant shall be referred to appropriate counseling. The defendant shall return a certified copy of the results of all tests to the court. The court shall examine results in camera and seal the record. For the sole purpose of determining whether there is probable cause to prosecute a person for aggravated prostitution under § 39-13-516, the district attorney general may view the record, notwithstanding the provisions of subdivision (b)(2). The district attorney general shall be required to file a written, signed request with the court stating the reason the court should grant permission for the district attorney general to view the record. If the test results indicate the defendant is infected with HIV, then the district attorney general may use the results of the test in a prosecution for aggravated prostitution.

Medical Segregation

Reference Number: CTAS-1372

Inmates suffering from communicable diseases and those who are sick but do not require hospitalization shall be housed separate from other inmates as recommended by health care authorities.. Rules of the Tennessee Corrections Institute, Rule 1400-1-.13(26).

Placement in medical isolation is a permissible administrative intake procedure when an inmate refuses to take a TB test. *Johnson v. County of Nassau*, 2005 WL 991700 (E.D. N.Y. 2005), citing *Hewitt v. Helms*, 459 U.S. 460, 468, 103 S.Ct. 864, 74 L.Ed.2d 675 (1983). See also *Davis v. City of New York*, 142 F.Supp.2d 461, 464 (S.D. N.Y. 2001) (The brief placement of an inmate in medical isolation in order to restrict his exposure to the general population and facilitate a medical examination in consequence of his refusal to submit a blood sample did not violate any constitutional rights because it served the legitimate penological interest of insuring the health and safety of other prisoners.); *Jones-Bey v. Wright*, 944 F.Supp. 723, 732 (N.D. Ind. 1996) (Placement of prisoner who refused to submit to TB screening test in medical isolation unit for maximum of 40 days did not violate Eighth Amendment cruel and unusual punishments clause.); *Westbrook v. Wilson*, 896 F.Supp. 504 (D. Md. 1995) (Regulation and practice of placing inmates who refuse to submit to test for TB in medical segregation is constitutional; test is minimally intrusive, related to legitimate prison management goal of protecting other inmates and staff, and placement in medical segregation is reasonable.).

Several federal circuit courts have upheld against constitutional challenge the practice of segregating HIV-positive prisoners from the rest of the prison population on the theory that such segregation is a reasonable anticontagion measure even though it incidentally and necessarily effects disclosure of medical information. In *Harris v. Thigpen*, 941 F.2d 1495, 1521 (11th Cir. 1991), the Eleventh Circuit Court of Appeals found that the decision to segregate HIV-positive inmates from the general prison population served a legitimate penological interest in reducing the transmission of HIV and reducing the threat of violence. See also *Onishea v. Hopper*, 171 F.3d 1289, 1297-1299 (11th Cir. 1999) (allowing segregation of HIV-positive prisoners), *cert. denied*, 528 U.S. 1114, 120 S.Ct. 931, 145 L.Ed.2d 811 (2000). Other courts of appeals have likewise upheld the segregation of HIV-positive inmates from the general population. See, e.g. *Moore v. Mabus*, 976 F.2d 268, 271 (5th Cir. 1992) (finding HIV segregation policy reasonably related to legitimate penological interests); *Matthews v. Graham*, 235 F.3d 1339 (Table) (5th Cir. 2000) (Placement in administrative segregation in a county jail for three months due to HIV-positive status serves a legitimate penological interest.); *Carter v. Lowndes County*, 89 Fed.Appx. 439 (5th Cir. 2004) (County's segregation policy for inmates with contagious diseases served a legitimate penological interest.); *Camarillo v. McCarthy*, 998 F.2d 638, 640 n. 2 (9th Cir. 1993) (reserving question of whether HIV segregation policy is constitutional but holding officers entitled to qualified immunity); *Bowman v. Beasley*, 8 Fed.Appx. 175, 178-179 (4th Cir. 2001) (The practice of segregating HIV-positive inmates is within the wide deference afforded prison administrators, and it is reasonably related to legitimate penological interests.). Cf. *Anderson v. Romero*, 72 F.3d 518, 525 (7th Cir.1995) (holding that the constitutional rights of an HIV-positive inmate are not infringed when prison officials undertake to warn prison officials and inmates who otherwise may be exposed to contagion, even if those warnings are administered on an ad hoc basis).

In *McRoy v. Sheahan*, 2005 WL 1926560 (N.D. Ill. 2005), the district court found that jail officials were not deliberately indifferent to the presence of tuberculosis bacteria in the jail in violation of the 14th Amendment rights of a pretrial detainee who contracted latent form of tuberculosis where jail officials followed the screening, isolation, and treatment policies of the Centers for Disease Control (CDC) and the American Thoracic Society (ATS).

Temporary inconveniences incurred while being held in medical segregation usually do not rise to the level of a constitutional violation. *Taggart v. MacDonald*, 131 Fed.Appx. 544, 546 (9th Cir. 2005) (upholding dismissal of inmate's claims regarding his confinement in medical segregation because his allegations that he was temporarily deprived of reading material, temporarily unable to properly cleanse himself, and was yelled at by a prison official, were not objectively serious enough to rise to a constitutional claim).

Information to At-Risk Employees Regarding Infectious Diseases

Reference Number: CTAS-1468

Where there has been a potential exposure to an infectious disease in a correctional facility, the institution is required to inform affected employees, contract employees and visitors. When an incident occurs that may have resulted in exposure to disease, the institution must test the inmate, with or without his or her consent, to determine if the inmate is infected with a blood-borne pathogen such as hepatitis B or HIV. The institution is required to disclose the results of the test to each employee, law enforcement officer or visitor who reasonably believes he or she was potentially exposed to a life-threatening disease or pathogen. However, confidential medical information is not to be released to the general public. T.C.A. § 41-51-102.

Similar provisions in T.C.A. § 39-13-112 apply in cases where a law enforcement officer, firefighter, correctional officer, youth services officer, probation and parole officer, employee of the Department of Correction or Department of Children's Services, emergency medical or rescue worker, EMT, or paramedic is the victim of an aggravated assault and comes into actual contact with blood or other body fluid of the arrestee. When that occurs, upon the request of the victim, the arrestee shall undergo HIV testing immediately. The test shall be performed by a licensed medical laboratory at the expense of the arrestee. Test results are not a public record and are available to only the victim and certain other people listed in the statute. If the arrestee is infected with HIV, that person shall be liable for the victim's medical bills and other expenses related to the victim's exposure to HIV upon a finding that such exposure was from the arrestee.

Protection Against Blood Borne Pathogens

Reference Number: CTAS-2137

The superintendent, director or warden of any correctional institution or county or municipal jail or

workhouse shall provide training in universal precaution from blood borne pathogens for all employees at risk for potential occupational exposure to blood borne pathogens, including, but not limited to, hepatitis B or HIV (AIDS). Voluntary vaccinations shall be provided and strongly encouraged for all employees at risk. In order to increase the awareness of the need for practicing universal precaution, the superintendent, director or warden may periodically warn all employees at risk of potential exposure that a portion of the inmate population is likely to be infected with a blood borne pathogen. TCA 41-51-101

Physical Examination

Reference Number: CTAS-1373

A more complete examination shall be completed on inmates within fourteen (14) days of their initial confinement date. If the facility can document that health appraisal was conducted within the previous ninety (90) days, this fourteen (14)-day physical is not required unless medical conditions dictate otherwise. This examination shall be performed by a physician or a person who has been designated by a physician as capable of performing such examination. If a designee performs the examination he/she must do so under supervision of a physician and with a protocol or set of instructions and guidelines from the physician. This examination shall include:

- (a) Inquiry into current illness and health problems, including those specific to women;
- (b) Inquiry into medications taken and special health requirements;
- (c) Screening of other health problems designated by the responsible physician;
- (d) Behavioral observation, including state of consciousness and mental status;
- (e) Notification of body deformities, trauma markings, bruises, lesions, jaundice, ease of movement, etc.;
- (f) Condition of skin and body orifices, including rashes and infestations;
- (g) Disposition/referral of prisoners to qualified medical personnel on an emergency basis;
- (h) A review of the initial intake receiving screening; and,
- (i) An individual treatment plan as appropriate.

Rules of the Tennessee Corrections Institute, Rule 1400-1-.13(9).

An intake physical examination is advisable in order to screen out drug addicts, alcoholics, and physical ailments for treatment, to avoid contagion within the jail population, and as a public health function. *Collins v. Schoonfield*, 344 F.Supp. 257, 277 (D. Md. 1972) (Lack of complete physical examination for inmates upon entry into city jail did not constitute cruel and unusual punishment under constitutional standards as they existed in 1972.). See also *Smith v. Swanson*, 2004 WL 1157433 (Ohio App. 2004) (County jail inmate's § 1983 complaint alleging that upon his arrival at the jail he was denied a proper physical examination failed to allege "serious deprivation of human need" as required to state a claim for a violation of Eighth Amendment's cruel and unusual punishment cause.); *Mawby v. Ambroyer*, 568 F.Supp. 245, 250 (E.D. Mich. 1983) (Failure to provide incoming inmates with a physical exam found not to violate the Eighth Amendment absent claim that inmates had actually been denied treatment of any serious medical needs.).

Sick Call

Reference Number: CTAS-1374

Sick call, conducted by a physician or other person designated by a physician as capable of performing such duty, shall be available to each inmate according to a written procedure for sick call. All inmates must be informed of these procedures including any copay requirements, as well as procedures for submitting grievances, upon admission. Rules of the Tennessee Corrections Institute, Rule 1400-1-.13(11).

While society does not expect that inmates will have unqualified access to health care, a jail official who does not attend to the serious medical needs of an inmate violates that inmate's constitutional right. See *Hudson v. McMillian*, 503 U.S. 1, 9, 112 S.Ct. 995, 1000, 117 L.Ed.2d 156 (1992). See also *Dawson v. Kendrick*, 527 F.Supp. 1252, 1308 (S.D. W.Va. 1981) (holding that the "denial of adequate medical screening, classification, record keeping, sick call procedures and timely access to care at the Mercer County Jail constitutes deliberate indifference to the potentially serious medical needs of the pre-trial detainees and convicted prisoners alike in violation of the Eighth Amendment"); *Facility Review Panel v. Holden*, 356 S.E.2d 457, 460-461 (W.Va. 1987) (holding that failure to medically screen inmates upon admission, to keep medical records, or to hold regular sick call violated prohibition against cruel and

unusual punishment under federal constitution).

It has been held that sick call administered by prison security staff instead of medical staff violates constitutional standards and subjects prisoners to cruel and unusual punishment. *Carty v. Farrelly*, 957 F.Supp. 727, 737-738 (D. Virgin Islands 1997). It has also been held that providing inadequate medical staff effectively denies inmates access to diagnosis and treatment and constitutes deliberate indifference. *Inmates of Allegheny County Jail v. Pierce*, 612 F.2d 754, 762 (3d Cir. 1979). However, the mere fact that staff is not on "sick call" seven days a week does not constitute deliberate indifference to the serious medical needs of prisoners so long as emergency treatment is available during weekends and holidays. *Luca v. Scalzo*, 892 F.2d 83 (9th Cir. 1989) (The failure to provide regular medical office hours for two out of every seven days for nonemergency medical needs is not evidence of serious understaffing establishing deliberate indifference.); *Wood v. Housewright*, 900 F.2d 1332, 1335 (9th Cir.1990) (Only delays that cause substantial harm violate the Eighth Amendment.). See also *Gregory v. McGann*, 1992 WL 559661 (N.D. Ind. 1992) (finding policy of one day a week hospital sick call (except for emergencies) does not offend the Eighth Amendment); *Pounds v. Myers*, 76 Fed.Appx. 630 (6th Cir. 2003) (holding that allegations that nurse told inmate that he could be seen for only one complaint per sick call along with one day suspension of sick call privileges failed to state a claim upon which relief could be granted absent any allegation that the delay in receiving treatment had any detrimental effect on inmate's condition); *County of El Paso v. Dorado*, --- S.W.3d ----, 2005 WL 3254498 (Tex. App. 2005) ("Evidence of sick call requests, examinations, diagnoses and medications may rebut an inmate's claim of deliberate indifference.").

Medications

Reference Number: CTAS-1375

Facilities shall confiscate all medications in the possession of an inmate at the time of admission to the facility. The identification of and the need for such medication shall be verified by a physician or qualified health care personnel before it is administered. This shall include controlled drugs and injections. There must be strict control of medications to be issued to inmates. Medications issued to inmates shall be strictly controlled and shall be kept in a secure place within the administrative or medical offices in the facility. All medications shall be prescribed by a physician or his designee at the time of use. An officer or qualified health care personnel shall verify that the medication is taken as directed and a medication receipt system is established. This shall include controlled drugs and injections. Rules of the Tennessee Corrections Institute, Rule 1400-1-.13(18), (19) and (20).

It has been held that a prison official's actions of confiscating a diabetic prisoner's stockpiled medication and requiring him to take the medication under supervision did not amount to deliberate indifference to the prisoner's serious medical needs. *Jackson v. Lucine*, 119 Fed.Appx. 70 (9th Cir. 2004). See also *Loggins v. Phils*, 10 Fed.Appx. 793 (10th Cir. 2001) (Complaint alleging that a detention facility dispensed medication to inmate without first performing a physical examination or securing a doctor's prescription, resulting in significant side effects, stated, at most, a claim of medical malpractice, and did not state a claim under § 1983 for violation of civil rights, absent allegation of facts evidencing deliberate indifference to serious medical needs.).

"Differences in opinion by a doctor and a prisoner over the appropriate medication to be prescribed is a disagreement over a treatment plan and does not implicate the Eighth Amendment. The Eighth Amendment is not implicated by prisoners' complaints over the adequacy of the care they received when those claims amount to a disagreement over the appropriateness of a particular prescription plan. At most, such allegations may rise to the level of a medical malpractice claim, a type of action in which the Eighth Amendment is not implicated." *Veloz v. New York*, 339 F.Supp.2d 505, 525 (S.D. N.Y. 2004) (citations omitted). See *Houston v. Zeller*, 91 Fed.Appx. 956, 957 (5th Cir. 2004) (Inmate's disagreement with prison physician's choice of medications cannot support a claim of cruel and unusual punishment.); *White v. Correctional Medical Services Inc.*, 94 Fed.Appx. 262 (6th Cir. 2004) (same); *Chance v. Armstrong*, 143 F.3d 698, 702, 703 (2d Cir. 1998) (same). See also *Edens v. Larson*, 110 Fed.Appx. 710 (7th Cir. 2004) (holding that a doctor's refusal to dispense a medicine containing barbiturates until he could directly observe and evaluate an inmate's headaches was not so substantial a departure from reasonable and accepted practice as to imply deliberate indifference, so as to support the inmate's Eighth Amendment claim in a § 1983 suit); *Kittelson v. Nafrawi*, 112 Fed.Appx. 946 (5th Cir. 2004) (Inmate's claim that his receipt of other inmates' medication was negligent, medical malpractice, and illegal is not sufficient to establish deliberate indifference.).

The Eighth Amendment proscription on the infliction of cruel and unusual punishment prohibits jail guards from "intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed." *Zentmyer v. Kendall County*, 220 F.3d 805, 810 (7th Cir. 2000) (citations omitted). "Refusing to provide prescribed medication may violate the Constitution. However, as with any

other Eighth Amendment claim, plaintiff will have to show both that the denial of the medication caused a substantial risk of serious harm to his health *and* that defendants were deliberately indifferent to his health." *King v. Frank*, 328 F.Supp.2d 940, 948 (W.D. Wis. 2004) (citations omitted). *See also Cherry v. Berge*, 98 Fed.Appx. 513, 515 (7th Cir. 2004) (Prison staff act with deliberate indifference if they refuse to carry out a doctor's prescribed treatment in the face of a substantial risk to an inmate's health.).

The mere delay in administering medication to an inmate does not in and of itself constitute deliberate indifference to a serious medical need. *Van Court v. Lehman*, 137 Fed.Appx. 948 (9th Cir. 2005) (One-day delay in administering pain medication to inmate after he was injured in attack by another inmate did not demonstrate deliberate indifference to a serious medical need.). "Where the alleged lapses in treatment are minor and inconsequential in that they do not result in substantial risk of injury, an Eighth Amendment claim cannot be made out." *Atkins v. County of Orange*, 372 F.Supp.2d 377, 413 (S.D. N.Y. 2005). *See also Smith v. Carpenter*, 316 F.3d 178, 188 (2nd Cir. 2003) (Noting that "[a]lthough [inmate] suffered from an admittedly serious underlying condition, he presented no evidence that the two alleged episodes of missed medication resulted in permanent or on-going harm to his health..."); *Hill v. Dekalb Regional Youth Detention Ctr.*, 40 F.3d 1176, 1188 (11th Cir. 1994) ("An inmate who complains that delay in medical treatment rose to a constitutional violation must place verifying medical evidence in the record to establish the detrimental effect of the delay in the medical treatment to succeed."). The failure to "dispense bromides for the sniffles or minor aches and pains or a tiny scratch or a mild headache or minor fatigue - the sorts of ailments for which many people who are not in prison do not seek medical attention - does not ... violate the Constitution." *Zentmyer v. Kendall County*, 220 F.3d 805, 810 (7th Cir. 2000) (citations omitted).

It has been held that jail personnel are not deliberately indifferent to an inmate's serious medical need when they unsuccessfully attempt to get an inmate to take his prescribed medication. *Atwell v. Hart County*, 122 Fed.Appx. 215, 218 (6th Cir. 2005). It has also been held that jail personnel do not act with deliberate indifference in not dispensing an inmate's medication when the inmate refuses to comply with the rules for receiving medication. *Cherry v. Berge*, 98 Fed.Appx. 513, 515 (7th Cir. 2004), *citing Hernandez v. Keane*, 341 F.3d 137, 147 (2nd Cir. 2003) (no deliberate indifference where doctors attempted to provide post-operative treatment but inmate declined some of the treatment); *Watkins v. City of Battle Creek*, 273 F.3d 682, 686 (6th Cir. 2001) (Staff were not deliberately indifferent in failing to treat detainee when he denied need for treatment and staff did not force him to accept treatment.); *Logan v. Clarke*, 119 F.3d 647, 650 (8th Cir. 1997) (Doctor was not deliberately indifferent when inmate did not follow treatment instructions.). *See also Holley v. Deal*, 948 F.Supp. 711, 718-719 (M.D. Tenn. 1996) (Prison officials did not act with deliberate indifference in forcibly administering medication to inmate, and thus did not subject him to cruel and unusual punishment in violation of Eighth Amendment.).

In *Quint v. Cox*, 348 F.Supp.2d 1243, 1251 (D. Kan. 2004), the district court found that the sheriff's practice of not having a medical nurse or better trained personnel on staff to dispense medications to inmates did not amount to deliberate indifference to the inmates' serious medical needs.

Inmates do not have a constitutional right to take medications in private. *Chevrette v. Marks*, 558 F.Supp. 1133, 1134 (M.D. Pa. 1983) (An inmate is not subjected to cruel and unusual punishment simply because he is not allowed to take his prescribed medication in private.).

The jail's written policy and procedure must prohibit inmates from performing patient care services, scheduling health care appointments or having access to medications, health records or medical supplies and equipment. Rules of the Tennessee Corrections Institute, Rule 1400-1-.13(6).

At least one federal district court has held that the use of inmate trustees to carry out sensitive tasks such as distributing drugs violates the Eighth Amendment. *Nicholson v. Choctaw County*, 498 F.Supp. 295, 309 (S.D. Ala. 1980).

Medical Records

Reference Number: CTAS-1376

Medical and mental health records on the inmate's physical condition on admission, during confinement, and at discharge shall be kept in a separate file from the inmate's other facility records. The medical record shall indicate all medical orders issued by the facility's physician and/or any other health care personnel who are responsible for rendering health care services. These medical records shall be retained for a period of ten (10) years after the inmate's release. Rules of the Tennessee Corrections Institute, Rule 1400-1-.13(21).

Jail personnel have a duty to maintain complete medical records on each inmate. Records should also be kept on drugs administered to inmates. *Nicholson v. Choctaw County*, 498 F.Supp. 295, 309 (S.D. Ala. 1980) (The failure to keep adequate medical records constitutes a danger to the lives and health of

inmates.). See also *Dawson v. Kendrick*, 527 F.Supp. 1252, 1306-1307 (S.D. W.Va. 1981) (The Eighth Amendment has also been held to be implicated when a prison's "inadequate, inaccurate and unprofessionally maintained medical records" give rise to "the possibility for disaster stemming from a failure to properly chart" medical care received by prisoners.), citing *Burks v. Teasdale*, 492 F.Supp. 650, 676 (W.D. Mo. 1980).

Whether prisoners have any constitutional privacy rights in their prison medical records and treatment appears to be an unsettled question. In *Doe v. Delie*, 257 F.3d 309 (3d Cir. 2001), the Third Circuit Court of Appeals joined the Second Circuit in recognizing that the constitutional right to privacy in one's medical information exists in prison.

We acknowledge, however, that a prisoner does not enjoy a right of privacy in his medical information to the same extent as a free citizen. We do not suggest that Doe has a right to conceal this diagnosed medical condition from everyone in the corrections system. Doe's constitutional right is subject to substantial restrictions and limitations in order for correctional officials to achieve legitimate correctional goals and maintain institutional security.

Specifically, an inmate's constitutional right may be curtailed by a policy or regulation that is shown to be "reasonably related to legitimate penological interests." *Turner v. Safley*, 482 U.S. 78, 89, 107 S.Ct. 2254, 96 L.Ed.2d 64 (1987).

Id. at 317. See *Powell v. Schriver*, 175 F.3d 107, 112 (2d Cir. 1999).

In *Anderson v. Romero*, 72 F.3d 518 (7th Cir. 1995), the Seventh Circuit Court of Appeals recognized a "qualified constitutional right to confidentiality of medical records and medical communications" outside of prison but concluded that it was an open question as to whether the right applied in the prison setting. *Id.* at 522. The court concluded that prison officials were entitled to qualified immunity because, if such a right existed, it was not clearly established in 1992 or in 1995. *Id.* at 524.

The Sixth Circuit does not recognize the right to privacy in one's medical information in any setting. In *Doe v. Wigginton*, 21 F.3d 733, 740 (6th Cir.1994), the Sixth Circuit Court of Appeals explicitly held that the right of privacy is not implicated at all by prison official's disclosure of an inmate's medical status. *Id.* at 740. See *J.P. v. DeSanti*, 653 F.2d 1080, 1090 (6th Cir. 1981) (concluding that "the Constitution does not encompass a general right to nondisclosure of private information"); *Tokar v. Armontrout*, 97 F.3d 1078, 1084-1085 (8th Cir. 1996) (noting that prisoners do not have a constitutional right to confidentiality of their medical records). See also *Reeves v. Engelsjerd*, 2005 WL 3534906, *4 (E.D. Mich. 2005) ("Although other Circuits have recognized a constitutional right to privacy in the information in one's medical records, the Sixth Circuit has specifically held that such a right generally does not exist.").

The Tennessee Supreme Court has held that the confidentiality of records is a statutory matter left to the legislature. *Doe v. Sundquist*, 2 S.W.3d 919 (Tenn. 1999), citing *Tennessean v. Electric Power Bd. of Nashville*, 979 S.W.2d 297, 300-301 (Tenn. 1998); *Thompson v. Reynolds*, 858 S.W.2d 328 (Tenn. Ct. App. 1993).

Pursuant to T.C.A. § 10-7-504(a)(1), the medical records of county inmates shall be treated as confidential and shall not be open for inspection by members of the public.

First Aid Training

Reference Number: CTAS-1377

At least one person per shift, assigned to work at the facility, shall be trained in First Aid/CPR, as defined by the American Red Cross, and CPR, as defined by the American Heart Association. Training shall also cover:

- (a) Awareness of potential emergency situations;
- (b) Transfer to appropriate health care provider;
- (c) Recognition of symptoms of illness most common to the facility; and,
- (d) Giving medications to inmates.

In addition, the health authority shall approve policies and procedures that insure that emergency supplies and equipment are readily available and in working order. Rules of the Tennessee Corrections Institute, Rule 1400-1-.13(15).

First aid kits shall be available and a physician shall approve the number, contents, and location of such kits on an annual basis. Documentation of such approval must be in the facility's permanent records or attached to the kit itself. Rules of the Tennessee Corrections Institute, Rule 1400-1-.13(7).

"Jail personnel should be trained in basic health care delivery and must be trained in emergency health

techniques." *Nicholson v. Choctaw County*, 498 F.Supp. 295, 309 (S.D. Ala. 1980). See also *Bunyon v. Burke County*, 306 F.Supp.2d 1240, 1258 (S.D. Ga. 2004) (It is undisputed that jail staff are charged with ensuring that an inmate's medical needs are met while he or she is detained at the county Jail. Thus, the need to train personnel in the constitutional requirements of providing adequate medical care can be said to be so obvious that failure to do so could properly be characterized as deliberate indifference to constitutional rights.); *Brock v. Warren County*, 713 F.Supp. 238, 243 (E.D. Tenn. 1989) (finding that the sheriff and the county commissioners were deliberately indifferent to plaintiffs' decedent's constitutional rights in failing to provide minimal medical training to the jail guards).

County Liability for Inmate Medical Care

Reference Number: CTAS-1378

In *Chattanooga-Hamilton County Hosp. Authority v. Bradley County*, 66 S.W.3d 888 (Tenn. Ct. App. 2001), the plaintiff hospital (Erlanger Health System) sued the county for the payment of medical bills for care provided to an arrestee who was shot by Bradley County officers during his apprehension. The pertinent facts were as follows. "A Bradley County officer shot Dunn in the process of an arrest, and Bradley County EMS requested an air ambulance service from Erlanger. Dunn was transported to Erlanger, accompanied by a County deputy, and was admitted. Dunn was under a police hold while in Erlanger at the request of Bradley County, and upon his release from the hospital, was picked up by the Bradley County Sheriff's Department and taken to the County Jail." *Id.* at 889.

Noting that the trial court had correctly found that it was the county's duty to provide medical care to Dunn, the Tennessee Court of Appeals cited the United States Supreme Court's opinion in *City of Revere v. Massachusetts General Hospital*, 463 U.S. 239, 103 S.Ct. 2979, 77 L.Ed.2d 605 (1983).

In *City of Revere v. Massachusetts General Hospital*, 463 U.S. 239, 103 S.Ct. 2979, 77 L.Ed.2d 605 (1983), officers attempted to detain an individual who attempted to flee, and the individual was shot by an officer. An ambulance was summoned and the individual was taken to Massachusetts General Hospital. The hospital sued the City of Revere seeking payment for medical services rendered. Justice Blackman, speaking for the Court, said at p. 2983 of the Opinion:

The Due Process Clause, however, does require the responsible government or governmental agency to provide medical care to persons, such as Kivlin, who have been injured while being apprehended by the police. In fact, the due process rights of a person in Kivlin's situation are at least as great as the Eighth Amendment protections available to a convicted prisoner. (Citation omitted). We need not define, in this case, Revere's due process obligation to pretrial detainees or to other persons in its care who require medical attention. (Citations omitted). Whatever the standard may be, Revere fulfilled its constitutional obligation by seeing that Kivlin was taken promptly to a hospital that provided the treatment necessary for his injury. And as long as the governmental entity ensures that the medical care needed is in fact provided, the Constitution does not dictate how the cost of that care should be allocated as between the entity and the provider of the care. That is a matter of state law.

Id. at 889 - 890.

Pursuant to T.C.A. § 41-4-115, it is the duty of the county legislative body to provide medical attendance for all prisoners confined in the county jail. The statute is silent with respect to persons who have yet to be confined in the county jail. Relying on this statute, the county argued that state law does not require the county to pay for medical services on the facts of this case. Nevertheless, despite the fact that the United States Supreme Court's holding in *Revere* clearly states that the cost of medical care provided to persons such as Dunn is a matter of state law, the Tennessee Court of Appeals held that implicit in the Supreme Court's holding in *Revere* "is the requirement that the State or responsible governmental agency, in discharging its duty to provide these medical services, must provide the method for payment of these services." *Id.* at 890.

To bolster its conclusion, the Court of Appeals cited the Tennessee Supreme Court's decision in *Bryson v. State*, 793 S.W.2d 252 (Tenn. 1990). In *Bryson*, the issue was whether or not the state of Tennessee is liable for the payment of medical expenses incurred by a convict who is injured while on a furlough from a state institution. The Tennessee Supreme Court held that the state is liable for the medical costs of state prisoners who are out of prison on a temporary furlough. Central to the Court's holding were its findings that the prisoner remained in the state's custody while on furlough and remained a prisoner for the purpose of medical treatment, absent a waiver by the prisoner of the right (under state law) to have the state provide him with medical care. *Bryson*, 793 S.W.2d at 254-255.

Noting the Tennessee Supreme Court's finding that being "in custody" was sufficient to trigger governmental liability for the prisoner's care, the Court of Appeals, finding that Dunn was in the custody of

the Bradley County Sheriff's Office while he remained in the hospital, held that the county was liable for Dunn's medical expenses even though he was not confined in the county jail. 66 S.W.3d at 891.

In the case of *In re Estate of Davis*, 1994 WL 44448 (Tenn. Ct. App. 1994), the single issue was whether the estate of a deceased state inmate was liable for the decedent's hospital expenses irrespective of the responsibility of the state of Tennessee to the estate of the decedent for these expenses. Noting that "[t]here is nothing in the language of our statutes to suggest Mr. Davis's status as a prisoner precludes him or his estate from being liable to pay the hospital for his medical care," the Tennessee Court of Appeals held that the estate of the deceased state inmate was liable for hospital expenses incurred while the inmate was serving his sentence in the county jail. See also *City of Revere v. Massachusetts Gen. Hosp.*, 463 U.S. 239, 245 n. 7, 103 S.Ct. 2979, 2984 n. 7, 77 L.Ed.2d 605 (1983) ("Nothing we say here affects any right a hospital or government entity may have to recover from a detainee the cost of medical services provided to him.").

The attorney general has opined that if an inmate has health insurance coverage, there appears to be no provision of law that would allow the insurance carrier to avoid paying covered medical costs solely because the insured was incarcerated in the county jail at the time the claim arose. However, an individual loses eligibility for TennCare upon becoming incarcerated. Accordingly, TennCare may properly deny coverage to an individual who is incarcerated either before or after conviction. Op. Tenn. Atty. Gen. 97-010 (February 4, 1997). See also Op. Tenn. Atty. Gen. 95-095 (September 15, 1995) (A county is permitted to collect from a nonindigent inmate housed in the county jail the cost of providing needed medical or dental care to the inmate. However, the county is the party ultimately responsible for paying providers who render medical or dental services to county inmates.).

As a general rule a county may include medical expenses incurred on behalf of an inmate as jailers' fees taxable in the bill of costs. A defendant convicted of a criminal offense is responsible for paying the costs associated with the prosecution. The costs of a criminal case include all costs incident to the arrest and safekeeping of the defendant, including the costs of the jailer. Op. Tenn. Atty. Gen. 03-072 (June 10, 2003).

Inmate Copay

Reference Number: CTAS-1379

Any county may, by resolution adopted by a two-thirds vote of the county legislative body, establish and implement a plan authorizing the county jail administrator to charge an inmate in the county jail a copay amount for any medical care, treatment, pharmacy services or substance abuse treatment by a licensed provider provided to the inmate by the county. A county adopting a copay plan must establish the amount the inmate is required to pay for each service provided. However, an inmate who cannot pay the copay amount established by the plan cannot be denied medical care, treatment, pharmacy services or substance abuse treatment by a licensed provider. T.C.A. § 41-4-115(d).

If an inmate cannot pay the copay amount established by a plan adopted pursuant to T.C.A. § 41-4-115(d), the plan may authorize the jail administrator to deduct the copay amount from the inmate's commissary account or any other account or fund established by or for the benefit of the inmate while incarcerated. T.C.A. § 41-4-115(e).

Notwithstanding any other provision of law to the contrary, a plan established pursuant to T.C.A. § 41-4-115(d) may also authorize the jail administrator to seek reimbursement for expenses incurred in providing medical care, treatment, hospitalization or pharmacy services to an inmate incarcerated in the jail from an insurance company, healthcare corporation, TennCare or other source, if the inmate is covered by an insurance policy or TennCare or subscribes to a healthcare corporation or other source for those expenses. T.C.A. § 41-4-115(f). Note: An individual loses eligibility for TennCare upon becoming incarcerated. Accordingly, TennCare may properly deny coverage to an individual who is incarcerated. See Op. Tenn. Atty. Gen. 97-010 (February 4, 1997).

The United States Constitution, on its face, says nothing about medical care due inmates. The right to medical care was inferred by the United States Supreme Court in *Estelle v. Gamble*, 429 U.S. 97, 103, 97 S.Ct. 285, 290, 50 L.Ed.2d 251 (1976) and the contours of that right have been shaped by subsequent case law. Constitutional principles derived from the Eighth Amendment's prohibition of "cruel and unusual punishments" establish the government's obligation to provide medical care for those whom it is punishing by incarceration. *Id.* See also *Helling v. McKinney*, 509 U.S. 25, 32, 113 S.Ct. 2475, 2480, 125 L.Ed.2d 22 (1993); *Marsh v. Butler County*, 268 F.3d 1014 (11th Cir. 2001).

"Although the Supreme Court has held that a state must provide inmates with basic medical care, the Court has not tackled the question whether that care must be provided free of charge." *Reynolds v. Wagner*, 128 F.3d 166, 174 (3d Cir. 1997), citing *City of Revere v. Massachusetts Gen. Hosp.*, 463 U.S.

239, 245 n. 7, 103 S.Ct. 2979, 2984 n. 7, 77 L.Ed.2d 605 (1983) ("Nothing we say here affects any right a hospital or government entity may have to recover from a detainee the cost of medical services provided to him."). See also *Englehart v. Dasovick*, 12 F.3d 1102 (8th Cir. 1993) (Table) ("While the state has an obligation to provide medical care to prisoners, the Constitution does not dictate how the cost of that care is to be allocated.") (citations omitted).

There is no general constitutional right to free healthcare. *Reynolds*, 128 F.3d at 173. In *Reynolds*, the Third Circuit Court of Appeals affirmed a district court's ruling that there is nothing unconstitutional about a program that requires inmates with adequate resources to pay a small portion of their medical care. The court rejected the inmates' argument that charging inmates for medical care is *per se* unconstitutional. The court found that if a prisoner is able to pay for medical care, requiring such payment is not "deliberate indifference to serious medical needs." The court noted that "such a requirement simply represents an insistence that the prisoner bear a personal expense that he or she can meet and would be required to meet in the outside world." *Id.* at 174. See also *Roberson v. Bradshaw*, 198 F.3d 645 (8th Cir. 1999) (County's policy of requiring jail inmates to pay for their own medications if they could afford to do so did not violate the Eighth Amendment.).

If an inmate cannot pay, he must be maintained at the county's expense; it cannot deny minimal medical care to poor inmates. If an inmate can pay for his medical care, then the county may require reimbursement. No right described or alluded to in the Constitution is implicated by a decision of the county to seek compensation for its actual, reasonable costs in maintaining an inmate. As he was obliged to pay court costs, he may be obliged to pay his medical costs. Tennessee imprisoned him; it did not adopt him. See *Bihms v. Klevenhagen*, 928 F.Supp. 717, 718 (S.D. Tex. 1996). See also *White v. Correctional Medical Services Inc.*, 94 Fed.Appx. 262, 264 (6th Cir. 2004) ("It is constitutional to charge inmates a small fee for health care where indigent inmates are guaranteed service regardless of ability to pay."); *George v. Smith*, 2005 WL 1812890 (W.D. Wis. 2005).

In *Breakiron v. Neal*, 166 F.Supp.2d 1110, 1114-1115 (N.D. Tex. 2001), the district court found that deducting payments from an inmate's inmate commissary or trust account for medical services rendered does not violate the Due Process Clause of the Fourteenth Amendment. The court noted that states may decide who should pay for the medical care of inmates. *Id.*, citing *City of Revere v. Massachusetts Gen. Hosp.*, 463 U.S. 239, 244-245, 103 S.Ct. 2979, 77 L.Ed.2d 605 (1983). *Accord Negron v. Gillespie*, 111 P.3d 556, 558-559 (Colo. App. 2005) ("As long as the state meets an inmate's serious medical needs, each state may determine whether a governmental entity or an inmate must pay the cost of medical services provided to the inmate.") (citing cases).

Reimbursement for State Inmate Medical Care

Reference Number: CTAS-1380

The state is liable for expenses incurred from emergency hospitalization and medical treatment rendered to any state prisoner incarcerated in a county jail or workhouse, provided that the prisoner is admitted to the hospital. The sheriff of the county in which the state prisoner is incarcerated must file a petition with the criminal court committing the state prisoner to the county jail or workhouse attaching thereto a copy of the hospital bills of costs for the state prisoner. It is the duty of the court committing the state prisoner to the county jail or workhouse to examine bills of costs, and if the costs are proved, the court is required to certify the fact thereon and forward a copy to the judicial cost accountant. Expenses for emergency hospitalization and medical treatment are paid in the same manner as court costs. T.C.A. § 41-4-115(b).

The state is responsible for transportation costs and cost of any guard necessary when a state prisoner is admitted to a hospital or requires follow-up treatment. Such reimbursement is to be made according to the procedures established by T.C.A. § 41-8-106, but shall be in addition to the per diem established in T.C.A. § 41-8-106. T.C.A. § 41-4-115(c).

No claim against the state for the payment of medical expenses shall be paid unless the claim is submitted to the department of correction within six (6) months from the date the services were provided. No claim against the state for the payment of costs incurred in the prosecution and safekeeping of criminal defendants shall be paid unless the claim is submitted to the department of correction within six (6) months from the date of entry of the judgment of conviction. T.C.A. §§ 40-25-144(a) and 41-4-115(g).

If a defendant serving a felony sentence in a local jail develops medical problems that the local jail is not equipped to treat, the court has the authority to transfer the defendant to the Department of Correction. T.C.A. § 40-35-314(e).

Psychiatric Care of Inmates

Reference Number: CTAS-1381

The Eighth Amendment requirement of adequate medical care for a prisoner applies equally to psychiatric care. *McCullough v. Barnes*, 2005 WL 2704878, *8 (M.D. Tenn. 2005), citing *Torraco v. Maloney*, 923 F.2d 231, 234 (1st Cir. 1991); *Bowring v. Godwin*, 551 F.2d 44, 47 (4th Cir. 1977).

Inmates shall have access to mental health services as clinically warranted in accordance with protocols established by the health authority that include:

- (a) Screening for mental health problems;
- (b) Referral to outpatient services, including psychiatric care;
- (c) Crisis intervention and management of acute psychiatric episodes;
- (d) Stabilization of the mentally ill and prevention of psychiatric deterioration in the facility;
- (e) Referral and admission to inpatient facilities; and
- (f) Informed consent for treatment. Rules of the Tennessee Corrections Institute, Rule 1400-1-.13(12).

A suicide prevention program shall be approved by the health authority and reviewed by the facility administrator. The program must include specific procedures for handling intake, screening, identifying, and continually supervising the suicide-prone inmate. All facility employees responsible for supervising suicide-prone inmates shall be trained annually on program expectations. Rules of the Tennessee Corrections Institute, Rule 1400-1-.13(13) and (14).

Involuntary administration of psychotropic medication(s) to inmates shall be authorized by a physician and provided in accordance with policies and procedures approved by the health authority, and in accordance with applicable laws and regulations of the jurisdiction. Rules of the Tennessee Corrections Institute, Rule 1400-1-.13(23).

Dental Care of Inmates

Reference Number: CTAS-1382

The requirement that the state furnish healthcare includes necessary dental services. *Grubbs v. Bradley*, 552 F.Supp. 1052, 1123 (D.C. Tenn. 1982). Pursuant to state regulations, dental treatments, not limited to extractions, must be provided when the health of the inmate would otherwise be adversely affected during confinement, as determined by a physician or dentist. Rules of the Tennessee Corrections Institute, Rule 1400-1-.13(17).

"[N]ot all claims regarding improper dental care will be constitutionally cognizable. Dental conditions, like other medical conditions, may be of varying severity. The standard for Eighth Amendment violations contemplates 'a condition of urgency' that may result in 'degeneration' or 'extreme pain.'" *Chance v. Armstrong*, 143 F.3d 698, 702 (2nd Cir. 1998). "A cognizable claim regarding inadequate dental care, like one involving medical care, can be based on various factors, such as the pain suffered by the plaintiff, the deterioration of the teeth due to a lack of treatment, and the inability to engage in normal activities." *Goodnow v. Palm*, 264 F.Supp.2d 125, 132 (D. Vt. 2003) (citations omitted). See also *Fields v. Gander*, 734 F.2d 1313, 1314-1315 (8th Cir. 1984) (Inmate's claims that sheriff knew of the pain he was suffering and still refused to provide dental care for him for up to three weeks could support a finding of an Eighth Amendment violation.).

Charging Inmates for Issued Items

Reference Number: CTAS-1383

Any county may, by a resolution adopted by a two-thirds vote of the county legislative body, establish and implement a plan authorizing the jail administrator to charge an inmate committed to the county jail a fee, not to exceed the actual cost, for items issued to the inmate upon each new admission to the county jail. T.C.A. § 41-4-142(a).

Additionally, any county may, by a resolution adopted by a two-thirds vote of its county legislative body, establish and implement a plan authorizing the jail administrator to charge an inmate committed to the jail a nominal fee set by the county legislative body at the time of adoption for the following special services when provided at the inmate's request:

1. Participation in GED or other scholastic testing for which the administering agency charges a fee for each test administered;
2. Escort by correctional officers to a hospital or other healthcare facility for the purpose of visiting an immediate family member who is a patient at such facility; or
3. Escort by correctional officers for the purpose of visiting a funeral home or church upon the death

of an immediate family member.

T.C.A. § 41-4-142(b).

A plan adopted pursuant to T.C.A. § 41-4-142(a) or (b) may authorize the jail administrator to deduct the amount from the inmate's jail trust account or any other account or fund established by or for the benefit of the inmate while incarcerated. Nothing in T.C.A. § 41-4-142 shall be construed as authorizing the jail administrator to deny necessary clothing or hygiene items or to fail to provide the services specified in T.C.A. § 41-4-142(b) based on the inmate's inability to pay such fee or costs. T.C.A. § 41-4-142(c).

"[D]ebiting an inmate's account for costs associated with his incarceration does not deprive him of a protected property interest without due process of law. More specifically, such debits are not 'deprivations' in the traditional sense because an inmate has been provided with a service or good in exchange for the money debited." *Browder v. Ankrom*, 2005 WL 1026045 (W.D. Ky. 2005) (holding that charging of a per diem for room and board is not in violation of an inmate's federally protected constitutional rights). See also *Sellers v. Worholtz*, 86 Fed.Appx. 398 (10th Cir. 2004) (holding prisoner's due process rights were not violated by withdrawing funds from his prison account to pay various fees, and officials did not violate prisoner's Eighth Amendment rights by withdrawing funds from his prison account to pay various fees).

Inmate Marriages

Reference Number: CTAS-2198

Post v. Mohr. Not Reported in F.Supp.2d, 2012 WL 76894 N.D. Ohio, 2012. Prisoners have a constitutional right to marry and, therefore, prison regulations that interfere with that right must be reasonably related to legitimate penological interests. *Turner v. Safley*, 482 U.S. 78, 89–96, 107 S.Ct. 2254, 96 L.Ed.2d 64 (1987) (finding a regulation prohibiting inmate marriage unconstitutional); see *Zablocki v. Redhail*, 434 U.S. 374, 385–86, 98 S.Ct. 673, 54 L.Ed.2d 618 (1978) (marriage is fundamental right).

King v. Caruso 542 F.Supp.2d 703 E.D. Mich., 2008. Moreover, in the very case in which the Supreme Court held impermissible a prison regulation effecting an "almost complete ban" on marriage by inmates, *Turner v. Safley*, 482 U.S. 78, 107 S.Ct. 2254, 2267, 96 L.Ed.2d 64 (1987), the Court reiterated:

- [W]hen a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests. In our view, such a standard is necessary if "prison administrators ... and not the courts, [are] to make the difficult judgments concerning institutional operations."
- *Id.* 107 S.Ct. at 2261, quoting *713 *Jones v. North Carolina Prisoners' Union*, 433 U.S. 119, 128, 97 S.Ct. 2532, 2539, 53 L.Ed.2d 629 (1977); see also *id.* 107 S.Ct. at 2267. The Court upheld in *Turner* a Missouri regulation restricting inmate-to-inmate correspondence, 107 S.Ct. at 2263–64, and stated that an inmate's marriage is indeed "subject to substantial restrictions as a result of incarceration," *id.* at 2265, although the restrictions imposed must be "reasonably related to legitimate penological objectives," *id.* at 2267, including "legitimate security concerns." *Id.* at 2266.
- The D.C. Circuit noted that while *Turner v. Safley*, 482 U.S. 78, 107 S.Ct. 2254, 96 L.Ed.2d 64 (1987), held impermissible a prison regulation effecting an "almost complete ban" on marriage by inmates,^{FN4} the Supreme Court nonetheless reiterated:
 - [W]hen a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests. In our view, such a standard is necessary if "prison administrators ... and not the courts, [are] to make the difficult judgments concerning institutional operations."

Allman v. Motley Not Reported in S.W.3d, 2007 WL 1723373 Ky.App., 2007. As stated in *Turner v. Safley*, 482 U.S. 78, 89, 107 S.Ct. 2254, 2261, 96 L.Ed.2d 64 (1987), "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." Thus, "legitimate security concerns may require placing reasonable restrictions upon an inmate's right to marry, and may justify requiring approval of the superintendent." *Id.*, 482 U.S. at 97, 107 S.Ct. at 2266. The court indicated that a reasonable restriction might be one such as that provided by 28 CFR § 551.10 (1986), which the court described as generally permitting inmate marriage unless the "warden finds that it presents a threat to security or order of institution, or to public safety." *Id.* 482 U.S. at 98, 107 S.Ct. at 2266.

Inmate Commissary

Reference Number: CTAS-2125

Tenn. Code Ann. § 71-4-502(5) defines the term "vending facility" as follows: "Vending facility" means a

location or structure or space that may sell foods, beverages, confections, newspapers, periodicals, tobacco products, and other articles and services that are dispensed automatically by a machine or manually by sales personnel or attendants and that may be prepared on or off premises in accordance with applicable health laws. A "vending facility" may consist, exclusively or in appropriate combination as determined by the Tennessee Department of Human Services, of automatic vending machines, cafeterias, snack bars, catering services, food concession vehicles, cart services, shelters, counters, and any appropriate equipment necessary for the sale of articles or services described in this subdivision (5). A "vending facility" may encompass more than one (1) building on a public property.

Authority to Operate a Jail Commissary

Counties owe their creation to the statutes, and the statutes confer on them all the powers which they possess, prescribe all the duties they owe, and impress all the liabilities to which they are subject." *State v. Stine*, 292 S.W.2d 771, 772 (Tenn. 1956), quoting *Burnett v. Maloney*, 37 S.W. 689, 693 (Tenn. 1896).

Tennessee statutory law imposes upon the sheriff a multitude of mandatory duties designed to promote an inmate's welfare. T.C.A. § 41-4-101, et seq.

Although there are Tennessee statutes that refer to jail commissaries, under current Tennessee law, there is no authority for a sheriff's office to operate a jail commissary, regardless of whether it is operated on a for profit basis or not for profit basis. Furthermore, engaging in such unauthorized activity may result in undesired consequences. For example, "when a county departs from its governmental activities and engages in a business enterprise for gain, which would ordinarily be taxable and which the county is not authorized to engage in, that it then becomes liable for the tax." *State v. Hamilton County*, 144 S.W.2d 749, 751 (Tenn. 1940). The Rules of the Tennessee Corrections Institute, Rule 1400-1-.15(4) indicates that an inmate commissary may be available by which inmates can purchase approved items that are not furnished by the facility. If one is provided, the commissary operations shall be strictly controlled using standard accounting procedures.

As previously stated, there is no statute specifically authorizing the sheriff to operate a jail commissary or to accept compensation or fees from inmates for providing commissary services. T.C.A. § 5-8-101, which lists the sources of county revenue, and T.C.A. § 8-21-901, which lists fees a sheriff may collect, do not include such payment or compensation.

Pursuant to T.C.A. § 8-21-101, the sheriff is not allowed to demand or receive fees or other compensation for any service further than is expressly provided by law. If any officer demands or receives any other or higher fees than are prescribed by law, such officer is liable to the party aggrieved in the penalty of fifty dollars (\$50.00), to be recovered before any judge of the court of general sessions, and the officer also commits a Class C misdemeanor. T.C.A. § 8-21-103.

In the Court of Appeals of Tennessee *Edwin Graybeal, Jr., Sheriff, Washington County, Et Al. v. Tennessee Department of Human Services*, No. M2007-02320-COA-R3-CV, local officials appealed to the Chancery Court the decision by the Secretary of State that the Department of Human Services has a statutory priority under Tenn. Code Ann. § 71-4-501 et seq. to operate the inmate commissary at the local detention facility with blind vendors. The Chancery Court's findings were affirmed that the inmate commissary is subject to the statutory priority.

Inmate Funds Accounting/Blind Vendors

Reference Number: CTAS-2126

In Tennessee, the sheriff is responsible for the jail and for the inmates in the custody of the jail in the sheriff's county. Tenn. Code Ann. § 8-8-201(3). However, no Tennessee statute addresses whether funds in commissary accounts of inmates in county custody would be considered "public funds." The most analogous statutory provision is Tenn. Code Ann. § 41-21-216, which permits the warden of a state correctional institution to take charge of any personal property in an inmate's possession upon entering prison and to receive, hold, and account for money due or belonging to the inmate while incarcerated.

The term "public funds" is not defined in Tennessee statute. American Jurisprudence defines "public funds" as "moneys belonging to the United States or a corporate agency of the Federal Government, a state or subdivision thereof, or a municipal corporation; . . . moneys raised by the operation of law for the support of the government or for the discharge of its obligations." 63C Am. Jur. 2d Public Funds § 1. This office has previously opined that the administrative expenses appropriated by a county or counties for a county or regional housing authority are "public funds." *Op. Tenn. Att'y Gen. No. 89-102*, 1989 WL 434599 (Tenn. A.G.). Conversely, this office has opined that funds held by a Clerk and Master for the benefit of a life tenant and ultimately for the benefit of remaindermen, which are not collected for governmental or public purposes, but are held by the Clerk and Master in the performance of his lawful duties for the benefit of private parties, are private funds rather than public funds. *Op. Tenn. Att'y Gen. No. 77-249*, 1977 WL

28373 (Tenn. A.G.).

Based on the foregoing, it is the opinion of this office that inmate funds in the inmate's commissary account or other account established by or for the benefit of the inmate while incarcerated and used to pay for commissary items such as snacks, clothing items, toiletries, etc.; to pay for medical copays as provided in Tenn. Code Ann. § 41-4-115; to pay child support; or to pay for law enforcement to escort the inmate to family member funerals or hospital visits as provided in Tenn. Code Ann. § 41-4-142, and which are not collected for governmental or public purposes, are private funds held by the sheriff in the performance of his lawful duties for the benefit of the inmates.

"All county officials and agencies receiving and disbursing the revenues of the state or any political subdivision thereof" are required to adopt the bookkeeping and accounting standards prescribed by the Comptroller. Tenn. Code Ann. §§ 5-8-501 and 5-8-502. The department of audit is required to annually audit all county records, including any trust funds held by any county official. Tenn. Code Ann. § 4-3-304(4). It is, therefore, the opinion of this office that the inmate funds are required to be handled by the sheriff consistent with the standards established by the State Comptroller's County Audit Division.

This office has previously addressed the question of whether a county can require, as a bid specification, that a blind vendor have the capability to manage its jail or correctional facility's inmate trust fund accounting system. Op. Tenn. Att'y Gen. No. 01-128, 2001 WL 964181 (Tenn. A.G.). As set forth in that opinion, the statute and rules which govern the blind vendors program do not require a blind vendor to have this capability. Therefore, it was and remains the opinion of this office that TBE has the discretion but may not be required to provide a blind vendor capable of handling inmate funds in order to exercise its statutory priority.

DHS' statutory priority under Tenn. Code Ann. § 71-4-501 *et seq.* gives DHS "the exclusive right to the operation of any and all vending facilities on any public property" that DHS determines are capable of being operated by a blind vendor. Tenn. Code Ann. § 71-4-502(3). This priority is to be liberally construed. Tenn. Code Ann. § 71-4-501. As previously discussed, DHS' exercise of its statutory priority may not be conditioned on the blind vendor's handling of inmate funds. Therefore, should DHS decide not to require that the blind vendor handle inmate funds, that decision will not affect DHS' statutory priority to operate the vending or commissary facilities at the jail.

As previously stated, the statute and rules which govern the blind vendors program do not require a blind vendor to conduct services, other than vending/commissary services, as part of the operation of the commissary. Therefore, a sheriff or some other administrative official may not by-pass DHS' statutory priority to operate a vending facility by requiring services, other than vending/commissary services, as part of the operation of the commissary.

Tenn. Code Ann. § 71-4-502(5) defines the term "vending facility" as follows:

"Vending facility" means a location or structure or space that may sell foods, beverages, confections, newspapers, periodicals, tobacco products, and other articles and services that are dispensed automatically by a machine or manually by sales personnel or attendants and that may be prepared on or off premises in accordance with applicable health laws. A "vending facility" may consist, exclusively or in appropriate combination as determined by the department, of automatic vending machines, cafeterias, snack bars, catering services, food concession vehicles, cart services, shelters, counters, and any appropriate equipment necessary for the sale of articles or services described in this subdivision (5). A "vending facility" may encompass more than one (1) building on a public property.

Based on this definition, DHS' discretion to exercise its right to operate the vending facility/commissary/vending machines on public property includes the discretion to determine the services that it will, or will not, perform while still retaining the statutory priority to other vending facility services under Tenn. Code Ann. §§ 71-4-502(5) and 503. Tenn. Atty. Gen. 06-156 (October 9, 2006).

Applicability of the Blind Vendors Program

Reference Number: CTAS-2127

As provided in Tenn. Code Ann. §71-4-502, the Department of Human Services has a right of priority to establish a vending facility to be operated by a blind individual on any public property. This statute provides, in pertinent part:

This priority means that when the department has surveyed a public property and determined that such property is suitable for the location of a vending facility, it shall have the right of first refusal and the exclusive right to the operation of any and all vending

facilities on any public property that it determines are capable of being operated by a blind individual[.]

Tenn. Code Ann. §71-4-502(3).

The department is required to be notified whenever any new buildings or other facilities are to be constructed by the State or on any other public property. Tenn. Code Ann. §71-4-503(a). In addition, the department shall also be notified when any existing contracts expire or are changed in any way. *Id.* At that time, the department shall promptly investigate and survey such property to determine if the location is suitable for one or more vending facilities. *Id.* If the department determines that such property is suitable for the location of a vending facility, its priority is established and may be exercised.

The term "priority" is defined in Tenn. Code Ann. §71-4-502(3) to apply to the operation of "any and all vending facilities" on any public property. There is no distinction between vending services operated by a County Sheriff's Office internally or through outside sources. Accordingly, the department's right of first refusal applies whether or not such services are offered by the County Sheriff's Office to outside sources for bid.

As noted above, the department's priority is not limited to situations where vending services are offered to outside sources for bid. A "vending facility" is defined in Tenn. Code Ann. §71-4-502(5) as a location or structure or space that sells "foods, beverages, confections, newspapers, periodicals, tobacco products, and other articles and services that are dispensed automatically by a machine or manually by sales personnel or attendants." A "vending facility" may consist of vending machines, cafeterias, snack bars, catering services, food concession vehicles, cart services, shelters, or counters. Tenn. Code Ann. §71-4-502(5). The operation of a commissary by a County Sheriff's Office would fall within the definition of a "vending facility" for purposes of the Blind Vendors Program. Accordingly, unless there is a pre-existing contract for a commissary or the department determines that the public property is not suitable for a vending facility, the County Sheriff's Office may not operate a commissary on such public property whether internally or through outside sources.

As long as a vending facility, as defined by Tenn. Code Ann. §71-4-502(5), is operated on public property either through contract or directly by the County Sheriff's Office, the provisions of the Blind Vendors Program shall apply. See Tenn. Op. Atty. Gen. No. 06-037 (Feb. 21, 2006). Thus, a Sheriff's Department will be considered to be operating vending facilities on public property even if this is accomplished through a third party contract.

Jail Security Operations

Reference Number: CTAS-2196

Facilities shall maintain a written policy and procedure for key control, including the inventory and use of keys, and the operator of the control center shall have knowledge of who has the keys in use and the location of duplicate keys. All day-to-day operations shall be centralized and controlled through the control center. There shall be one full set of well-identified keys, other than those in use, secured in a place accessible only to facility personnel for use in the event of an emergency. These keys shall be easily identifiable by sight and touch under adverse conditions. Rules of the Tennessee Corrections Institute, Rules 1400-1-.07(7) and (8).

Written policy and procedures shall govern the availability, control, inventory, storage, and use of firearms, less-lethal weapons, and related security devices, and specify the level of authority required for their access and use. Chemical agents and electrical disablers shall be used only with the authorization of the facility administrator or designee. Access to storage areas shall be restricted to authorized facility employees and the storage space shall be located in an area separate from and apart from inmate housing or activity areas. A written report shall be submitted to the facility administrator when such weapons are used. Rules of the Tennessee Corrections Institute, Rules 1400-1-.07(9).

Facilities shall develop a written policy and procedure to require that firearms, chemical agents, and related security and emergency equipment are inventoried and tested at least quarterly to determine the condition and expiration dates. This written policy and procedure shall provide for regular inspection of ABC type fire extinguishers, smoke detectors, and other detection and suppression systems. Rules of the Tennessee Corrections Institute, Rules 1400-1-.07(10).

All tools, toxic corrosive and flammable substances and other potentially dangerous supplies and equipment shall be stored in a locked area which is secure and located outside the security perimeter of the confinement area. Tools, supplies and equipment which are particularly hazardous shall be used by inmates only under direct supervision. Rules of the Tennessee Corrections Institute, Rules 1400-1-.07(11).

Facilities shall develop a written policy and procedure to provide for continuous inspection, inventory, and maintenance of all locks, tools, kitchen utensils, toxic, corrosive, and flammable substances and other potentially dangerous supplies and equipment. There shall also be a written policy and procedure to require at least weekly inspection of all security facilities and documentation of the dates of inspections. Rules of the Tennessee Corrections Institute, Rules 1400-1-.07(12) and (13).

Facilities shall develop a written plan that provides for continuing operations in the event of a work stoppage or other job action. Copies of the plan shall be available to all supervisory personnel who are required to familiarize themselves with it. Rules of the Tennessee Corrections Institute, Rules 1400-1-.07(14).

Detention officer posts shall be located in close proximity to inmate living areas to permit officers to see or hear and respond promptly to emergency situations. There shall be written orders for every detention officer duty and post. Rules of the Tennessee Corrections Institute, Rules 1400-1-.07(15).

The facility perimeter shall ensure that inmates are secured and that access by the general public is denied without proper authorization. All inmate movement from one area to another shall be controlled by facility employees. Rules of the Tennessee Corrections Institute, Rules 1400-1-.07(17) and (18)

Facility employees shall maintain a permanent log and prepare shift reports that record routine information, emergency situations, and unusual incidents. Rules of the Tennessee Corrections Institute, Rules 1400-1-.07(19).

Restraint devices shall never be applied as punishment. Facilities shall define circumstances under which supervisory approval is needed prior to application. Rules of the Tennessee Corrections Institute, Rule 1400-1-.07(21). Four/five point restraints shall be used only in extreme instances and only when other types of restraints have proven ineffective. Advance approval shall be secured from the facility administrator/designee before an inmate is placed in a four/five point restraint. Subsequently, the health authority or designee shall be notified to assess the inmate's medical and mental health condition, and to advise whether, on the basis of serious danger to self or others, the inmate should be in a medical/mental health unit for emergency involuntary treatment with sedation and/or other medical management, as appropriate. If the inmate is not transferred to a medical/mental health unit and is restrained in a four/five-point restraint. The following minimum procedures shall be followed:

- (a) Continuous direct visual observation by facility employees prior to an assessment by the health authority or designee;
- (b) Subsequent visual observation is made at least every fifteen minutes;
- (c) Restraint procedures are in accordance with guidelines approved by the designated health authority; and,
- (d) Documentation of all decisions and actions. Rules of the Tennessee Corrections Institute, Rules 1400-1-.07(22).

The Rules of the Tennessee Corrections Institute, Rules 1400-1-.07(23) require that the use of firearms shall comply with the following requirements:

- (a) A written policy and procedure that governs the availability, control, and use of chemical agents and firearms;
- (b) Firearms, chemical agents, and related security and emergency equipment are inventoried and tested at least quarterly;
- (c) Weapons are subjected to stringent safety regulations and inspections;
- (d) A secure weapons locker is located outside the secure perimeter of the facility;
- (e) Except in emergency situations, firearms and authorized weapons are permitted only in designated areas to which inmates have no access;
- (f) Facility employees supervising inmates outside the facility perimeter follow procedures for the security of weapons;
- (g) Facility employees are instructed to use deadly force only after other actions have been tried and found ineffective, unless the employee believes that a person's life is immediately threatened;
- (h) Facility employees on duty use only firearms or other security equipment that has been approved by the facility administrator;
- (i) Appropriate equipment is provided to facilitate safe unloading and loading of firearms; and,
- (j) A written report shall be submitted to the facility administrator when such weapons are used.

Safety of Inmates

Reference Number: CTAS-1384

Under the common law the sheriff and his jailer have a duty to treat prisoners "kindly and humanely." See *State ex rel. Morris v. National Surety Co.*, 39 S.W.2d 581 (Tenn. 1931); *Hale v. Johnston*, 203 S.W. 949 (Tenn. 1918). See also *Wisconsin Dept. of Corrections v. Kliesmet*, 564 N.W.2d 742, 746 (Wis. 1997) (The duty of sheriffs to maintain a safe jail was recognized at common law.). Moreover, the sheriff has a constitutional duty to protect inmates from violence at the hands of other inmates and guards. "[W]hen the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being." *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189, 199-200, 109 S.Ct. 998, 1005, 103 L.Ed.2d 249 (1989).

Facilities shall provide for regularly scheduled disposal of liquid, solid, and hazardous material complying with applicable government regulations. Rules of the Tennessee Corrections Institute, Rule 1400-1-.09(4).

Facilities shall provide for control of vermin and pests and shall remove inmates from treatment areas if there is a risk of illness. Rules of the Tennessee Corrections Institute, Rule 1400-1-.09(5).

Inmate housing and temporary holding area walls shall be kept clean and free of pictures or other objects which provide hiding places for vermin or create a fire hazard. Rules of the Tennessee Corrections Institute, Rule 1400-1-.09(6).

All walls, ceilings, floors, showers, and toilets shall be kept free from mold and mildew. Rules of the Tennessee Corrections Institute, Rule 1400-1-.09(7).

Employment of Guard

Reference Number: CTAS-1385

In all cases where a defendant charged with the commission of a felony is committed to jail, either before or after trial, and the safety of the defendant or the defendant's safekeeping requires a guard, it is the duty of the sheriff to employ a sufficient guard to protect the defendant from violence and to prevent the defendant's escape or rescue. T.C.A. § 41-4-118.

While the United States Constitution "does not mandate comfortable prisons," neither does it permit inhumane ones. *Farmer v. Brennan*, 511 U.S. 825, 832, 114 S.Ct. 1970, 1976, 128 L.Ed.2d 811 (1994) quoting *Rhodes v. Chapman*, 452 U.S. 337, 349, 101 S.Ct. 2392, 2400, 69 L.Ed.2d 59 (1981). Under the Eighth Amendment's prohibition of "cruel and unusual punishments," prison officials must "take reasonable measures to guarantee the safety of the inmates." *Id.*, quoting *Hudson v. Palmer*, 468 U.S. 517, 526-527, 104 S.Ct. 3194, 3200, 82 L.Ed.2d 393 (1984). They "have a duty ... to protect prisoners from violence at the hands of other prisoners." *Id.* at 833, quoting *Cortes-Quinones v. Jimenez-Nettleship*, 842 F.2d 556, 558 (1st Cir.), cert. denied, 488 U.S. 823, 109 S.Ct. 68, 102 L.Ed.2d 45 (1988). "It is not, however, every injury suffered by one prisoner at the hands of another that translates into constitutional liability for prison officials responsible for the victim's safety." *Farmer* at 834. See *Clark v. Corrections Corp. of America*, 98 Fed.Appx. 413 (6th Cir 2004) (In the prison context, the Eighth Amendment imposes a duty on prison officials to take reasonable measures to guarantee the safety of inmates. "[D]eliberate indifference of a constitutional magnitude may occur when prison guards fail to protect one inmate from an attack by another.") (citations omitted); *Dellis v. Corrections Corp. of America*, 257 F.3d 508 (6th Cir. 2001) (Prison officials have a duty to protect prisoners from violence suffered at the hands of other prisoners.) (citations omitted).

In *Buckner v. Hollins*, 983 F.2d 119, 122-123 (8th Cir.1993), the Eighth Circuit Court of Appeals held that a prison official was not entitled to qualified immunity when he allowed fellow corrections officers to attack a prisoner and he possessed the only set of keys to the prisoner's holding cell. The court concluded the official could be found liable because he deliberately ignored a prisoner's serious injury and failed to protect the prisoner from a foreseeable attack or otherwise guarantee the prisoner's safety. The court concluded the officer had a duty to intervene. And in *McHenry v. Chadwick*, 896 F.2d 184, 188 (6th Cir. 1990), the Sixth Circuit Court of Appeals held that a prison official has "a duty to try and stop another officer who summarily punishes a person in the first officer's presence." Accordingly, a correctional officer who observes an unlawful beating may be held liable without actively participating in the unlawful beating. See also *Walker v. Norris*, 917 F.2d 1449 (6th Cir. 1990) (prison guard's failure to prevent inmate's stabbing by another inmate violated inmate's Eighth Amendment rights where the guards had the opportunity to prevent the stabbing but failed to do so and instead looked on while the inmate was attacked); *Roland v. Johnson*, 856 F.2d 764, 769-70 (6th Cir. 1988); *McGhee v. Foltz*, 852 F.2d 876,

880-81 (6th Cir. 1988).

Sufficient Jails

Reference Number: CTAS-1386

The sheriff has authority, when the jail of the county is insufficient for the safekeeping of a prisoner, to convey the prisoner to the nearest sufficient jail in the state. T.C.A. § 41-4-121(a). This authority is subject to the securing of a court order. *State v. Grey*, 602 S.W.2d 259 (Tenn. Crim. App. 1980). In all cases, also, where it is shown to the committing magistrate, judge or court that the jail of the county in which the commitment should be made is insufficient for the safekeeping of the prisoner, the commitment shall be by mittimus or warrant stating the fact to the nearest sufficient county jail. T.C.A. § 41-4-121(b). In all cases where the jail in which a prisoner is confined becomes insufficient from any cause, any circuit or criminal judge, upon application of the sheriff and proof of the fact, may order the prisoner, by mittimus or warrant, to be removed to the nearest sufficient jail. T.C.A. § 41-4-121(c).

In *Chisom v. State*, 539 S.W.2d 831, 833 (Tenn. Crim. App. 1976), the Court of Criminal Appeals held that the trial judge acted within his authority in ordering the removal of a convicted rapist, for safekeeping reasons, from the county jail to the state penitentiary pending his appeal. However, in *State v. Grey*, 602 S.W.2d 259 (Tenn. Crim. App. 1980), the court held that the statute providing authority for a criminal judge to order a prisoner to be removed to the nearest sufficient jail, upon proof that jail in which prisoner was confined was insufficient, did not justify an order transferring the defendant, who was being detained in a local jail prior to trial, to the state penitentiary for safekeeping upon finding that defendant was an escape risk. The court found that the term "jail" was not intended to include the state penitentiary, and there was no showing that there was no nearby jail sufficient to contain defendant safely.

Guard for Removal of Prisoner

Reference Number: CTAS-1387

The sheriff is authorized to employ as many as two guards, if necessary, in removing a prisoner under T.C.A. § 41-4-121, and they shall each be allowed for such services as are provided for similar services in conveying convicts to the penitentiary. T.C.A. § 41-4-122. On demand made immediately preceding or during the term at which the prisoner is triable, the prisoner must be delivered to the sheriff or deputy sheriff of the county from which the prisoner was sent. T.C.A. § 41-4-123. When the court orders the prisoner to be carried to the jail of another county for safekeeping for want of a sufficient jail in the county where the case is pending, it may make a reasonable allowance to the sheriff and necessary guard, including expenses for conveying the prisoner to the jail so ordered by the judge. T.C.A. § 41-4-124. If the court directs the sheriff to summon more than two guards in order to carry safely any prisoner charged with a crime from one county to another for trial or safekeeping, the commissioner of finance and administration shall allow such additional guards ordered by the court the same compensation that is allowed by law to the two guards, and give a warrant for the same to the sheriff. T.C.A. § 41-4-126. See also T.C.A. § 8-26-108.

The jailer in such case may prove costs in the circuit or criminal court of the county and obtain the certificate of the district attorney general of that court thereto. The clerk of the court shall forward the same to the court where the cause is pending to be taxed in the bill of costs. T.C.A. § 41-4-125.

Jail Crowding

Reference Number: CTAS-1388

The Tennessee Supreme Court has held that an "insufficient" jail under T.C.A. § 41-4-121 includes one that is so overcrowded that it violates the prisoner's rights under the Eighth Amendment to the United States Constitution. *State v. Walker*, 905 S.W.2d 554, 557 (Tenn. 1995).

If a sheriff is of the opinion that he is being asked to house too many inmates at his facility, he can request the committing judge or any circuit or criminal judge to order prisoners removed to the nearest sufficient jail. Under T.C.A. § 41-4-121(c), the court may order such a transfer "[i]n all cases where the jail in which the prisoner is confined becomes insufficient from any cause ..." The population level is relevant to the determination of sufficiency, but is not conclusive as to this issue.

With regard to the sheriff's legal obligations under the Eighth Amendment, it is important to bear in mind that insufficiency under the statute is not the same thing as unconstitutionality. The jail is not necessarily unconstitutionally overcrowded simply because it houses more inmates than its Tennessee Corrections Institute (TCI) capacity. *Feliciano v. Barcelo*, 497 F.Supp. 14, 35

(D.P.R.1979). TCI and American Correctional Association (ACA) standards do not establish the constitutional standard. *Grubbs v. Bradley*, 552 F.Supp. 1052, 1124 (M.D. Tenn. 1982).

Overcrowding is not a *per se* constitutional violation. *Rhodes v. Chapman*, 452 U.S. 337, 101 S.Ct. 2392, 69 L.Ed.2d 59 (1981).

Op. Tenn. Atty. Gen. 89-65 (April 28, 1989). See also Op. Tenn. Atty. Gen. 02-015 (February 6, 2002) (This office has maintained "that insufficiency under the statute is not the same thing as unconstitutionality. The jail is not necessarily unconstitutionally overcrowded simply because it houses more inmates than its Tennessee Corrections Institute (TCI) capacity.").

"It is ... beyond dispute that county officials have a duty to maintain their jails to minimize the risks resulting from overcrowding, *i.e.*, conflicts among and injury to those individuals incarcerated in the jail, lest they violate the prisoners' constitutional rights (and subject themselves to liability under 42 U.S.C. § 1983)." *Patrick v. Jasper County*, 901 F.2d 561, 569, n. 16 (7th Cir. 1990), citing *Carver v. Knox County*, 887 F.2d 1287 (6th Cir. 1989); *Union County Jail Inmates v. DiBuono*, 713 F.2d 984 (3d Cir. 1983), cert. denied, 465 U.S. 1102, 104 S.Ct. 1600, 80 L.Ed.2d 130 (1984).

However, overcrowding is not a *per se* constitutional violation. *Rhodes v. Chapman*, 452 U.S. 337, 101 S.Ct. 2392, 69 L.Ed.2d 59 (1981). A claim alleging that the "overall conditions" of confinement are inadequate cannot give rise to an Eighth Amendment violation when no specific deprivation of a single human need exists. *Wilson v. Seiter*, 501 U.S. 294, 305, 111 S.Ct. 2321, 2327, 115 L.Ed.2d 271 (1991) ("Nothing so amorphous as 'overall conditions' can rise to the level of cruel and unusual punishment when no specific deprivation of a single human need exists.").

In *Bell v. Wolfish*, 441 U.S. 520, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979), the Supreme Court held that "double-bunking" pretrial detainees in cells that have a total floor space of approximately 75 square feet did not violate the pretrial detainees' due process rights. "[W]e are convinced as a matter of law that 'double-bunking' as practiced at the MCC did not amount to punishment and did not, therefore, violate respondents' rights under the Due Process Clause of the Fifth Amendment." *Id.* at 541, 99 S.Ct. at 1875. In *Bell*, the Court noted that the respondents' "reliance on other lower court decisions concerning minimum space requirements for different institutions and on correctional standards issued by various groups was misplaced." *Id.* at 543, n. 27, 99 S.Ct. at 1876, n. 27. The Court stated that "while the recommendations of these various groups may be instructive in certain cases, they simply do not establish the constitutional minima; rather, they establish goals recommended by the organization in question." *Id.*

In *Rhodes v. Chapman*, 452 U.S. 337, 101 S.Ct. 2392, 69 L.Ed.2d 59 (1981), the United States Supreme Court considered whether double-bunking inmates in 63 square foot cells was cruel and unusual punishment in violation of the Eighth Amendment. The Supreme Court found no Eighth Amendment violation.

The court found that the double-celling made necessary by an unanticipated increase in the prison population (38 percent over design capacity) did not lead to deprivations of essential food, medical care, or sanitation. The court found no evidence that double-celling under the circumstances of the case either inflicted unnecessary or wanton pain or was grossly disproportionate to the severity of crimes warranting imprisonment. The court noted that the Constitution does not mandate comfortable prisons. *Id.* at 348, 101 S.Ct. at 2400.

In finding a constitutional violation, the lower court had relied on, among other considerations, square footage standards promulgated by the American Correctional Association (60-80 square feet); the National Sheriffs' Association (70-80 square feet); and the National Council on Crime and Delinquency (50 square feet). The Supreme Court stated that the lower court had "erred in assuming that opinions of experts as to desirable prison conditions suffice to establish contemporary standards of decency." As the court noted in *Bell v. Wolfish*, such opinions may be helpful and relevant with respect to some questions, but "they simply do not establish the constitutional minima; rather, they establish goals recommended by the organization in question." *Id.* at 350, n. 13, 101 S.Ct. at 2401, n. 13, citing *Bell v. Wolfish*, 441 U.S. 520, 543-544, n. 27, 99 S.Ct. 1861, 1876, n. 27, 60 L.Ed.2d 447 (1979).

In *Stevenson v. Whetsel*, 52 Fed.Appx. 444 (10th Cir. 2002), the Tenth Circuit Court of Appeals held that the county's placement of three pretrial detainees in a jail cell designed for two did not violate the detainee's due process rights. The court held that the detainee could not recover damages for injuries allegedly sustained due to prison overcrowding absent a showing that the overcrowding resulted in the denial of the minimal civilized measure of life's necessities, or that prison officials were aware that overcrowding created excessive risks to inmate safety.

[O]vercrowding alone is not "sufficiently serious" to establish a constitutional violation. *Stevenson* has not demonstrated that placing three inmates in a cell designed for two denied him the minimal civilized measure of life's necessities. He has not alleged that the situation led to "deprivations of

essential food, medical care, or sanitation." Nor has he alleged facts allowing an inference that conditions rose to the level of "conditions posing a substantial risk of serious harm."

Id. at 446. See also *Kennibrew v. Russell*, 578 F.Supp. 164, 168 (E.D. Tenn. 1983) (The United States Supreme Court has held that double-celling of prison inmates in cells containing 63 square feet of floor space (31.5 square feet per inmate) does not constitute cruel and unusual punishment.).

"The constitutional standard on overcrowding cannot be expressed in a square footage formula. Rather, whether a particular institution is unconstitutionally overcrowded depends on a number of factors including the size of the inmate's living space, the length of time the inmate spends in his cell each day, the length of time of his incarceration, his opportunity for exercise and his general sanitary and living conditions." *Carver v. Knox County*, 753 F.Supp. 1398, 1401 (E.D. Tenn. 1990) (citations omitted). The correct legal standard recognizes that the issue is not overcrowding *per se*, rather, it is *unconstitutional* overcrowding. In other words, a prison facility is not unconstitutional simply because it is overcrowded. In order to ascertain whether a particular facility is unconstitutionally overcrowded, the court must review "...a number of factors including the size of the inmates' living space, the length of time the inmate spends in his cell each day, the length of time of his incarceration, his opportunity for exercise and his general sanitary and living conditions...". *Id.* However, even though the court is required to consider all of the prison's conditions and circumstances in evaluating the sentenced inmates' Eighth Amendment claims, the court must find a specific condition on which to base an Eighth Amendment claim, *i.e.*, it must amount to a deprivation of "life's necessities." *Id.* at 1400 (citations omitted).

See *Roberts v. Tennessee Dept. of Correction*, 887 F.2d 1281 (6th Cir. 1989) and *Carver v. Knox County*, 887 F.2d 1287 (6th Cir. 1989), for cases dealing with the court ordered removal of state inmates from county jails.

Fire Safety

Reference Number: CTAS-1389

If the jail is not fireproof and any person is confined in the jail, it is the duty of the sheriff to be constantly at the jail or to constantly have a jailer at the jail with all the keys necessary to liberate all the prisoners in the jail in case of fire. T.C.A. § 41-4-112. Facilities shall have a written and graphic evacuation plan posted in the housing area, as well as any other specified locations. The plan shall be approved by a contractor or local fire inspector trained in the application of fire safety codes and shall be reviewed annually. Rules of the Tennessee Corrections Institute, Rule 1400-1-.05(7). Facilities shall maintain a written policy and procedure to provide for fire drills every three months for all staff members on every shift and document dates of said drills. Rules of the Tennessee Corrections Institute, Rule 1400-1-.05(5).

Courts have held that adequate shelter must include adequate provisions for fire safety. *Grubbs v. Bradley*, 552 F.Supp. 1052, 1122-1123 (M.D. Tenn. 1982) *citing Leeds v. Watson*, 630 F.2d 674, 675-76 (9th Cir.1980); *Ruiz v. Estelle*, 503 F.Supp. 1265, 1383 (S.D. Tex. 1980), *aff'd in part, rev'd in part and remanded*, 679 F.2d 1115 (1982); *Gates v. Collier*, 349 F.Supp. 881, 888 (N.D. Miss. 1972), *aff'd*, 501 F.2d 1291 (5th Cir. 1974).

Inmates "have the right not to be subjected to the unreasonable threat of injury or death by fire and need not wait until actual casualties occur in order to obtain relief from such conditions." *Jones v. City and County of San Francisco*, 976 F.Supp. 896, 908 (N.D. Cal. 1997) (finding that county failed to reasonably respond to fire safety risks in the jail and holding that the risks constituted punishment in violation of pretrial detainees' 14th Amendment rights) *citing Hoptowit v. Spellman*, 753 F.2d 779, 784 (9th Cir. 1985). See also *Nicholson v. Choctaw County*, 498 F.Supp. 295, 308 (S.D. Ala. 1980) (County officials' failure to correct the fire safety violations as ordered by the state fire marshal violated inmates' Eighth and 14th Amendment rights.); *Dawson v. Kendrick*, 527 F.Supp. 1252, 1289-1290 (S.D. W.Va. 1981) ("Prisoners likewise have the right not to be subjected to the unreasonable threat of injury or death by fire. Prisoners need not wait until they are actually injured by an assault or a fire in order to obtain relief from such conditions.") (citations omitted).

Pursuant to T.C.A. § 68-102-130, the state fire marshal may at all hours enter the county jail for the purpose of making an inspection or investigation. The State Fire Marshal's Office will inspect a county jail upon the written complaint of any citizen or whenever the state fire marshal or his or her deputies or assistants deem it necessary. T.C.A. § 68-102-116. The officer shall order remedies to be made if the officer finds that the jail is especially liable to fire or is in a dangerous or defective condition and is situated so as to endanger life or property due to:

1. A lack of repairs;
2. A lack of sufficient fire escapes;
3. A lack of automatic or other fire alarm apparatus;

4. A lack of fire-extinguishing equipment;
5. Age or dilapidated condition; or
6. Any other cause.

If the officer finds any combustible or explosive matter or inflammable conditions dangerous to the safety of the jail, the officer shall order the same removed. Such orders must be immediately complied with by the county. T.C.A. § 68-102-117(a)(1). If compliance with such order is not expedient and does not permanently remedy the condition, after giving written notice, then the officer has the authority to issue a citation for the violation, requiring the person found to be responsible for the dangerous or defective conditions to appear in court at a specified date and time. T.C.A. § 68-102-117(a)(2). (NOTE: It is the duty of the county legislative body to keep the jail in order and repair. T.C.A. §§ 5-7-104 and 5-7-106.) If the person cited fails to appear in court on the date and time specified, the court shall issue a bench warrant for such person's arrest. T.C.A. § 68-102-117(a)(4).

Inmate Labor

Reference Number: CTAS-1390

The 13th Amendment to the Constitution provides that "[n]either slavery nor involuntary servitude, except as punishment for a crime whereof the party shall have been duly convicted, shall exist within the United States or any place subject to their jurisdiction." U.S. Const. amend. XIII, § 1.

The United States Supreme Court has observed that requiring convicted prisoners to work without pay does not violate the 13th Amendment's prohibition against involuntary servitude. *United States v. Kozminski*, 487 U.S. 931, 943-944, 108 S.Ct. 2751, 2760, 101 L.Ed.2d 788 (1988) ("Our precedents reveal that not all situations in which labor is compelled by physical coercion or force of law violate the Thirteenth Amendment. By its terms the Amendment excludes involuntary servitude imposed as legal punishment for a crime."). "When a person is duly tried, convicted, and sentenced in accordance with the law, no issue of personage or involuntary servitude arises." *Draper v. Rhay*, 315 F.2d 193, 197 (9th Cir.1963).

Pretrial Detainees

Reference Number: CTAS-1391

"Requiring a pretrial detainee to work or be placed in administrative segregation is punishment. Requiring a pretrial detainee to perform general housekeeping chores, on the other hand, is not." *Martinez v. Turner*, 977 F.2d 421, 423 (8th Cir. 1992), cert. denied, 507 U.S. 1009, 113 S.Ct. 1658, 123 L.Ed.2d 277 (1993). See also *Channer v. Hall*, 112 F.3d 214, 218-19 (5th Cir. 1997) (recognizing the existence of a judicially created "housekeeping-chore" exception to the prohibition against involuntary servitude). The Rules of the Tennessee Corrections Institute, Rule 1400-1-.12(9) state that written policy shall provide that pretrial detainees shall not be required to work, except to do personal housekeeping.

"[T]he pretrial detainee, who has yet to be adjudicated guilty of any crime, may not be subjected to any form of 'punishment.' But not every inconvenience encountered during pre-trial detention amounts to 'punishment' in the constitutional sense. To establish that a particular condition or restriction of his confinement is constitutionally impermissible 'punishment,' the pretrial detainee must show either that it was (1) imposed with an expressed intent to punish or (2) not reasonably related to a legitimate non-punitive governmental objective, in which case an intent to punish may be inferred." *Martin v. Gentile*, 849 F.2d 863, 870 (4th Cir. 1988) (citations omitted).

The Fourth Circuit Court of Appeals has held that requiring pretrial detainees to perform "general housekeeping responsibilities" does not violate the 13th Amendment. *Hause v. Vaught*, 993 F.2d 1079, 1085 (4th Cir. 1993) (requiring pretrial detainee to participate in cleaning cell block was not inherently punitive and was related to legitimate governmental objective of prison cleanliness, and was not in violation of detainee's right not to be punished prior to conviction for some crime). See also *Tourscher v. McCullough*, 184 F.3d 236, 240 (3d Cir. 1999) (Inmate's status as pretrial detainee does not necessarily mean that he cannot be compelled to perform some service in the prison.).

In *Bijeol v. Nelson*, 579 F.2d 423, 424 (7th Cir. 1978), the Seventh Circuit Court of Appeals held that a pretrial detainee may constitutionally be compelled to perform simple housekeeping tasks in his or her own cell and community areas.

A pretrial detainee has no constitutional right to order from a menu or have maid service. Daily general housekeeping responsibilities are not punitive in nature and for health and safety must be routinely observed in any multiple living unit. In this case, the affidavit of a unit manager at the Metropolitan Correctional Center stated that the approximate daily time required for the assigned

housekeeping chores was between 45 and 120 minutes, that the assignments were rotated weekly, and that inmates were required to clean up areas which became unusually messy prior to the regularly scheduled cleaning (in this case Bijeol was requested to clean up some cigarette butts outside the door to his room and adjacent to the television room). The arrangement seems as fair and equitable as is possible when you have groups of people living together, some of whom may tend to be neater than others.

Id. "The work must not be overly burdensome in the time or labor required. In addition, such work must not be assigned so as to preclude a pretrial detainee from effectively participating in his or her defense to pending criminal charges." *Id.* at 425.

In *Ford v. Nassau County Executive*, 41 F.Supp.2d 392 (E.D. N.Y. 1999) the district court found that requiring a pretrial detainee to work without payment as a food cart worker did not deprive the detainee of liberty without due process of law.

Ford's being required to distribute food cannot, by itself, be considered punishment. The work involved, helping to feed other inmates, is clearly the type that may be classified as serving a legitimate government purpose. Furthermore, as Ford himself testified, he was rewarded for his assistance by being given extra food. Compensation, even minimal compensation, is not in keeping with an intent to punish. Moreover, the kinds of chores Ford did, handing out food, mopping and sweeping, more closely resemble those that have been held to be allowable reasonable "housekeeping duties" than those held to be forced labor.

Id. at 397.

It is important to add that certain types of required labor might indicate an intent to punish and, therefore, would constitute a interference with the liberty interest under *Bell v. Wolfish*. While help with the "chores" around the detention center is a reasonable requirement of those who live there, tasks which carry with them demeaning connotations might amount to punishment-for instance, requiring a detainee to clean a toilet with a toothbrush. Alternatively, even non-demeaning tasks may be unduly strenuous for a particular detainee and, therefore, exceed what is acceptable. Although this type of case-by-case review may appear to force courts to engage in unwarranted supervision of prison institutions, in fact, it should be fairly obvious to any professional warden what are acceptable "chores" and what are not. Here, there is no evidence that Ford's chores, despite his medical status, were overly burdensome to him. Under any standard, the tasks assigned to plaintiff were reasonable, appropriate, and not punishment.

Id. at 398-399.

In addition to dismissing Ford's due process claim, the court dismissed Ford's 13th Amendment claim. "In the present case, Ford does not allege that a burdensome work schedule was imposed upon him. Instead, he asserts that while a detainee he could be called upon at any time to help distribute food. This does not smack of the kind of evil prohibited by the Thirteenth Amendment." *Id.* at 401.

In *Brooks v. George County*, 84 F.3d 157 (5th Cir. 1996), the county held Brooks as a pretrial detainee.

In March 1991, during the time period in which he was confined in the George County jail, Brooks requested and was granted trusty status. Brooks specifically asked that he be made trusty. As a trusty, Brooks was not locked down in his cell, but was, instead, allowed the freedom to roam in and out of his cell, Sheriff Howell's office, the jail and the surrounding grounds area.

While incarcerated, Brooks performed, at his own request, various services for Sheriff Howell, George County and others, including several charitable and benevolent organizations. Brooks performed these services on public property as well as private property. Brooks performed these services for two reasons: (1) he was able to secure his release from jail during the day and (2) Brooks earned extra money by working on the outside. Brooks was not compensated for those services he performed on public property, but on several occasions, was paid money or received goods in exchange for the services he rendered on private property.

Id. at 161.

The Fifth Circuit Court of Appeals held that Brooks was not subject to involuntary servitude and thus presented no claim under the 13th Amendment. The court noted that as a pretrial detainee, Brooks was entitled only to be confined until trial. The sheriff was under no obligation to allow Brooks the freedom he enjoyed.

Brooks made the request for trusty status. He desired to leave the jail and chose to work as the price for that right. Since Brooks was not being punished by being detained until trial, the choice between this confinement and work as a trusty cannot be considered coercive because the benefits he received for working were not benefits for which he was otherwise entitled.

Admittedly, the choice described might have been a painful one, but it was nonetheless a choice. *Id.* at 162-163. See also *Watson v. Graves*, 909 F.2d 1549, 1552-1553 (5th Cir. 1990) (Inmates who voluntarily request work have no 13th Amendment claim.).

Convicted Prisoners

Reference Number: CTAS-1392

Officials having responsibility for the custody and safekeeping of defendants may promulgate and enforce reasonable disciplinary rules and procedures requiring all able-bodied inmates to participate in work programs. Such rules and procedures may provide appropriate punishments for inmates who refuse to work, including, but not limited to, increasing the amount of time the defendant must serve in confinement or changing the conditions of the defendant's confinement, or both. Any such increase in the amount of time a defendant must serve for refusing to participate in a work program shall not exceed the sentence originally imposed by the court. T.C.A. § 40-35-317(b).

The legislature has clearly stated its intent to require able-bodied inmates to participate in work programs. Under T.C.A. § 40-35-317(b), officials in charge of county jails or workhouses may promulgate and enforce disciplinary rules requiring such work and punishing inmates refusing to work. Op. Tenn. Atty. Gen. No. 83-363 (August 15, 1983).

All those convicted of a felony whose imprisonment has been by the jury commuted to imprisonment in the county jail shall be compelled to work out the term of imprisonment at hard labor in the county workhouse in the county where convicted. T.C.A. § 40-23-105.

"The Thirteenth Amendment permits involuntary servitude without pay as punishment after conviction of an offense, even when the prisoner is not explicitly sentenced to hard labor." *Smith v. Dretke*, 2005 WL 3420079 (5th Cir. 2005) (holding the plaintiff failed to show that the defendants violated his rights by making him hold a prison job). See also *Walton v. Texas Dept. of Criminal Justice, Institutional Div.*, 146 Fed.Appx. 717, 718 (5th Cir. 2005) ("Compelling an inmate to work without pay does not violate the Constitution even if the inmate is not specifically sentenced to hard labor. The State maintains discretion to determine whether and under what circumstances inmates will be paid for their labor."); *Ali v. Johnson*, 259 F.3d 317, 317-318 (5th Cir. 2001) (This appeal leads us to reiterate that inmates sentenced to incarceration cannot state a viable 13th Amendment claim if the prison system requires them to work.); *Vanskike v. Peters*, 974 F.2d 806, 809 (7th Cir. 1992) ("The Thirteenth Amendment excludes convicted criminals from the prohibition of involuntary servitude, so prisoners may be required to work."), *cert. denied*, 507 U.S. 928, 113 S.Ct. 1303, 122 L.Ed.2d 692 (1993); *Mikeska v. Collins*, 900 F.2d 833, 837 (5th Cir. 1990) (Forcing inmates to work without pay, and compelling them to work on private property without pay, does not violate the 13th Amendment.); *Murray v. Mississippi Department of Corrections*, 911 F.2d 1167 (5th Cir. 1990) (same); *Moss v. Arbogast*, 888 F.2d 1392, *1 (6th Cir. 1989) (Table) (There is no 13th Amendment violation of the prohibition against involuntary servitude when a prisoner is forced to work without pay.) (citation omitted); *Jones v. Brown*, 793 F.2d 1292, *2 (6th Cir. 1986) (Table) ("However, compelling prisoners to work does not violate the thirteenth amendment.") (citation omitted); *Newell v. Davis*, 563 F.2d 123, 124 (4th Cir. 1977) (There is no 13th Amendment violation of prohibition against involuntary servitude when a prisoner is forced to work without pay), *cert. denied*, 435 U.S. 907, 98 S.Ct. 1455, 55 L.Ed.2d 498 (1978); *Draper v. Rhay*, 315 F.2d 193, 197 (9th Cir.) ("When a person is duly tried, convicted and sentenced in accordance with the law, no issue of peonage or involuntary servitude arises."), *cert. denied*, 375 U.S. 915, 84 S.Ct. 214, 11 L.Ed.2d 153 (1963); *Borror v. White*, 377 F.Supp. 181, 183 (W.D. Va. 1974) (There exists no constitutional right on the part of a state prisoner to be paid for his labor.); *McLaughlin v. Royster*, 346 F.Supp. 297, 311 (E.D. Va. 1972) ("Prisoners validly convicted may be forced to perform work, whether or not compensated and whether or not related to purposes of rehabilitation, so long as it does not amount to cruel and unusual punishment."). *But see Anderson v. Morgan*, 898 F.2d 144 (Table) (4th Cir. 1990) (Forcing an inmate to perform work that inures solely to an individual's private benefit, as opposed to the public benefit, is not as plainly allowed under the 13th Amendment's exception for work imposed as punishment for crime.), *citing Matthews v. Reynolds*, 405 F.Supp. 50 (W.D. Va. 1975).

"Compelling prison inmates to work does not contravene the Thirteenth Amendment. However there are circumstances in which prison work requirements can constitute cruel and unusual punishment. [F]or prison officials knowingly to compel convicts to perform physical labor which is beyond their strength, or which constitutes a danger to their lives or health, or which is unduly painful constitutes an infliction of cruel and unusual punishment prohibited by the Eighth Amendment to the Constitution of the United States as included in the 14th Amendment." *Ray v. Mabry*, 556 F.2d 881, 882 (8th Cir. 1977) (per curiam) (citations omitted). See also *Berry v. Bunnell*, 39 F.3d 1056 (9th Cir. 1994) (The 13th Amendment does not apply where prisoners are required to work in accordance with prison rules. And the

Eighth Amendment does not apply unless prisoners are compelled to perform physical labor that is beyond their strength, endangers their lives or health, or causes undue pain.); *Madewell v. Roberts*, 909 F.2d 1203, 1207 (8th Cir.1990) ("Cruel and unusual punishment encompasses (1) deliberate indifference to serious medical needs, and (2) compelled labor beyond an inmate's physical capacity, that is, labor which is (a) beyond the inmate's strength, (b) dangerous to his or her life or health, or (c) unduly painful.").

Conversely, inmates have no constitutional right to work or to be paid for work. And, while work activity is preferable to idleness, the conferral of a job upon an inmate is a matter within the sound discretion of jail administrators. Finally, inmates have no constitutional right to be paid for idle time. *Kennibrew v. Russell*, 578 F.Supp. 164, 169 (E.D. Tenn. 1983), citing *Manning v. Lockhart*, 623 F.2d 536, 538 (8th Cir.1980) and *Inmates, Washington County Jail v. England*, 516 F.Supp. 132, 141 (E.D. Tenn. 1980). See also *Carter v. Tucker*, 69 Fed.Appx. 678, 680 (6th Cir. 2003) ("A prisoner has no constitutional right to prison employment or a particular prison job. Further, as the Constitution and federal law do not create a property right for inmates in a job, they likewise do not create a property right to wages for work performed by inmates."); *Sotherland v. Myers*, 41 Fed.Appx. 752, 753 (6th Cir. 2002) (Prisoners do not have a constitutionally protected right to a prison job.); *Clegg v. Bell*, 3 Fed.Appx. 398, 399 (6th Cir. 2001) (State prisoners possess no right to a specific prison job.); *Newsom v. Norris*, 888 F.2d 371, 374 (6th Cir. 1989).

"[T]he Constitution does not create a property or liberty interest in prison employment [and] any such interest must be created by state law by 'language of an unmistakably mandatory character.'" *Miller v. Campbell*, 108 F.Supp.2d 960, 967 (W.D. Tenn. 2000), citing *Newsom v. Norris*, 888 F.2d 371, 374 (6th Cir. 1989) (citations omitted) (quoting *Ingram v. Papalia*, 804 F.2d 595, 596-597 (10th Cir. 1986)); *Watts v. Morgan*, 572 F.Supp. 1385, 1388 (N.D. Ill. 1983). "As the Constitution and federal law do not create a property right for inmates in a job, they likewise do not create a property right to wages for work performed by inmates." *Id.*, (citing cases). "Rather, prison administrators may assign inmates jobs and wages at their discretion." *Id.*, (citations omitted).

In *Tourscher v. McCullough*, 184 F.3d 236, 240 (3d Cir. 1999), the Third Circuit Court of Appeals found that the 13th Amendment does not preclude prison authorities from compelling a prisoner to work during the pendency of his or her appeal from a conviction. Likewise, other circuits have held that a person sentenced to serve a term of imprisonment can be required to work during the time his or her appeal is pending before a reviewing court. See *Stiltner v. Rhay*, 322 F.2d 314, 315 (9th Cir. 1963) ("There is no federally protected right of a state prisoner not to work while imprisoned after conviction, even though that conviction is being appealed."). See also *Plaisance v. Phelps*, 845 F.2d 107, 108 (5th Cir. 1988) ("The fact that appellant is appealing does not require the district court to assume that his conviction was other than duly obtained."); *Omasta v. Wainwright*, 696 F.2d 1304, 1305 (11th Cir. 1983) (holding that "where a prisoner is incarcerated pursuant to a presumptively valid judgment ... the Thirteenth Amendment's prohibition against involuntary servitude is not implicated even though the conviction may be subsequently reversed").

Pursuant to T.C.A. § 41-2-147(a), any sheriff having responsibility for the custody of any person sentenced to a local jail pursuant to the provisions of T.C.A. § 40-35-302 (misdemeanor sentence), T.C.A. § 40-35-306 (split confinement), T.C.A. § 40-35-307 (probation coupled with periodic confinement) or T.C.A. § 40-35-314 (felon confined in local jail) shall, when such person has become eligible for work-related programs pursuant to such sections, be authorized to permit that person to perform any of the duties set out in T.C.A. § 41-2-123 or T.C.A. § 41-2-146.

Trustee status for sexual offenders. In accordance with TCA 41-51-104(a and b), no person who has been convicted of an offense that will require the person to register as a sexual offender pursuant to the provisions of title 40, chapter 39, part 2, and who is being housed in a county or municipal jail or workhouse, shall be eligible for, nor shall such person be placed on, trusty status. The provisions of subsection (a) are applicable regardless of whether the person is: (1) Sentenced to the department of correction but is serving the sentence in a county or municipal jail or workhouse pursuant to contract or is sentenced to confinement in a county or municipal jail or workhouse; or (2) Sentenced to the department of correction but is being housed in a county or municipal jail or workhouse while awaiting transfer to the department.

Road Work

Reference Number: CTAS-1393

When any prisoner has been sentenced to imprisonment in a county jail for a period not to exceed 11 months and 29 days, the sheriff is authorized to permit the prisoner to work on the county roads or within municipalities within the county on roads, parks, public property, public easements or alongside public waterways up to a maximum of 50 feet from the shoreline .T.C.A. § 41-2-123(b)(1).

It is the duty of such prisoners to pick up and collect litter, trash and other miscellaneous items that are unsightly to the public and that have accumulated on the county roads. All such prisoners participating in this work program shall be under the supervision of the county sheriff or the sheriff's representative. Prisoners used by a municipality shall be supervised by representatives of the municipality. The prisoners may be used by municipalities for such duties or manual labor as the municipality deems appropriate. T.C.A. § 41-2-123(b)(2).

Neither the state nor any municipality, county or political subdivision thereof, nor any employee or officer thereof, shall be liable to any person for the acts of any prisoner while on a work detail, while being transported to or from a work detail, while attempting an escape from a work detail, or after escape from a work detail. T.C.A. § 41-2-123(d)(1).

Neither the state nor any municipality, county, or political subdivision thereof, nor any employee or officer thereof, shall be liable to any prisoner or prisoner's family for death or injuries received while on a work detail, other than for medical treatment for the injury during the period of the prisoner's confinement. T.C.A. § 41-2-123(d)(2).

Jail Maintenance Work

Reference Number: CTAS-1394

When any prisoner has been sentenced to imprisonment in a county jail or is serving time in the county jail pursuant to an agreement with the Department of Correction, the sheriff is authorized to permit the prisoner to participate in work programs. T.C.A. § 41-2-146(a).

Jail or Workhouse Sentences of less than one year

Reference Number: CTAS-2133

In accordance with T.C.A. § 40-20-117:

(a) Whenever any person is sentenced to imprisonment in a county jail or workhouse for a period not to exceed eleven (11) months and twenty-nine (29) days, the judge of the court in which the sentence is imposed may, in the judge's discretion, include in the order of judgment suitable provisions and directions to the officer to whose custody the prisoner is committed for safekeeping as will ensure that the convicted person will be allowed to serve the sentence on nonconsecutive days, which may include, but is not limited to, weekends, between hours to be specified in the judgment, which provisions or directions may be revoked, suspended or amended from time to time by the judge of the committing court until the sentence is served or until the convicted person is lawfully released prior to the expiration of the person's sentence.

(b) The sheriff, warden, superintendent or other official having responsibility for the safekeeping of the convicted person in any jail or workhouse shall adopt procedures for the release of the convicted person at the times specified in the order of judgment and for receiving the person back into custody at the specified times. Willful failure of any official to comply with the directions of the court constitutes contempt of court, punishable as provided by law for contempt generally.

(c) Failure of the convicted person to surrender to the custody of the sheriff, warden, superintendent or other official responsible for the convicted person's safekeeping in the jail or workhouse within the time specified in the order of judgment constitutes grounds for the suspension or revocation of the privilege granted, in the discretion of the court. The order of judgment may specify time limits beyond which a continued absence shall be considered an escape and the offender shall then be liable to punishment for escape as provided by law; provided, that the person sentenced may elect to serve the person's sentence on consecutive days.

Sentence Reduction Credits

Reference Number: CTAS-1395

There is no right under the Constitution to earn or receive sentence credits. *Miller v. Campbell*, 108 F.Supp.2d 960, 966 (W.D. Tenn. 2000), citing *Hansard v. Barrett*, 980 F.2d 1059, 1062 (6th Cir. 1992). Neither is there any fundamental right to parole or to release from a sentence of incarceration that has itself been lawfully imposed. *Id.*, citing *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1, 7, 99 S.Ct. 2100, 60 L.Ed.2d 668 (1979).

Road work performed by a prisoner under T.C.A. § 41-2-123(b) shall be credited toward reduction of the prisoner's sentence as follows: for each one day worked on the road by the prisoner, the prisoner's sentence shall be reduced by two days. T.C.A. § 41-2-123(b)(3). Work performed by a prisoner under T.C.A. § 41-2-146 shall be credited toward reduction of the prisoner's sentence as follows: for each one day worked on such duties by the prisoner, the sentence shall be reduced by two days. T.C.A. § 41-2-146(b). See also T.C.A. § 41-2-147 (Work performed by a prisoner under T.C.A. § 41-2-147 shall be credited toward reduction of the prisoner's sentence as follows: for each one day worked on such duties by the prisoner, the sentence shall be reduced by two days.); Op. Tenn. Atty. Gen. No. 03-125 (September 29, 2003).

Any prisoner receiving sentence credits under T.C.A. § 41-2-147 is not eligible for good time credits authorized by T.C.A. § 41-2-111. T.C.A. § 41-2-147(c).

FELONY OFFENDERS. Sentence reduction credits for good institutional behavior as authorized by T.C.A. § 41-21-236 for state prisoners serving sentences in county jails shall likewise apply in accordance with the terms of T.C.A. § 41-21-236, and under the criteria, rules and regulations established by the Department of Correction, to all felony offenders serving sentences of one or more years in local jails or workhouses and to all inmates serving time in county jails or workhouses because the inmate's commitment to the Department of Correction has been delayed due to invocation of the governor's emergency overcrowding powers or through an injunction from a federal court restricting the intake of inmates into the Department of Correction. When T.C.A. § 41-21-236 is applied to such offenders, references therein to "warden" are deemed references to the superintendent or jailer, as appropriate. Such felony offenders are not eligible to receive any other sentence credits for good institutional behavior provided that in addition to the sentence reduction credits for good institutional behavior as authorized by T.C.A. § 41-21-236, such felony offenders may receive any credits for which they are eligible under Title 41, Chapter 2, for work performed or satisfactory performance of job, educational or vocational programs. T.C.A. § 41-21-236(d).

With respect to sentence reduction credits, when a state inmate is serving a sentence in a county jail the sheriff is deemed to be a warden pursuant to T.C.A. § 41-21-236(d) and is, therefore, required to keep written records on a monthly basis of the sentence reduction credits a prisoner has earned. T.C.A. § 41-21-236(a)(3). Because prisoners may become ineligible to earn sentence reduction credits (see T.C.A. § 41-21-236(b)(7)) and may also be deprived of sentence reduction credits they have already earned (see T.C.A. § 41-21-236(a)(5), (6)), these records must reflect any actions that either render a prisoner ineligible to earn sentence credits or deprive a prisoner of previously earned sentence reduction credits. *Cooley v. May*, 2001 WL 1660830, *6 (Tenn. Ct. App. 2001).

"Although no statute or rule expressly requires a sheriff housing a state prisoner to send an accounting of a prisoner's sentence reduction credits to the Department of Correction, this obligation is a necessary part of T.C.A. § 41-21-236(a)(3). It would be nonsensical to allow state prisoners to earn sentence reduction credits while they are incarcerated in a county jail but then not to require a sheriff to inform the Department of Correction – the legal custodian of the prisoner – how many sentence reduction credits the prisoner had earned or forfeited on a monthly basis." *Id.*

A defendant is given credit on his sentence by the trial court for any period of time in which the defendant was committed and held in the county jail or workhouse pending arraignment and trial, provided the time spent in jail arises out of the original offense for which the defendant was tried. Tenn. Code Ann. § 40-23-101(c). The statute provides specifically in pertinent part:

The trial court shall, at the time the sentence is imposed and the defendant is committed to jail, the workhouse or the state penitentiary for imprisonment, render the judgment of the court so as to allow the defendant credit on the sentence *for any period of time* for which the defendant was committed and held in the city jail or juvenile court detention prior to waiver of juvenile court jurisdiction, or county jail or workhouse, pending arraignment and trial.

(emphasis added). The provisions of this code section are mandatory. *Stubbs v. State*, 216 Tenn. 567, 393 S.W.2d 150 (1965). Pretrial jail credit must be documented by the court in the judgment order. Tenn. Code Ann. § 40-35-209(e)(1)(P). Pretrial jail credits affect release eligibility and sentence expiration in the same manner as other types of credit for time served. Tenn. Atty. Gen. 11-12 (January 27, 2011)

Good Time Credit

Reference Number: CTAS-1396

Each prisoner who has been sentenced to the county jail for any period of less than one year on either a misdemeanor or a felony, and who behaves uprightly, shall have deducted from the sentence imposed by the court time equal to one-quarter of such sentence. In calculating the amount of good time credit

earned, the one-quarter reduction shall apply to the entire sentence, including pretrial and posttrial confinement. Fractions of a day's credit for good time of one-half or more shall be considered a full day's credit. If any prisoner violates the rules and regulations of the jail or otherwise behaves improperly, the sheriff may revoke all or any portion of the prisoner's good time credit provided that the prisoner is given a hearing in accordance with due process before a disciplinary review board and is found to have violated the rules and regulations of the institution. T.C.A. § 41-2-111(b).

Any prisoner receiving sentence credits under T.C.A. § 41-2-147 is not eligible for good time credits authorized by T.C.A. § 41-2-111. T.C.A. § 41-2-147(c).

Disciplinary Review Board

Reference Number: CTAS-1397

Each county is required to have a disciplinary review board that shall be composed of six impartial members, one or more of whom may be members of the jail staff. Members of the disciplinary review board are appointed by the sheriff or the jail administrator, subject to approval by the county legislative body. Members serve for a period of two years, except that appointments made to fill unexpired terms are for the period of such unexpired terms. No less than one and no more than three of the members of the disciplinary review board are required to transact the business authorized by law. Members of the board, while acting in good faith, shall not be subject to civil liability relative to the performance of duties delegated to the board by law. T.C.A. § 41-2-111(c).

The prisoner shall be given notice of the disciplinary hearing and shall have the right to call witnesses in the prisoner's behalf. Decisions of the disciplinary review board may be appealed to the sheriff. T.C.A. § 41-2-111(d).

Except in Shelby County, the county legislative body is authorized to establish the rate of compensation for members of the disciplinary review board. T.C.A. § 41-2-111(c)(5).

Punishment for Refusing to Work

Reference Number: CTAS-1398

Except as provided in T.C.A. § 41-2-150(b), any person sentenced to the county jail for either a felony or misdemeanor conviction in counties with programs whereby prisoners work either for pay or sentence reduction or both shall be required to participate in such work programs during the period of incarceration. Any prisoner who refuses to participate in such programs when work is available shall have any sentence reduction credits received pursuant to the provisions of T.C.A. § 41-2-123 or T.C.A. § 41-2-146 reduced by two days of credit for each one day of refusal to work. Any prisoner who refuses to participate in such work programs who has not received any sentence reduction credits pursuant to such sections may be denied good time credit in accordance with the provisions of T.C.A. § 41-2-111(b), and may also be denied any other privileges given to inmates in good standing for refusing to work. T.C.A. § 41-2-150(a).

The only exceptions to the requirements of T.C.A. § 41-2-150(a) are for those who, in the opinion of the sheriff, would present a security risk or a danger to the public if allowed to leave the confines of the jail and for those who, in the opinion of a licensed physician or licensed medical professional, should not perform such labor for medical reasons. T.C.A. § 41-2-150(b).

"The Eighth Amendment requires prison officials to provide humane conditions of confinement. A prison official may be liable for denying an inmate humane conditions of confinement only if he or she 'knows of and disregards an excessive risk to inmate health or safety.' There is no dispute that forcing an inmate to work beyond his physical abilities could pose a serious risk to an inmate's health or safety." *Moore v. Moore*, 111 Fed.Appx. 436, 438 (8th Cir. 2004) (holding that assigning prison inmate, who suffered from advanced osteoarthritis in his back, to work detail that included cleaning prison yard and clearing ice and snow from walkways did not amount to cruel and unusual punishment in violation of his Eighth Amendment rights, where inmate was subject to certain work restrictions and he worked within the restrictions while on the work detail). *Cf. Williams v. Norris*, 148 F.3d 983, 987 (8th Cir. 1998) (finding sufficient evidence that prison officials violated the Eighth Amendment by forcing an inmate to work in excess of his medical restrictions).

Pursuant to T.C.A. § 41-2-120(a), any prisoner refusing to work or becoming disorderly may be confined in solitary confinement or subjected to such other punishment, not inconsistent with humanity, as may be deemed necessary by the sheriff for the control of the prisoners, including reducing sentence credits pursuant to the procedure established in T.C.A. § 41-2-111. Such prisoners refusing to work, or while in solitary confinement, shall receive no credit for the time so spent. T.C.A. § 41-2-120(b).

In *Hope v. Pelzer*, 240 F.3d 975 (2001), the United States Court of Appeals for the Eleventh Circuit held

that "the policy and practice of cuffing an inmate to a hitching post or similar stationary object for a period of time that surpasses that necessary to quell a threat or restore order is a violation of the Eighth Amendment." *Id.* at 980-981. And in *Hope v. Pelzer*, 536 U.S. 730, 737, 122 S.Ct. 2508, 2514, 153 L.Ed.2d 666 (2002), the United States Supreme Court agreed. "In 1995, Alabama was the only State that followed the practice of chaining inmates to one another in work squads. It was also the only State that handcuffed prisoners to 'hitching posts' if they either refused to work or otherwise disrupted work squads." *Id.* at 733, 122 S.Ct. at 2512. The Supreme Court stated:

As the facts are alleged by Hope, the Eighth Amendment violation is obvious. Any safety concerns had long since abated by the time petitioner was handcuffed to the hitching post because Hope had already been subdued, handcuffed, placed in leg irons, and transported back to the prison. He was separated from his work squad and not given the opportunity to return to work. Despite the clear lack of an emergency situation, the respondents knowingly subjected him to a substantial risk of physical harm, to unnecessary pain caused by the handcuffs and the restricted position of confinement for a 7-hour period, to unnecessary exposure to the heat of the sun, to prolonged thirst and taunting, and to a deprivation of bathroom breaks that created a risk of particular discomfort and humiliation. The use of the hitching post under these circumstances violated the "basic concept underlying the Eighth Amendment[, which] is nothing less than the dignity of man. This punitive treatment amounts to gratuitous infliction of "wanton and unnecessary" pain that our precedent clearly prohibits.

Id. at 738, 122 S.Ct. at 2514-2515. See also *Gates v. Collier*, 501 F.2d 1291, 1306 (5th Cir. 1974) (holding the practice of handcuffing inmates to a fence and to cells for long periods of time and forcing inmates to stand, sit or lie on crates, or stumps, or otherwise maintain awkward positions for prolonged periods violates the Eighth Amendment and offends contemporary concepts of decency, human dignity, and precepts of civilization); *Ort v. White*, 813 F.2d 318, 325 (11th Cir. 1987) (holding that an officer's temporary denials of drinking water to an inmate who repeatedly refused to do his share of the work assigned to a farm squad "should not be viewed as punishment in the strict sense, but instead as necessary coercive measures undertaken to obtain compliance with a reasonable prison rule, *i.e.*, the requirement that all inmates perform their assigned farm squad duties"); *Murray v. Unknown Evert*, 84 Fed.Appx. 553 (6th Cir. 2003) (The mere fact that state prisoner was placed in detention, with nothing more, was insufficient to state an Eighth Amendment claim under § 1983; he did not allege that his detention was more severe than the typical conditions of segregation or that he was deprived of the minimum civilized measures of life's necessities.).

"It is not constitutionally permissible for officers to administer a beating as punishment for a prisoner's past misconduct," nor may government officials use gratuitous force against a prisoner who has been already subdued or incapacitated. *Skrnich v. Thornton*, 280 F.3d 1295, 1300-1303 (11th Cir. 2002).

Under the Eighth Amendment, force is deemed legitimate in a custodial setting as long as it is applied "in a good faith effort to maintain or restore discipline [and not] maliciously and sadistically to cause harm." To determine if an application of force was applied maliciously and sadistically to cause harm, a variety of factors are considered including: "the need for the application of force, the relationship between that need and the amount of force used, the threat reasonably perceived by the responsible officials, and any efforts made to temper the severity of a forceful response." From consideration of such factors, "inferences may be drawn as to whether the use of force could plausibly have been thought necessary, or instead evinced such wantonness with respect to the unjustified infliction of harm as is tantamount to a knowing willingness that it occur." Moreover, an officer who is present at the scene and who fails to take reasonable steps to protect the victim of another officer's use of excessive force can be held personally liable for his nonfeasance.

Id.

In *Skrnich*, officers were called to Skrtich's cell to perform a "cell extraction" because he had refused to vacate his cell so it could be searched. Skrtich was on "close management status" due to his history of disciplinary problems. Skrtich's prison records set out his disciplinary problems, which included a conviction for aggravated assault with a deadly weapon for repeatedly stabbing a prison guard. Skrtich had been subject to several cell extractions in the past. The officers arrived at Skrtich's cell wearing riot gear. The officers entered Skrtich's cell and used an electronic shield to shock Skrtich, knocking him to the floor. Once on the floor, the officers kicked him repeatedly in the back, ribs and side, and one of the officers struck him with his fists. Three times, after falling, Skrtich was lifted onto his knees and the beating continued each time. Two officers watched and did nothing to stop the beating. At some point, one of those officers verbally threatened Skrtich and actively participated in the assault by knocking Skrtich to the ground several times after the other officers picked him up, and by slamming his head into the wall. *Id.* at 1299-1300. As a result of his injuries, Skrtich had to be airlifted by helicopter to a hospital. The kind of injuries Skrtich suffered included multiple rib fractures, back injuries, lacerations to the scalp,

and abdominal injuries requiring nine days of hospitalization and several months of rehabilitation. *Id.* at 1302.

The court found that in "the absence of any evidence that any force, much less the force alleged here, was necessary to maintain order or restore discipline, it is clear that Skrtich's Eighth Amendment rights were violated." *Id.*

Other Work Permitted for Inmates

Reference Number: CTAS-1399

Inmates housed in a county jail may voluntarily perform any labor on behalf of a charitable organization or a nonprofit corporation or a governmental entity. T.C.A. § 41-3-106(b)(2). *See also* T.C.A. § 41-2-148(b)(2); Op. Tenn. Atty. Gen. No. 03-075 (June 18, 2003).

Inmate Labor for Private Purposes Prohibited

Reference Number: CTAS-1400

No sheriff, jailer or other person responsible for the care and custody of inmates housed in a county jail may employ, require or otherwise use any such inmate housed therein to perform labor that will or may result directly or indirectly in such sheriff's, jailer's or other person's personal gain, profit or benefit or in gain, profit or benefit to a business partially or wholly owned by such sheriff, jailer or other person. This prohibition shall apply regardless of whether the inmate is or is not compensated for any such labor. T.C.A. § 41-2-148(a). *See also* Op. Tenn. Atty. Gen. No. 03-075 (June 18, 2003).

No sheriff, jailer or other person responsible for the care and custody of inmates housed in a county jail may permit any such inmate housed therein to perform any labor for the gain, profit or benefit of a private citizen, or for-profit corporation, partnership or other business unless such labor is part of a court-approved work release program or unless the work release program operates under a commission established pursuant to T.C.A. § 41-2-134. T.C.A. § 41-2-148(b)(1). *See also* Op. Tenn. Atty. Gen. No. 03-125 (September 29, 2003).

Penalties for Violating Inmate Labor for Private Purposes

Reference Number: CTAS-1401

Any sheriff, jailer or other person responsible for the custody of an inmate housed in a local facility who violates the provisions of T.C.A. § 41-2-148 regarding inmate labor for private purposes, upon such person's first such conviction therefor, commits a misdemeanor and shall be punished by a fine equal to the value of the services received from the inmate or inmates and imprisonment for not less than 30 days nor more than 11 months and 29 days. Upon a second or subsequent conviction for a violation of T.C.A. § 41-2-148, such sheriff, jailer or other person is guilty of a felony and shall be punished by a fine of not less than the value of the services received from the inmate or inmates nor more than \$5,000 and imprisonment for not less than one nor more than five years. If the person violating T.C.A. § 41-2-148 for the second or subsequent time is a public official, in addition to the punishment set out above such person shall immediately forfeit his office and shall be forever barred from holding public office in this state. T.C.A. § 41-2-148(d)(1).

Any private citizen, corporation, partnership or other business knowingly and willfully using inmate labor in violation of T.C.A. § 41-2-148(b) commits a Class A misdemeanor and, upon conviction, shall be punished by a fine of \$1,000 and by imprisonment for not more than 11 months and 29 days. Each day inmate labor is used in violation of T.C.A. § 41-2-148(b) constitutes a separate offense. T.C.A. § 41-2-148(d)(2).

In the case of *In re Williams*, 987 S.W.2d 837 (Tenn. 1998), the Tennessee Supreme Court heard the appeal of Judge Billy Wayne Williams from the Court of the Judiciary's judgment recommending that he be removed from the office of general sessions court judge of Lauderdale County. Judge Williams had, among other things, used an inmate from the county jail to help build a house for his son.

"Judge Williams asserted that he was unaware that the practice of using prison labor for personal work was illegal. He believed that he had committed no impropriety because other county officials had also used prison labor as an 'informal work release program.' Although several other witnesses testified that private individuals in Lauderdale County had a long standing practice of using inmate labor for personal work, it was undisputed that Lauderdale County did not have a formal, approved work release program." *Id.* at 838-839.

Noting that the use of an inmate for a private purpose is a criminal offense, the court found that neither assertion constituted a defense to the disciplinary charges and held that the judge's use of an inmate from

the county jail to help build a house for his son violated several canons of the Code of Judicial Conduct. *Id.* at 841-842. The Supreme Court affirmed the Court of the Judiciary's recommendation that Judge Williams be removed from office. *Id.* at 844.

Forcing an inmate to perform work that inures solely to an individual's private benefit, as opposed to the public benefit, is not as plainly allowed under the 13th Amendment's exception for work imposed as punishment for crime. *Anderson v. Morgan*, 898 F.2d 144 (Table) (4th Cir. 1990), *citing Matthews v. Reynolds*, 405 F.Supp. 50 (W.D. Va. 1975).

In *Jordan v. State ex rel. Williams*, 397 S.W.2d 383 (Tenn. 1965), a county commissioner was ousted for utilizing for his own benefit equipment and supplies of the Shelby County Penal Farm and labor of its inmates.

Inmate Discipline

Reference Number: CTAS-1402

Pursuant to Tennessee Code Annotated § 41-2-111, facilities shall maintain written policies and procedures governing disciplinary actions, administrative actions, and criminal offenses. Each County is required to have a disciplinary review board. Rules of the Tennessee Corrections Institute, Rule 1400-1-.08 (4).

Facilities shall maintain policies and procedures to insure that written or electronic facility rules along with the corresponding range of sanctions for rule violations and disciplinary procedures to be followed shall be provided to each inmate during the booking process prior to being placed into general population. A record shall be maintained of this transaction. Socially, mentally, or physically impaired inmates shall be assisted by facility employees in understanding the rules. The rules and regulations shall be available for viewing during confinement and shall be translated into those languages spoken by a significant number of inmates. Rules of the Tennessee Corrections Institute, Rule 1400-1-.08 (2).

Disciplinary reports shall be prepared by facility employees and must include, but are not limited to, the following information:

- (a) Names of persons involved;
- (b) Description of the incident;
- (c) Specific rule(s) violated;
- (d) Employee or inmate witnesses;
- (e) Any immediate action taken, including use of force; and,
- (f) Reporting staff member's signature, date and time report is made.

Rules of the Tennessee Corrections Institute, Rule 1400-1-.08 (3).

The written policy must provide prisoners with a hearing prior to segregation, except in cases where the security of the facility is threatened as determined by the jail administrator or his or her designee. Rules of the Tennessee Corrections Institute, Rule 1400-1-.08 (6).

Facilities shall maintain written policies and procedures to provide for disciplinary hearings, which shall be presided over by a disciplinary board or impartial disciplinary officer, to be held in cases of alleged violations of inmate conduct rules. Hearings shall include the following administrative due process guarantees:

- (a) Inmates shall receive written notice of charges and time of hearing;
- (b) The inmate shall be allowed time, not less than twenty-four (24) hours, to prepare for appearance before an impartial officer or board;
- (c) The inmate shall have the right to call and cross examine witnesses and present evidence in his own defense, when permitting him to do so will not be unduly hazardous to institutional safety or correctional goals;
- (d) An inmate may be excluded during testimony. An inmate's absence or exclusion shall be documented;
- (e) The reasons for any limitations placed on testimony or witnesses shall be stated in writing by the hearing officer;
- (f) There must be a written statement by the fact finders to include, at a minimum, evidence relied on and the reasons for the disciplinary action; and,
- (g) Appeals process is available.

Rules of the Tennessee Corrections Institute, Rule 1400-1-.08 (5).

For segregated prisoners, a disciplinary hearing must be held within 72 hours of placement in segregation, excluding holidays, weekends and emergencies, and for other prisoners a disciplinary hearing must be held within seven days of the write-up. Rules of the Tennessee Corrections Institute, Rule 1400-1-.08 (7).

The prisoner must receive a copy of the disciplinary decision and a copy must be kept in the prisoner's record. The written policy and procedure must provide that disciplinary reports are removed from all files on prisoners found not guilty of an alleged violation. Rules of the Tennessee Corrections Institute, Rule 1400-1-.08 (8) and Rule 1400-1-.08 (9).

"The courts accord wide-ranging deference to correction officials in adopting and administering policies that, in the officials' judgment, are needed to preserve internal order and discipline and to maintain institutional security." *Utley v. Tennessee Dept. of Correction*, 118 S.W.3d 705, 713 (Tenn. Ct. App. 2003) (citations omitted).

The United States Supreme Court has held that state prisoners do not have a liberty interest in the procedural rights created by internal prison disciplinary regulations unless the punishment they receive "imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." *Sandin v. Conner*, 515 U.S. 472, 483-484, 115 S.Ct. 2293, 2300, 132 L.Ed.2d 418 (1995). In other words, *Sandin v. Conner* holds that due process is not necessary as long as the prisoner's punishment is not disproportionate to the rigors of prison life.

An inmate has no liberty interest in remaining free of disciplinary or administrative segregation, as such segregation does not impose an "atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." *Gore v. Tennessee Dept. of Correction*, 132 S.W.3d 369, 371-372 (Tenn. Ct. App. 2003), citing *Sandin v. Conner*, 515 U.S. 472, 115 S.Ct. 2293, 2301, 132 L.Ed.2d 418 (1995) (holding that a punishment of 30 days segregation was not an atypical, significant deprivation). See also *Willis v. TDOC*, 2002 WL 1189730 (Tenn. Ct. App. 2002) (finding that punitive segregation was not an atypical, significant deprivation).

Denial of due process claims are analyzed using a two-part inquiry. "The first question is whether the [inmate] has identified a 'liberty' or 'property' interest that is entitled to protection by the Due Process Clause. An affirmative answer to this question requires the consideration of a second question – what process is due under the particular circumstances? The answer to the second question is situational because due process is a flexible concept that calls for only those procedural protections that the particular situation demands." *Jeffries v. Tennessee Dept. of Correction*, 108 S.W.3d 862, 870 (Tenn. Ct. App. 2002). "Accordingly, the fate of the due process claims of a prisoner seeking judicial review of internal disciplinary proceedings depends upon the punishment the prisoner received." *Id.* at 871.

Tennessee cases addressing petitions filed by prisoners seeking judicial review of prison disciplinary proceedings typically hold that placement in maximum security, the loss of good time credits, the loss of a prison job, and small fines, either separately or in combination, do not trigger due process concerns because the punishments do not impose an atypical and significant hardship on the prisoner in relation to the ordinary incidents of prison life. *Id.*, citing cases.

Corporal Punishment and Use of Force

Reference Number: CTAS-1403

Pursuant to state regulations, corporal punishment is not to be permitted under any circumstances. Rules of the Tennessee Corrections Institute, Rule 1400-1-.08 (10). However, the use of force may be used to:

1. Overcome resistance;
2. Repel aggression;
3. Protect life; or
4. Retake prisoner or property.

The use of physical force must be thoroughly documented with a detailed account of who was involved, the force that was used and justification for its use. This report must be submitted to the jail administrator. Rules of the Tennessee Corrections Institute, Rule 1400-1-.08 (11).

"It is not constitutionally permissible for officers to administer a beating as punishment for a prisoner's past misconduct," nor may government officials use gratuitous force against a prisoner who has been already subdued or incapacitated. *Skrnich v. Thornton*, 280 F.3d 1295, 1300-1303 (11th Cir. 2002).

Under the Eighth Amendment, force is deemed legitimate in a custodial setting as long as it is applied "in a good faith effort to maintain or restore discipline [and not] maliciously and sadistically to cause harm." To determine if an application of force was applied maliciously and sadistically to cause harm, a variety of factors are considered including: "the need for the application of force, the relationship between that need and the amount of force used, the threat reasonably perceived by the responsible officials, and any efforts made to temper the severity of a forceful response." From consideration of such factors, "inferences may be drawn as to whether the use of force could

plausibly have been thought necessary, or instead evinced such wantonness with respect to the unjustified infliction of harm as is tantamount to a knowing willingness that it occur." Moreover, an officer who is present at the scene and who fails to take reasonable steps to protect the victim of another officer's use of excessive force can be held personally liable for his nonfeasance.

Id. See also *Hope v. Pelzer*, 240 F.3d 975, 980-981 (2001) (holding that "the policy and practice of cuffing an inmate to a hitching post or similar stationary object for a period of time that surpasses that necessary to quell a threat or restore order is a violation of the Eighth Amendment"), *affirmed*, 536 U.S. 730, 737, 122 S.Ct. 2508, 2514, 153 L.Ed.2d 666 (2002).

The maintenance of prison security and discipline may require that inmates be subjected to physical contact actionable as assault under common law; however, a violation of the Eighth Amendment will nevertheless occur if the offending conduct reflects an unnecessary and wanton infliction of pain. Factors to consider in determining whether the use of force was wanton and unnecessary include the extent of injury suffered by an inmate, the need for application of force, the relationship between that need and the amount of force used, the threat reasonably perceived by the responsible officials, and any efforts made to temper the severity of a forceful response.

Billingsley v. Shelby County Dept. of Correction, 2005 WL 2659105, *2 (W.D. Tenn. 2005), *citing Combs v. Wilkinson*, 315 F.3d 548, 556-557 (6th Cir. 2002).

Under the Eighth Amendment, prison "officials confronted with a prison disturbance must balance the threat unrest poses to inmates, prison workers, administrators, and visitors against the harm inmates may suffer if guards use force." *Combs v. Wilkinson*, 315 F.3d 548, 557 (6th Cir. 2002) (citation omitted). Because prison officials "must make their decisions in haste, under pressure, and frequently without the luxury of a second chance," courts analyzing a claim of excessive force in violation of the Eighth Amendment must grant them "wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security." *Id.*, (citations omitted).

The *Combs* Court found that a corrections officer's use of mace against a death row inmate while quelling a disturbance in the death row unit was not malicious or sadistic as required to support the inmate's claim of excessive force in violation of the Eighth Amendment. *Id.* See also *Brikho v. Horan*, 146 Fed.Appx. 13 (6th Cir. 2005) (finding deputy sheriff's kick or nudge to back of sleeping inmate when he did not wake up was not excessive force and did not violate Eighth Amendment, absent evidence of malicious or sadistic purpose); *Jennings v. Peiffer*, 110 Fed.Appx. 643 (6th Cir. 2004) (finding correctional officers use of chemical agents on an inmate in a good-faith effort to maintain or restore discipline defeated the inmate's Eighth Amendment excessive force claim under § 1983); *Davis v. Agosto*, 89 Fed.Appx. 523 (6th Cir. 2004) (finding prison officers' use of force in attempting to bring inmate under control was not excessive and thus did not violate inmate's Eighth Amendment rights where inmate refused to comply with officers' command to submit to handcuffs, forced his way out of cell when door was opened, continued to resist after he was tackled by guard in hallway, and was struck with batons only after he tried to hit guard); *Leonard v. Hoover*, 76 Fed.Appx. 55 (6th Cir. 2003) (finding corrections officers' use of force to extract inmate from his cell was justified under the Eighth Amendment where officers had reason to believe that inmate had dangerous contraband in his cell and inmate repeatedly refused to comply with orders to submit to a search, and inmate suffered only minor injuries); *Kennedy v. Doyle*, 37 Fed.Appx. 755 (6th Cir. 2002) (holding that placing prisoner in restraints after he broke his prison cell window did not violate the prisoner's Eighth Amendment right against cruel and unusual punishment and 14th Amendment right to due process; the restraints were designed to control the prisoner's behavior, more restrictive restraints were placed on the prisoner after he continued to be involved in breaking one window while in restraints and attempting to break another window, and placement in such restraints did not impose "atypical and significant hardship"); *Davis v. Sutton*, 2005 WL 3434633 (W.D. Tenn. 2005) (finding defendants in contempt of court for violating permanent injunction prohibiting the use of chemical agents as a form of inmate discipline and awarding inmates a total of \$95,000 in compensatory damages for the inmates' pain and suffering).

Correspondence and Visitors

Reference Number: CTAS-1404

After examining and committing prisoners, the jailer is required to convey letters from prisoners to their counsel and others, sealing and putting them in the post office if required. The jailer must also admit, without charge, people having business with prisoners and must remain present at all interviews between prisoners and others, except their counsel. T.C.A. § 41-4-114.

Mail

Reference Number: CTAS-1405

Pursuant to state regulations, the jail must have a written policy outlining the facility's procedures governing prisoner mail. Each jail must develop a written policy governing the censoring of mail. Any regulation for censorship must meet the following criteria:

1. The regulation must further an important and substantial governmental interest unrelated to the suppression of expression (e.g., detecting escape plans that constitute a threat to facility security or the well-being of employees and/or inmates); and
2. The limitation must be no greater than is necessary to protect the particular governmental interest involved.

Both incoming and outgoing mail shall be inspected for contraband items prior to delivery unless received from the courts, attorney of record, or public officials, where the mail must be opened in the presence of the prisoner. Outgoing mail must be collected and incoming mail must be delivered without unnecessary delay. An inmate and his/her correspondent must be notified if either person's letter is rejected and given a reasonable opportunity to protest the rejection to an impartial official prior to the facility returning the letter to its sender. Written policy and procedure must provide that the facility permits postage for two free personal letters per week for prisoners who have less than \$2 in their account. They must also receive postage for all legal or official mail. Rules of the Tennessee Corrections Institute, Rule 1400-1-.11 (2)-(7).

Prisoners have a limited liberty interest in their mail under the First Amendment. Prison actions that affect an inmate's receipt of nonlegal mail must be "reasonably related to legitimate penological interests." Legitimate practices include inspection of inmate mail for contraband, escape plans or other threats to prison security. *Leslie v. Sullivan*, 2000 WL 34227530, *7 (W.D. Wis. 2000) (dismissing plaintiff's claim that delay in mail delivery violated the First Amendment) (citations omitted).

A prisoner's right to receive mail is subject to prison policies and regulations that are "reasonably related to legitimate penological interests," *Turner v. Safley*, 482 U.S. 78, 89, 107 S.Ct. 2254, 96 L.Ed.2d 64 (1987), such as "security, good order, or discipline of the institution." *Thornburgh v. Abbott*, 490 U.S. 401, 404, 109 S.Ct. 1874, 104 L.Ed.2d 459 (1989). Courts generally afford great deference to prison policies, regulations, and practices relating to the preservation of these interests. *Id.* at 407-08, 109 S.Ct. 1874. In *Turner*, the Supreme Court set forth the following four factors to determine whether a prison's restriction on incoming publications was reasonably related to legitimate penological interests: (1) whether there is a valid, rational connection between the prison policy and the legitimate governmental interest asserted to justify it; (2) the existence of alternative means for inmates to exercise their constitutional rights; (3) the impact that accommodation of these constitutional rights may have on other guards and inmates, and on the allocation of prison resources; and (4) the absence of ready alternatives as evidence of the reasonableness of the regulation. *Cornwell v. Dahlberg*, 963 F.2d 912, 917 (6th Cir. 1992) (citing *Turner*, 482 U.S. at 89, 107 S.Ct. 2254).

Harbin-Bey v. Rutter, 420 F.3d 571, 578 (6th Cir. 2005) (upholding regulation prohibiting prisoners from receiving mail depicting gang symbols or signs finding that the prison's policy was reasonably related to the prison's goal of maintaining security and order). See *Thompson v. Campbell*, 81 Fed.Appx. 563, 567-568 (6th Cir. 2003) (upholding policy of withholding mail advocating "anarchy" or containing "obscenity" finding that the policy on its face does not violate the First Amendment).

Different standards apply to the evaluation of regulations governing incoming mail and outgoing mail. While a prisoner's right to receive mail is subject to prison policies and regulations that are "reasonably related to legitimate penological interests," *Turner v. Safley*, 482 U.S. 78, 89, 107 S.Ct. 2254, 2262, 96 L.Ed.2d 64 (1987), a prisoner's right to send mail is subject to prison regulations or practices that "further an important or substantial governmental interest unrelated to the suppression of expression," and that extend no further "than is necessary or essential to the protection of the particular governmental interest involved." *Procunier v. Martinez*, 416 U.S. 396, 413, 94 S.Ct. 1800, 1811, 40 L.Ed.2d 224 (1974). Prison officials must demonstrate that regulations authorizing the censorship of prisoners' mail furthers one or more of the substantial interests of security, order, and rehabilitation. *Id.*

In *Martucci v. Johnson*, 944 F.2d 291, 295-296 (6th Cir. 1991), the Sixth Circuit found that a jailer's decision to withhold both the incoming and outgoing mail of a pretrial detainee was legitimate under the dual standards enunciated in *Procunier* and *Turner v. Safley* where the jailer believed that the pretrial detainee was planning an escape. See also *Burton v. Nault*, 902 F.2d 4 (6th Cir.), cert. denied, 498 U.S. 873, 111 S.Ct. 198, 112 L.Ed.2d 160 (1990). In exercising their authority to monitor inmate correspondence, prison officials justifiably may refuse to send "letters concerning escape[] plans or containing other information concerning proposed criminal activity, whether within or without the prison. Similarly, prison officials may properly refuse to transmit encoded messages." *Koutnik v. Brown*, 351

F.Supp.2d 871, 879 (W.D. Wis. 2004) (citation omitted).

The Seventh Circuit has held that "a jail is allowed to screen and intercept non-privileged mail that contains threats or seeks to facilitate criminal activity." *Grissette v. Ramsey*, 81 Fed.Appx. 67, 68 (7th Cir. 2003) (citation omitted). "[B]ecause of their reasonable concern for prison security and inmates' diminished expectations of privacy, prison officials do not violate the constitution when they read inmates' outgoing letters." *United States v. Whalen*, 940 F.2d 1027, 1035 (7th Cir. 1991) (citation omitted). "In short, it is well established that prisons have sound reasons for reading the outgoing mail of their inmates." *Id.*

In *Martin v. Kelley*, 803 F.2d 236 (6th Cir. 1986) the Sixth Circuit delineated the "minimum procedural safeguards" referred to in *Procunier v. Martinez*, 416 U.S. 396, 94 S.Ct. 1800, 40 L.Ed.2d 224 (1974) that must be in place before inmates' letters are withheld or censored. First, an incoming mail censorship regulation must provide that notice of rejection be given to the inmate-recipient. Second, the mail censorship regulation must require that notice and an opportunity to protest the decision be given to the author of the rejected letter. Finally, the mail censorship regulation must provide for an appeal of the rejection decision to an impartial third party prior to the letter being returned. *Id.* at 243-244. See *Rogers v. Martin*, 84 Fed.Appx. 577, 579 (6th Cir. 2003) (upholding prison mail policy that prohibited photographs depicting actual or simulated sexual acts by one or more persons finding that the policy was reasonably related to legitimate penological interests. The inmate was given notice of the rejections, hearings were held to determine whether the magazines violated the policy, and the inmate was given an appeal.).

An indigent inmate has no constitutional right to free postage for nonlegal mail. *Argue v. Hofmeyer*, 80 Fed.Appx. 427, 429 (6th Cir. 2003) citing *Moore v. Chavez*, 36 Fed.Appx. 169, 171 (6th Cir. 2002) and *Hershberger v. Scaletta*, 33 F.3d 955, 957 (8th Cir. 1994).

Legal Mail

Reference Number: CTAS-1406

Prison regulations or practices that affect a prisoner's legal mail are of particular concern because of the potential for interference with a prisoner's right of access to the courts. See *Lewis v. Casey*, 518 U.S. 343, 116 S.Ct. 2174, 135 L.Ed.2d 606 (1996). When the incoming mail is "legal mail," courts "have heightened concern with allowing prison officials unfettered discretion to open and read an inmate's mail because a prison's security needs do not automatically trump a prisoner's First Amendment right to receive mail, especially correspondence that impacts upon or has import for the prisoner's legal rights, the attorney-client privilege, or the right of access to the courts." *Sallier v. Brooks*, 343 F.3d 868, 874 (6th Cir. 2003) citing *Kensu v. Haigh*, 87 F.3d 172, 174 (6th Cir. 1996) and *Davis v. Goord*, 320 F.3d 346, 351 (2d Cir. 2003).

"In an attempt to accommodate both the prison's needs and the prisoner's rights, courts have approved prison policies that allow prison officials to open 'legal mail' and inspect it for contraband in the presence of the prisoner." *Sallier* at 874, citing *Wolff v. McDonnell*, 418 U.S. 539, 577, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974) (upholding such a policy against a Sixth Amendment attorney-client privilege claim and a 14th Amendment due process claim based on access to the courts).

"Not all mail that a prisoner receives from a legal source will implicate constitutionally protected legal mail rights." *Sallier* at 874. Nevertheless, "even constitutionally protected mail can be opened (although not read) and inspected for contraband. The only requirement is that such activity must take place in the presence of the recipient, if such a request has been made by the prisoner." *Id.*

In *Knop v. Johnson*, 977 F.2d 996, 1012 (6th Cir. 1992), the Sixth Circuit addressed an opt-in system in which prison officials could open any mail sent to a prisoner unless the prisoner affirmatively requested that "privileged mail," defined by the policy as mail sent by a court or by counsel, be opened in his presence. The court found that the opt-in system was constitutionally sound as long as prisoners received written notice of the policy, did not have to renew the request upon transfer to another facility, and were not required to designate particular attorneys as their counsel. *Id.* If such a system is in place, the Sixth Circuit has held that "[a]s a matter of law, [prison officials] cannot be liable for having opened mail, even if it is 'legal mail,' prior to the time [the inmate] made his written request to have such mail opened in his presence." *Sallier*, 343 F.3d at 875.

Correspondence From Legal Organizations

Reference Number: CTAS-1407

Correspondence from an organization such as the American Bar Association may be opened pursuant to a prison's regular mail policy without violating the First Amendment rights of a prisoner when there is no specific indication that the envelope contains confidential, personal, or privileged material; that it was sent

from a specific attorney at the organization; or that it relates to a currently pending legal matter in which the inmate is involved. *Sallier*, 343 F.3d at 875. *Compare Jensen v. Klecker*, 648 F.2d 1179, 1183 (8th Cir. 1981) (finding that a letter from the National Prison Project, bearing the name of an attorney and stamped "Lawyer Client Mail Do Not Open Except In Presence of Prisoner" appears to come well within the definition of protected attorney-client legal mail). *Cf. Boswell v. Mayer*, 169 F.3d 384, 388-89 (6th Cir. 1999) (upholding prison policy of treating mail from a state attorney general's office as protected legal mail only if (a) the envelope contains the return address of a licensed attorney and (b) the envelope has markings that warn of its privileged content); *Wolff v. McDonnell*, 418 U.S. 539, 576, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974) (finding it entirely appropriate for a state to require any communication from an attorney to be specially marked as originating from an attorney, including the attorney's name and address, if the communication is to be given special treatment).

Correspondence From County Clerks

Reference Number: CTAS-1408

Correspondence from a county clerk or register of deeds may be opened pursuant to a prison's regular mail policy without violating the First Amendment rights of a prisoner when there is no specific indication that the envelope contains confidential, personal, or privileged material; that it was sent from an attorney; that it relates to a currently pending legal matter in which the inmate is involved; or that it is to be opened only in the presence of the prisoner. As a general matter mail from a county clerk or register of deeds does not implicate constitutionally protected legal mail rights. *Sallier*, 343 F.3d at 876.

Correspondence From State and Federal Courts

Reference Number: CTAS-1409

Correspondence from a state or federal court constitutes "legal mail" and cannot be opened outside the presence of a prisoner who has specifically requested otherwise. *Sallier*, 343 F.3d at 876-877. *See also Taylor v. Sterrett*, 532 F.2d 462, 475 (5th Cir.1976) (holding that an inmate's right of access to the courts requires that incoming prisoner mail from courts, attorneys, prosecuting attorneys, and probation or parole officers be opened only in the presence of the inmate)

Correspondence From Attorneys

Reference Number: CTAS-1410

Correspondence from an attorney cannot be opened outside the presence of a prisoner who has specifically requested otherwise. *Sallier*, 343 F.3d at 877-878 ("We find that the prisoner's interest in unimpaired, confidential communication with an attorney is an integral component of the judicial process and, therefore, that as a matter of law, mail from an attorney implicates a prisoner's protect legal mail rights. There is no penological interest or security concern that justifies opening such mail outside of the prisoner's presence when the prisoner has specifically requested otherwise.") (citation omitted). *See also Knop v. Johnson*, 977 F.2d 996, 1012 (6th Cir. 1992) (holding that a prisoner may not be required to designate ahead of time the name of the attorney who will be sending the prisoner confidential legal mail).

Correspondence from the attorney general's office requires similar protection because of the potentially confidential nature of such correspondence. *Muhammad v. Pitcher*, 35 F.3d 1081, 1083 (6th Cir. 1994) ("The conclusion that mail from an attorney general to an inmate may be confidential should not be surprising, for courts have consistently recognized that 'legal mail' includes correspondence from elected officials and government agencies, including the offices of prosecuting officials such as state attorneys general.") (citations omitted).

Outgoing Legal Mail

Reference Number: CTAS-1411

A prisoner's right to send "legal mail" is subject to prison regulations and practices that "further an important or substantial governmental interest unrelated to the suppression of expression," and that extend no further "than is necessary or essential to the protection of the particular governmental interest involved." *Bell-Bey v. Williams*, 87 F.3d 832, 838 (6th Cir. 1996) *citing Proconier v. Martinez*, 416 U.S. 396, 413, 94 S.Ct. 1800, 1811, 40 L.Ed.2d 224 (1974) and *Martucci v. Johnson*, 944 F.2d 291, 295-96 (6th Cir. 1991). In *Bell-Bey*, the Sixth Circuit rejected an inmate's challenge to a prison mail policy, which required prison officials to "inspect" outgoing legal mail to determine whether the mail was in fact legal mail. The court upheld the policy, noting that there was no proof that the policy directed officials to read prisoners' legal mail. *Id.* at 839. In addition, the court noted that there were procedural safeguards that limited the prison official's inspection of a prisoner's legal mail. Under the policy at issue, "1) the official's

inspection [wa]s limited to scanning legal mail for docket numbers, case title, requests for documents, et cetera; 2) the inspection [wa]s conducted in the prisoner's presence in his cell; and 3) the prisoner [could] seal his mail after the inspection [wa]s completed." *Id.* at 837.

While it is clear that an indigent inmate has no constitutional right to free postage for nonlegal mail, *Argue v. Hofmeyer*, 80 Fed.Appx. 427, 429 (6th Cir. 2003) (citations omitted), "[i]t is indisputable that indigent inmates must be provided at State expense with paper and pen to draft legal documents with notarial services to authenticate them, and with stamps to mail them." *Bounds v. Smith*, 430 U.S. 817, 824-825, 97 S.Ct. 1491, 1496, 52 L.Ed.2d 72 (1977). "*Bounds*, however, does not require that inmates be provided with unlimited free postage." *Blaise v. Fenn*, 48 F.3d 337, 339 (8th Cir. 1995) *citing Smith v. Erickson*, 884 F.2d 1108, 1111 (8th Cir. 1989); *accord Chandler v. Coughlin*, 763 F.2d 110, 114 (2d Cir. 1985). See also *Myers v. Hundley*, 101 F.3d 542, 544 (8th Cir. 1996) (Inmates do not have a right to unlimited stamp allowances for legal mail.); *Hershberger v. Scaletta*, 33 F.3d 955, 956 (8th Cir. 1994) (holding that inmates who were not permitted to work for money nor provided with any allowance or other form of income must be provided with one first-class stamp per week for legal mail); *Gaines v. Lane*, 790 F.2d 1299, 1308 (7th Cir. 1986) ("However, although prisoners have a right of access to the courts, they do not have a right to unlimited free postage."); *Hoppins v. Wallace*, 751 F.2d 1161, 1162 (11th Cir.1985) ("The constitutional right to access to the courts entitles indigent prisoners to some free stamps as noted in *Bounds* but not unlimited free postage as is urged by the plaintiff.").

Visitation

Reference Number: CTAS-1412

Pursuant to state regulations, the jail must have a written policy defining the facility's visitation policies. State regulations require that each prisoner be allowed one hour of visitation each week, that prisoners submit a list of visitors, and that prisoners be allowed to visit with their children. Visitors shall register before being admitted to the facility and may be denied admission for refusal to register, for refusal to consent to a search, or for any violation of posted institutional rules. Probable cause must be established in order to do a strip or body cavity search of a visitor. When probable cause exists, the search must be documented. Rules of the Tennessee Corrections Institute, Rule 1400-1-.11 (8).

Regulation of Inmate Visitation

Reference Number: CTAS-1413

Convicted prisoners "have no absolute, unfettered constitutional right to unrestricted visitation with any person, regardless of whether that person is a family member or not. Rather, visitation privileges are subject to the discretion of prison officials." *Bazzetta v. McGinnis*, 902 F.Supp. 765, 769 (E.D. Mich. 1995), *aff'd*, 124 F.3d 774 (6th Cir. 1997) (citations omitted) (upholding regulations restricting visitation by minors to children, stepchildren, or grandchildren of prisoners and the overall number of visitors a prisoner may see to 10). See also *Spear v. Sowders*, 71 F.3d 626, 629-30 (6th Cir. 1995) ("It is clear that a prisoner does not have a due process right to unfettered visitation A fortiori, a citizen simply does not have a right to unfettered visitation of a prisoner that rises to a constitutional dimension.") (citations omitted).

The United States Supreme Court has recognized that "[t]he very object of imprisonment is confinement. Many of the liberties and privileges enjoyed by other citizens must be surrendered by the prisoner." *Overton v. Bazzetta*, 539 U.S. 126, 131, 123 S.Ct. 2162, 2167, 156 L.Ed.2d 162 (2003). Prison inmates retain only those constitutional rights that are consistent with their status as prisoners or with the legitimate penological objectives of the corrective system. The "freedom of association is among the rights least compatible with incarceration. Some curtailment of that freedom must be expected in the prison context." *Id.*

In *Overton*, the United States Supreme Court addressed prison regulations affecting prisoners' visitation privileges. The regulations in question excluded minor nieces and nephews and children as to whom parental rights had been terminated from noncontact visitation of inmates, required children who were authorized to visit to be accompanied by an adult family member or legal guardian, prohibited inmates from visiting with former inmates, and subjected inmates with two substance-abuse violations to a ban of at least two years on future visitation. The Supreme Court held that the challenged regulations did not violate the prisoners' constitutional rights under the First and Eighth Amendments or violate their 14th Amendment substantive due process rights.

Turning to the restrictions on visitation by children, we conclude that the regulations bear a rational relation to MDOC's valid interests in maintaining internal security and protecting child visitors from exposure to sexual or other misconduct or from accidental injury. The regulations promote internal

security, perhaps the most legitimate of penological goals, by reducing the total number of visitors and by limiting the disruption caused by children in particular. Protecting children from harm is also a legitimate goal.

To reduce the number of child visitors, a line must be drawn, and the categories set out by these regulations are reasonable. Visits are allowed between an inmate and those children closest to him or her - children, grandchildren, and siblings. The prohibition on visitation by children as to whom the inmate no longer has parental rights is simply a recognition by prison administrators of a status determination made in other official proceedings.

As for the regulation requiring children to be accompanied by a family member or legal guardian, it is reasonable to ensure that the visiting child is accompanied and supervised by those adults charged with protecting the child's best interests.

Id. at 133, 123 S.Ct. at 2168 (citations omitted).

MDOC's regulation prohibiting visitation by former inmates bears a self-evident connection to the State's interest in maintaining prison security and preventing future crimes. We have recognized that "communication with other felons is a potential spur to criminal behavior."

Id. at 133-134, 123 S.Ct. at 2168 (citations omitted).

Finally, the restriction on visitation for inmates with two substance-abuse violations, a bar which may be removed after two years, serves the legitimate goal of deterring the use of drugs and alcohol within the prisons. Drug smuggling and drug use in prison are intractable problems. Withdrawing visitation privileges is a proper and even necessary management technique to induce compliance with the rules of inmate behavior, especially for high-security prisoners who have few other privileges to lose. In this regard we note that numerous other States have implemented similar restrictions on visitation privileges to control and deter substance-abuse violations.

Id. at 134, 123 S.Ct. at 2168-2169 (citations omitted).

In addition, the court found that the two-year ban on visitation for inmates with two substance-abuse violations did not violate the Eighth Amendment prohibition against cruel and unusual punishment.

The restriction undoubtedly makes the prisoner's confinement more difficult to bear. But it does not, in the circumstances of this case, fall below the standards mandated by the Eighth Amendment. Much of what we have said already about the withdrawal of privileges that incarceration is expected to bring applies here as well. Michigan, like many other States, uses withdrawal of visitation privileges for a limited period as a regular means of effecting prison discipline. This is not a dramatic departure from accepted standards for conditions of confinement. Nor does the regulation create inhumane prison conditions, deprive inmates of basic necessities, or fail to protect their health or safety. Nor does it involve the infliction of pain or injury, or deliberate indifference to the risk that it might occur.

Id. at 136-137, 123 S.Ct. at 2170 (citations omitted).

In *Bazzetta v. McGinnis*, 423 F.3d 557 (6th Cir. 2005), the Sixth Circuit, addressing the same substance abuse regulation addressed in *Overton*, found that the regulation did not, on its face, violate the inmates' 14th Amendment procedural due process rights. The Sixth Circuit noted that "although the issue was not directly before the *Overton* Court, Court precedent and dictum has signaled against our finding a liberty interest on the face of the substance abuse regulation." *Id.* at 565. The Sixth Circuit found that the *Overton* Court had "foreclosed a facial procedural due process challenge under the standard set forth in" *Sandin v. Conner*, 515 U.S. 472, 115 S.Ct. 2293, 132 L.Ed.2d 418 (1995). *Id.* The court noted, however, that the Supreme Court's decision in *Overton* did not preclude individual prisoners from challenging a particular application of the substance abuse regulation on First Amendment, Eighth Amendment or 14th Amendment grounds.

In *Wirsching v. Colorado*, 360 F.3d 1191, 1198-1201, 1205 (10th Cir. 2004), the Tenth Circuit, applying *Overton*, held that prison officials did not violate a convicted sex offender's familial association and due process rights by refusing to allow prison visits by his daughter due to his refusal to comply with requirements of the prison's treatment program for sex offenders, and "that visitation with a particular person does not constitute basic necessity, the denial of which would violate the Eighth Amendment."

In *Bell v. Wolfish*, 441 U.S. 520, 99 S.Ct. 1861, 1884-1885, 60 L.Ed.2d 447 (1979), the Supreme Court considered whether it was permissible to conduct warrantless strip and body cavity searches of prisoners and pretrial detainees on less than probable cause after contact with outside visitors. The court held that requiring inmates to submit to a visual bodycavity search after every contact visit with a person outside the institution did not violate the Fourth Amendment.

The Fourth Amendment prohibits only unreasonable searches and under the circumstances, we do not believe that these searches are unreasonable.

A detention facility is a unique place fraught with serious security dangers. Smuggling of money, drugs, weapons, and other contraband is all too common an occurrence. And inmate attempts to secrete these items into the facility by concealing them in body cavities are documented in this record and in other cases.

441 U.S. at 558-559, 99 S.Ct. at 1884-1885. See also *Wood v. Hancock County Sheriff's Dept.*, 2003 WL 23095279 (1st Cir. 2003) (Except in atypical circumstances, a blanket policy of strip searching inmates after contact visits is constitutional.).

In *Block v. Rutherford*, 468 U.S. 576, 588, 104 S.Ct. 3227, 3234, 82 L.Ed.2d 438 (1984), the Supreme Court found that a county jail's blanket prohibition of contact visits between pretrial detainees and their spouses, relatives, children, and friends was an entirely reasonable nonpunitive response to the legitimate security concerns identified in the case and was consistent with the 14th Amendment.

Monitoring Inmate Conversations

Reference Number: CTAS-1414

Jail administrators may monitor and record an inmate's conversations with visitors. "[T]o say that a public jail is the equivalent of a man's 'house' or that it is a place where he can claim constitutional immunity from search or seizure of his person, his papers, or his effects, is at best a novel argument.... In prison, official surveillance has traditionally been the order of the day." *Lanza v. New York*, 370 U.S. 139, 143, 82 S.Ct. 1218, 1220-1221, 8 L.Ed.2d 384 (1962).

In *United States v. Hearst*, 563 F.2d 1331, 1344 (9th Cir. 1977), cert. denied, 435 U.S. 1000, 98 S.Ct. 1656, 56 L.Ed.2d 90 (1978), the defendant challenged the secret recording of a conversation between herself and her visitor, which took place in the jail visiting room over a telephone-like communication system while the two looked at each other through a bulletproof glass window. The conversation was monitored and recorded through a switchboard-type device operated by a deputy sheriff pursuant to an established jail policy to watch for security problems within the jail. The Ninth Circuit Court of Appeals stated:

An intrusion by jail officials pursuant to a rule or policy with a justifiable purpose of imprisonment or prison security is not violative of the Fourth Amendment. Under this rule, a prisoner is not deprived of all Fourth Amendment protections; the rule recognizes, however, the government's weighty, countervailing interests in prison security and order.

Id. at 1345 (citations omitted). As a result, the court found that the defendant's Fourth Amendment rights had not been violated and noted that the government "adequately established that its practice of monitoring and recording prisoner-visitor conversations was a reasonable means of maintaining prison security." *Id.* at 1346. See also *Christman v. Skinner*, 468 F.2d 723, 726 (2d Cir. 1972) (Monitoring county jail inmate's conversations with visitors violated no right of privacy possessed by inmate.); *Rodriguez v. Blaedow*, 497 F.Supp. 558, 559 (E.D. Wis. 1980) ("[A]n inmate's right of privacy is not violated when prison officials monitor his conversations with visitors."); *State v. McKercher*, 332 N.W.2d 286 (S.D. 1983) ("The United States Supreme Court has stated, however, that prisoners' constitutional rights are subject to some restrictions. These restrictions allow jail officials to monitor and record conversations between detainees and their visitors for security reasons and to use the conversation as evidence against the detainee without violating the Fourth Amendment."); *People v. Clark*, 466 N.E.2d 361, 365 (Ill. App. 1984) (holding that the defendant had no reasonable expectation of privacy in his conversation with another detainee in jail where electronic monitoring system was designed and used to maintain safety at jail); *People v. Myles*, 379 N.E.2d 897, 936 (Ill. App. 1978) ("It has also been held that there is no reasonable expectation of privacy in an ordinary jailhouse conversation between spouses.").

Likewise, in *United States v. Peoples*, 71 F.Supp.2d 967, 978 (W.D. Mo. 1999), the district court found that the visitor of prisoner did not have a reasonable expectation of privacy in conversations with the prisoner or in telephone calls involving the prisoner necessary to support a claim that his Fourth Amendment rights were violated when the prison recorded the conversations as part of a general recording program undertaken to maintain prison safety and order by reducing the flow of contraband into prison.

Regulation of Visitors

Reference Number: CTAS-1415

"[A] citizen simply does not have a right to unfettered visitation of a prisoner that rises to a constitutional

dimension. In seeking entry to such a controlled environment, the visitor simultaneously acknowledges a lesser expectation of privacy." *Spear v. Sowders*, 71 F.3d 626, 630 (6th Cir. 1995) (citations omitted). See also *Gray v. Bruce*, 26 Fed.Appx. 819, 824 (10th Cir. 2001) (Neither prisoners nor their visitors have a constitutional right to unfettered visitation.); *Johnson v. Medford*, 208 F.Supp.2d 590, 592 (W.D. N.C. 2002) ("Moreover, it is well settled that neither prisoners nor their would-be visitors have a constitutional right to prison visitation.").

Individuals who wish to visit inmates are subject to jail visitation policies and regulations. "Prison authorities have both the right and the duty by all reasonable means to see to it that visitors are not smuggling weapons or other objects which could be used in an effort to escape or to harm other prisoners. They have a duty to intercept narcotics and other harmful contraband." *Newman v. Alabama*, 559 F.2d 283, 291 (5th Cir. 1977). For similar language, see *Roach v. Kligman*, 412 F.Supp. 521, 525 (E.D. Pa. 1976); *Seale v. Manson*, 326 F.Supp. 1375, 1379 (D. Conn. 1971).

Prison officials are responsible for the safety and security of inmates, employees and visitors of their institutions. They have a great deal of discretion in establishing policies and rules which further the penological purposes of safety and security. It is well established that visitation of prisoners is subject to regulation. *Spear v. Sowders*, 71 F.3d 626, 630 (6th Cir. 1995). Persons who seek to enter a prison in order to visit an inmate do not have unfettered rights to such visitation. *Id.* Where visitors' interests may be affected by prison limitations on visits, courts have generally "[struck] the balance in favor of institutional security," and accorded great weight to the 'professional expertise of corrections officials.'" *Id.* (citations omitted).

[B]ecause of the need for prison security, visitors do not have the same right of unimpeded access to prisoners, without government scrutiny, that they would have to persons in society outside prison.... [T]he government's power to intrude depends on the fact that the person insists on access. *Id.* at 630, 632.

Similarly, an inmate's family member has no constitutional right to contact visitation, including no First Amendment right of association. *Bazzetta v. McGinnis*, 124 F.3d 774, 779 (6th Cir. 1997).

Boles v. Tennessee Dept. of Correction, 2001 WL 840283, *3 (Tenn. Ct. App. 2001) (upholding policy imposing behavior requirements on children who are brought to visit incarcerated individuals).

The natural extension of this principle is that prison authorities have much greater leeway in conducting searches of visitors. Visitors can be subjected to some searches, such as a pat-down or a metal detector sweep, merely as a condition of visitation, absent any suspicion. However, because a strip and body cavity search is the most intrusive search possible, courts have attempted to balance the need for institutional security against the remaining privacy interests of visitors. Those courts that have examined the issue have concluded that even for strip and body cavity searches prison authorities need not secure a warrant or have probable cause. However, the residual privacy interests of visitors in being free from such an invasive search requires that prison authorities have at least a reasonable suspicion that the visitor is bearing contraband before conducting such a search.

Spear v. Sowders, 71 F.3d 626, 630 (6th Cir. 1995) (citations omitted).

In *Spear*, the Sixth Circuit observed that the law is clearly established that the Fourth Amendment requires reasonable suspicion before authorizing a body cavity search of a prison visitor. *Id.*

Reasonable suspicion does not mean evidence beyond a reasonable doubt, or by clear and convincing evidence, or even by a preponderance of the evidence. Reasonable suspicion is not even equal to a finding of probable cause. Rather, reasonable suspicion requires only specific objective facts upon which a prudent official, in light of his experience, would conclude that illicit activity might be in progress.

The Supreme Court has examined the definition of reasonable suspicion on several occasions. Each time, the Court has made it clear that "[r]easonable suspicion is a less demanding standard than probable cause not only in the sense that reasonable suspicion can be established with information that is different in quantity or content than required to establish probable cause, but also in the sense that reasonable suspicion can arise from information that is *less reliable* than that required to show probable cause."

Id. at 631, citing *Alabama v. White*, 496 U.S. 325, 330, 110 S.Ct. 2412, 2416, 110 L.Ed.2d 301 (1990) (emphasis added). *Accord State v. Putt*, 955 S.W.2d 640, 646 (Tenn. Crim. App. 1997) (We take this opportunity to note that had the defendant been subjected to a strip search or a body cavity search, our analysis would not be the same. A reasonable suspicion standard generally applies to these types of searches and nothing in this opinion shall be construed to hold otherwise.) (citations omitted). *But see Laughter v. Kay*, 986 F.Supp. 1362, 1374 (D. Utah 1997) (Due to the level of intrusiveness, "manual body

cavity search" must be based upon the more stringent "probable cause" standard, rather than "reasonable suspicion" standard.).

It is important to note that, while a strip search or a body cavity search of a visitor can be sustained based upon a reasonable suspicion alone, the person to be subjected to such an invasive search must be given the opportunity to depart. *Spear* at 632. Moreover, pursuant to state regulations, probable cause must be established in order to do a strip or body cavity search of a visitor. Rules of the Tennessee Corrections Institute, Rule 1400-1-.11 (8).

It has been held, however, that vehicle searches on prison property are constitutional under the state and federal constitutions despite the fact that they are conducted without a warrant, probable cause, or reasonable suspicion. *State v. Putt*, 955 S.W.2d 640, 646 (Tenn. Crim. App. 1997). In *Putt*, the Court noted that people entering a correctional facility have a lesser expectation of privacy, that the state has a substantial interest in keeping drugs out of prisons, and that searching all incoming cars was a sufficiently reasonable method of preventing drugs from entering the facility. *Id.* at 645-646. Moreover, the court held that, based upon the facts of the case, the denial of the visitor's request to leave was not a violation of her constitutional rights. *Id.* at 647. *See also Neumeyer v. Beard*, 421 F.3d 210, 216 (3d Cir. 2005) (holding that prison policy of subjecting prison visitors' vehicles to random searches is reasonable, supportable as a special needs search, and hence constitutional despite the lack of individualized suspicion).

Subjecting a prison visitor to a noninvasive swab search using an ion spectrometer to test for drug residue is not a per se violation of the visitor's Fourth Amendment right to be free from unreasonable searches when balanced against the state's interest in keeping drugs out of prisons. *Gray v. Bruce*, 26 Fed.Appx. 819, 823 (10th Cir. 2001).

Regulations that require visitors to identify themselves are not unconstitutional. *State v. Jackson*, 812 N.E.2d 1002, 1005 (Ohio App. 2004) ("This court finds that a regulation that requires prison visitors to identify themselves is, for security reasons, a reasonable regulation."). *See also Flournoy v. Fairman*, 897 F.Supp. 350, 352 (N.D. Ill. 1995) (finding policy requiring visitors to produce proper identification was reasonably related to the need to maintain internal security at the jail, unquestionably a legitimate governmental objective)

Prison administrators can enact regulations that restrict the number of visitors an inmate can have for purposes of maintaining institutional security. *Kikumura v. Hurley*, 242 F.3d 950, 957 (10th Cir. 2001) (finding that a prison regulation allowing pastoral visits only when the prisoner initiated the request and only when the clergy member was from the inmate's faith group was reasonably related to legitimate penological goals).

Telephone Use

Reference Number: CTAS-1416

Pursuant to state regulations the jail must have a policy and procedure providing reasonable private access to a telephone for the prisoners. The policy and procedure must be in writing and posted so as to be conspicuous to the prisoners and must set forth any limitations. At a minimum, the procedure must include (1) the hours during which telephone access will generally be provided, (2) a statement regarding the privacy of telephone communications, and (3) inmates with hearing and/or speech disabilities shall be afforded access to a Telecommunications Device for the Deaf (TDD), or comparable equipment. Public telephones with volume control shall be made available to inmates with a hearing impairment. Information regarding the availability of TDD communication devices shall be posted. Inmates with hearing and/or speech impairments shall be afforded access similar to those inmates without impairments. Rules of the Tennessee Corrections Institute, Rule 1400-1-.12(5).

An inmate has no constitutional right to telephone use, *Griffin v. Cleaver*, 2005 WL 1200532, *6 (D. Conn. 2005), nor does he have a constitutional right to make private telephone calls. *Cook v. Hills*, 3 Fed.Appx. 393, *1 (6th Cir. 2001). *See also Washington v. Reno*, 35 F.3d 1093, 1100 (6th Cir. 1994) (concluding that prisoners have no entitlement to unlimited use of a telephone); *Benzel v. Grammer*, 869 F.2d 1105 (8th Cir. 1989) (same); *Lopez v. Reyes*, 692 F.2d 15, 17 (5th Cir. 1982) (A jail inmate in maximum security has no right to unlimited telephone use.); *Frazier v. Coughlin*, 81 F.3d 313, 317-318 (2d Cir. 1996) (holding that 30-day loss of recreation, commissary privileges, packages and telephone use did not state a cognizable claim for denial of due process).

Jail officials have the right to limit an inmate's access to phone calls "to the extent that such limitations are designed to achieve legitimate penological interests." *Leslie v. Sullivan*, 2000 WL 34227530, *7 (W.D. Wis. 2000). "Prisoners are not entitled to unlimited visits or inexpensive phone calls to their family members under the Constitution." *Id.* *See also Martin v. Tyson*, 845 F.2d 1451, 1458 (7th Cir. 1988) (per curiam) (upholding policy limiting pretrial detainee's telephone access to every other day); *Pope v.*

Hightower, 101 F.3d 1382, 1385 (11th Cir. 1996) (upholding policy limiting use to preapproved calling list of at most 10 people); *Washington v. Reno*, 35 F.3d 1093, 1100 (6th Cir. 1994) (upholding policy limiting use to preapproved list of at most 30 people); *Benzel v. Grammer*, 869 F.2d 1105, 1108-09 (8th Cir. 1989) (upholding policy limiting use by inmates in disciplinary segregation to preapproved list of at most three people).

An inmate's "right to telephone access, if any, is subject to rational limitations based upon legitimate security and administrative interests of the penal institution. 'The exact nature of telephone service to be provided to inmates is generally to be determined by prison administrators, subject to court scrutiny for unreasonable restrictions.'" *Arney v. Simmons*, 26 F.Supp.2d 1288, 1293 (D. Kan. 1998) (upholding restrictions placed on inmates' telephone access, including 10-person telephone call lists modified at 120-day intervals, monitoring of telephone calls, prohibition on international calls from inmate telephones, and prohibition on inclusion of public officials on call lists) (citations omitted).

In *Spurlock v. Simmons*, 88 F.Supp.2d 1189 (D. Kan. 2000), the court held that limiting a hearing-impaired inmate to two 30-minute telephone calls per week on a special facility TDD telephone, while permitting other inmates unlimited access to the inmate telephone system, did not violate the due process clause, *id.* at 1193, and did not violate the deaf inmate's equal protection rights. *Id.* at 1194. Further, the court found that prison officials did not discriminate against the deaf inmate in violation of the Americans with Disabilities Act (ADA) or the Rehabilitation Act. The court found that, as a matter of law, the plaintiff had meaningful access to a telephone. *Id.* at 1195-1196. *See also Hansen v. Rimel*, 104 F.3d 189 (8th Cir.1997) (finding no equal protection violation for failure to provide special telephone to disabled inmate).

In *Boriboune v. Litscher*, 91 Fed.Appx. 498, 499-500 (7th Cir. 2003), the Seventh Circuit Court of Appeals upheld a prison policy prohibiting inmates from communicating on the telephone in a language other than English without first receiving approval. The court found that the prisons' policy was reasonably related to its interest in maintaining security, which is a legitimate penological concern. *See also Sisneros v. Nix*, 884 F.Supp. 1313 (S.D. Iowa 1995) (finding regulation requiring mail to and from prisoners be in English language did not violate prisoner's First Amendment rights or his 14th Amendment Equal Protection rights).

Monitoring Inmate Telephone Conversations

Reference Number: CTAS-1417

The monitoring of inmate telephone calls is common in jails in Tennessee. Noting that the Fourth Amendment to the United States Constitution protects persons from unreasonable searches and seizures in places in which they have a reasonable expectation of privacy, the Tennessee Court of Criminal Appeals has held that a person does not have a reasonable expectation of privacy on a jailhouse telephone. *State v. Erwin*, 2001 WL 314340, *6 (Tenn. Crim. App. 2001), *citing State v. Hutchison*, 1987 WL 14331, at *5-6 (Tenn. Crim. App. 1987); *State v. Rudolph Munn*, 1999 WL 177341, at *12 (Tenn. Crim. App. 1999), *perm. app. granted*, (Tenn. 1999).

Inmates have no constitutional privacy right to unmonitored nonprivileged telephone calls from a correctional facility. *Washington v. Meachum*, 680 A.2d 262, 275 (Conn. 1996). "No such right has previously been found to exist in any jurisdiction in the country under either the federal constitution or any state constitution...." *Id.*

The courts applying the federal constitution have consistently concluded that whatever limited privacy rights inmates retain do not include a right to make unmonitored, non-privileged telephone calls. *United States v. Workman*, 80 F.3d 688, 694 (2d Cir. 1996) ("[o]nly a single participant in a conversation need agree to the monitoring in order to satisfy the requirements of the Fourth Amendment" and inmate use of prison telephone with knowledge of monitoring practice constitutes such agreement); *United States v. Sababu*, 891 F.2d 1308, 1329 (7th Cir. 1989) (outsider who telephones inmate has no reasonable expectation that conversation will be private because "[i]n prison, official surveillance has traditionally been the order of the day"); *United States v. Willoughby*, 860 F.2d 15, 20-21 (2d Cir. 1988); *United States v. Amen*, 831 F.2d 373, 379-80 (2d Cir. 1987), cert. denied sub nom, *Abbamonte v. United States*, 485 U.S. 1021, 108 S.Ct. 1573, 99 L.Ed.2d 889 (1988); *United States v. Paul*, 614 F.2d 115 (6th Cir. 1980); *United States v. Clark*, 651 F.Supp. 76, 81 (M.D. Pa. 1986) (distinguishing monitoring of public telephone booth from monitoring of jailhouse telephone on grounds that there is no reasonable expectation of privacy in jailhouse conversation); *Teat v. State*, 636 So.2d 697, 699 (Ala. Crim. App. 1993) ("there is no reasonable expectation of privacy in the telephone conversations of inmates at penal institutions"); *State v. Fox*, 493 N.W.2d 829, 832 (Iowa 1992) (no fourth amendment violation even though inmate not specifically notified of monitoring).

In cases in which other state courts have applied the independent provisions of their state constitutions to privacy claims pertaining specifically to prison telephone conversations, those courts unanimously have found that the monitoring or taping of such conversations does not violate the implicit or explicit privacy protections of their respective state constitutions. *People v. Myles*, 62 Ill.App.3d 931, 936, 20 Ill.Dec. 64, 379 N.E.2d 897 (1978) (no reasonable expectation of privacy in jailhouse conversations, despite explicit privacy provision in state constitution, because "[a] phone maintained in a jail for prisoner use shares none of the attributes of privacy of a home or automobile or even a public phone booth"); *State v. Fischer*, 270 N.W.2d 345, 354 (N. Dak. 1978) ("parties to a jailhouse conversation usually have no reasonable expectation of privacy due to the security needs of maintaining order and of limiting the introduction of contraband, such as drugs, into the jail" unless deceptive actions of law enforcement officials provide such reasonable expectation).

Id. at 276. *See also United States v. Balon*, 384 F.3d 38, 44 (2d Cir. 2004) ("[M]onitoring of telephone communications does not offend the Fourth Amendment because prisoners have 'no reasonable expectation of privacy.'" (citations omitted); *United States v. Gangi*, 57 Fed.Appx. 809, 815 (10th Cir. 2003) ("We agree with the Ninth Circuit that 'any expectation of privacy in outbound calls from prison is not objectively reasonable and that the Fourth Amendment is therefore not triggered by the routine taping of such calls.'" (citations omitted); *United States v. Workman*, 80 F.3d 688, 694 (2d Cir. 1996) ("[T]he interception of calls from inmates to noninmates does not violate the privacy rights of the noninmates." (citations omitted).

Monitoring and recording inmate telephone conversations does not, generally, violate the provisions of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-22. Title III generally forbids the intentional interception of telephone calls when done without court-ordered authorization. Under the "consent" exception, 18 U.S.C. § 2511(2)(c), law enforcement personnel may lawfully intercept telephone calls where one of the parties to the communication has given prior consent to such interception. Courts have held that consent may be either express or implied. Additionally, courts have held that under certain circumstances, prisoners are deemed to have given their consent for purposes of Title III to the interception of their calls on institutional telephones.

In *United States v. Amen*, 831 F.2d 373 (2d Cir. 1987), *cert. denied*, 485 U.S. 1021, 108 S.Ct. 1573, 99 L.Ed.2d 889 (1988), the Second Circuit Court of Appeals held that inmates impliedly consented to have their telephone conversations monitored where they had received notice of the surveillance and nevertheless used the prison telephones. *Id.* at 378-379. In *Amen*, the notice consisted of federal prison regulations clearly indicating that inmate telephone calls were subject to monitoring, an orientation lecture in which the monitoring and taping system was discussed, an informational handbook received by every inmate describing the system, and signs near the telephones notifying inmates of the monitoring.

In *United States v. Workman*, 80 F.3d 688 (2d Cir. 1996), prior to trial, the defendants moved to suppress recordings made by prison officials of defendant Green's incriminating conversations on the prison telephone system. The defendants contended that these recordings were made in violation of Title III of the Omnibus Crime Control and Safe Streets Act, 18 U.S.C. §§ 2510-22 ("Title III"). *Id.* at 692. The court held that the combination of signs, written in English and Spanish, near each telephone in the prison notifying inmates of the monitoring program, an orientation handbook that provided further notice of the telephone monitoring program, and state regulations that provided public notice that prisoner calls were subject to monitoring and recording were sufficient to find that Green impliedly consented to the surveillance. *Id.* at 693-694. *See also United States v. Corona-Chavez*, 328 F.3d 974, 978 (8th Cir. 2003) (finding implied consent where an inmate chose to proceed with a phone call after receiving notice of recording); *United States v. Hammond*, 286 F.3d 189, 192 (4th Cir. 2002) (same); *United States v. Footman*, 215 F.3d 145, 155 (1st Cir. 2000) (same); *United States v. Van Poyck*, 77 F.3d 285, 292 (9th Cir. 1996) (same).

Under the "law enforcement" exception, 18 U.S.C. § 2510(5)(a), oral communications may be intercepted by investigative and law enforcement officers acting in the ordinary course of their duties. *United States v. Van Poyck*, 77 F.3d 285, 291-292 (9th Cir. 1996). Finding that the law enforcement exception applied to the Los Angeles Metropolitan Detention Center's routine taping policy, the court noted that the "MDC is a law enforcement agency whose employees tape all outbound inmate telephone calls; interception of these calls would appear to be in the ordinary course of their duties." *Id.* *See also United States v. Hammond*, 286 F.3d 189, 192 (4th Cir. 2002) (The law enforcement exception rendered the recording of prisoner's telephone conversations permissible where the facility was acting pursuant to its well-known policies in the ordinary course of its duties in taping the calls.); *United States v. Feekes*, 879 F.2d 1562, 1565-1566 (7th Cir. 1989) (finding law enforcement exception was clearly satisfied where federal prison regulations authorized the tape recording of all prisoner calls, except to prisoners' lawyers, and inmate's calls were recorded in accordance with routine practice, which was the "ordinary course" for the officers who

supervised the monitoring system); *United States v. Paul*, 614 F.2d 115, 117 (6th Cir.), *cert. denied*, 446 U.S. 941, 100 S.Ct. 2165, 64 L.Ed.2d 796 (1980) (finding that the law enforcement exception applied where the monitoring took place within the ordinary course of the correctional officers' duties).

Inmate Programs

Reference Number: CTAS-2197

Library services shall be made available to all inmates. Rules of the Tennessee Corrections Institute, Rule 1400-1-.12(2).

Written policy and procedures requires that the facility shall provide for inmates to voluntarily participate in religious activity at least once each week. Rules of the Tennessee Corrections Institute, Rule 1400-1-.12(4)..

Inmate release programs shall require:

- (a) Written operational procedures;
- (b) Careful screening and selection procedures;
- (c) Written rules of inmate conduct;
- (d) A system of supervision to minimize inmate abuse of program privileges;
- (e) A complete record-keeping system;
- (f) A system for evaluating program effectiveness; and,
- (g) Efforts to obtain community cooperation and support. Rules of the Tennessee Corrections Institute, Rule 1400-1-.12(6).

Foreign nationals shall have access to the diplomatic representatives of their country of citizenship through the State Department consular notification protocols and contact information. Rules of the Tennessee Corrections Institute, Rule 1400-1-.12(10).

Religious Land Use and Institutionalized Persons Act (RLUIPA)

Reference Number: CTAS-2128

Public Law 106-274, codified as 42 U.S.C. §2000 cc et seq., is a United States federal law that prohibits the imposition of burdens on the ability of prisoners to worship as they please and gives churches and other religious institutions a way to avoid burdensome zoning law restrictions on their property use. It was enacted by the United States Congress in 2000 to correct the problems of the Religious Freedom Restoration Act (RFRA) of 1993.

In the 2005 case of *Cutler v. Wilkinson*, five prisoners in Ohio – including a Wiccan, a Satanist, and a member of a racist Christian sect – successfully sought to apply the protections of the act into their religious practices. The U.S. Court of Appeals for the Sixth Circuit had held that RLUIPA violated the Establishment Clause by impermissibly advancing religion by bestowing benefits to religious prisoners that were unavailable to non-religious prisoners.

The U.S. Supreme Court disagreed, unanimously holding that RLUIPA was a permissible accommodation of religion justified by the fact that the government itself had severely burdened the prisoners' rights through the act of incarceration.

In a unanimous opinion issued March 15, 2011, the entire U.S. 9th Circuit Court of Appeals held that an Orange County courthouse lockup is an "institution" under RLUIPA, meaning a Muslim woman who sued after being forced to remove her headscarf in front of strange men is entitled to the act's protections. The case is *Khatib v. County of Orange*, 08-56423. The lawsuit stated that as a result of court bailiffs ordering the woman to remove her headscarf while she was temporarily being held inside the courthouse lock up while a county court judge was deciding whether or not to revoke her misdemeanor probation (she was released that same day after the judge decided not to). It is the first time that a temporary holding facility (like a courthouse lock up) has been deemed to be an "institution" under the Act. The law prohibits the government from imposing a "substantial burden" on prisoner's religious practice unless officials can show a compelling need for the restrictions.

In *Ha'min v. Lewis*, 440 F.Supp.2d 715 a Muslim county jail inmate incarcerated in Montgomery County, TN sued claiming that the county violated his First Amendment rights by failing to accommodate his religious needs. The district court held that the Establishment Clause was not violated when the county provided

Bibles to inmates, but did not provide the Quaran to the Muslim inmate, where the county, which did not pay for any religious materials, distributed donated Bibles to inmates and would have distributed donated Quarans, if any had been received. The inmate requested the county to remove his personal copy of the Quaran from his property and give it to him, which they did. The court found that the county did not violate the free exercise of religious rights of the inmate by failing to hold Muslim services, where two Imams recruited by the county quit, the county was searching the Muslim community for a replacement, the complaining inmate was barred from conducting services himself by a policy against any inmate led religious ceremonies, and the county accommodated the inmate in private worship by providing a Quaran, prayer rug, and a compass.

In *Ciempa v. Jones*, 745 F.Supp.2d 1171 (N.D.Okla. 2010) an inmate brought claims against state prison officials under § 1983 for alleged violations of the RLUIPA. The court held that prison officials did not violate the inmate's First Amendment right to free exercise of religion, RLUIPA, the inmate's due process rights, or equal protection, by denying him access to particular issues of a religious publication based on guidelines prohibiting publications that advocate terrorism, criminal behavior, racial, religious, or national hatred. According to the court, the guidelines were reasonably related to the legitimate penological goal of maintaining order and security, individual review of incoming publications was a rational means of achieving that goal and did not deprive the inmate of all means of exercising his religion, and allowing such materials would have a significant negative impact on other inmates and guards.

Prisoner Rape Elimination Act

Reference Number: CTAS-2129

The Prison Rape Elimination Act (PREA) was passed in 2003. The law created the National Prison Rape Elimination Commission (NPREC) and charged it with developing standards for the elimination of sexual abuse in confinement. The law required the Department of Justice (DOJ) to review the NPREC standards, make revisions as necessary, and pass the final standards into law.

The final rule was published in the federal register on June 20, 2012, and became effective on August 20, 2012.

PREA standards apply equally to locally operated facilities, such as lockups, jails, juvenile detention centers, and locally operated residential community confinement facilities. The statute imposes certain financial consequences on states that do not comply with the standards. However, for local facilities or facilities not operated by the state, PREA provides no direct federal financial penalty for not complying.

If a local facility has a contract to hold state or federal inmates, however, it may lose that contract if it does not comply with PREA standards. If a governor should certify compliance, he/she must certify that all facilities under the state's authority, including all local facilities the state contracts with to hold inmates, are in compliance. Furthermore, states that operate unified systems must demonstrate that all state-operated facilities, including jails, comply with the PREA standards.

Finally, all agencies, state or local, have obligations under federal and state constitutions to provide safety for individuals in their custody. While PREA does not create any new cause of action, private civil litigants might assert noncompliance with PREA standards as evidence that facilities are not meeting constitutional obligations.

For information on the PREA standards, training, inspection toolkits, frequently asked questions, news and events go to the National PREA Resource Center.

Information shall be provided to inmates about sexual abuse/assault including:

- (a) Prevention/intervention;
- (b) Self-protection;
- (c) Reporting sexual abuse/assault; and,
- (d) Treatment and counseling.

This information shall be communicated in writing or electronically, in a language clearly understood by the inmate, upon arrival at the facility. Rules of the Tennessee Corrections Institute, Rule 1400-1-.13(31).

Victim Notification

Reference Number: CTAS-2131

In accordance with TCA 40-38-103(b), upon the request of a victim of violent crime involving serious bodily injury or death of a relative, the victim shall be supplied information and a request form by the law

enforcement agency responsible for the investigation of the crime or the arrest of the defendant, the sheriff or other custodian of the defendant or the victim-witness coordinator as to how the victim or relative of a victim may request and secure notification of the release from custody of an offender from a jail or detention facility prior to trial. The jailer, sheriff or other custodian of criminal offenders shall maintain a record or file of the request forms and, prior to the release of an offender about whom a notification request has been made, give immediate and prompt notice of the release to the requesting victim or family member of a victim by the most direct means available, including telephone, messenger or telegram. Any identifying information contained in the request forms shall be confidential. For purposes of this subsection (b), "identifying information" means the name, home and work addresses, telephone numbers and social security number of the person being notified or requesting that notification be provided.

Sexual Contact with Inmates

Reference Number: CTAS-2130

Under T.C.A. § 39-16-408(a through c), "Law enforcement officer" and "correctional employee" include a person working in that capacity as a private contractor or employee of a private contractor; and "Volunteer" means any person who, after fulfilling the appropriate policy requirements, is assigned to a volunteer job and provides a service without pay from the correctional agency, except for compensation for those expenses incurred directly as a result of the volunteer service.

It is an offense for a law enforcement officer, correctional employee, vendor or volunteer to engage in sexual contact or sexual penetration, as such terms are defined in T.C.A. § 39-13-501, with a prisoner or inmate who is in custody at a penal institution as defined in T.C.A. § 39-16-601, whether the conduct occurs on or off the grounds of the institution.

A violation of this section is a Class E felony.

Sexual conduct between facility employees, volunteers or contract personnel and inmates is prohibited and subject to administrative, disciplinary and criminal sanctions. The prohibition applies regardless of consent. Rules of the Tennessee Corrections Institute, Rule 1400-1-.13(32).

Access to Inmates by Alcohol and Drug Treatment Organizations

Reference Number: CTAS-2136

T.C.A. § 55-10-410(b) provides for:

The sheriff of each county shall develop a written policy that permits alcohol and drug treatment organizations to have reasonable access to persons confined in the county jail or workhouse who have been convicted of or charged with a violation of this part.

Access to the Courts and Attorneys

Reference Number: CTAS-1418

"The Supreme Court of the United States recognizes the existence of a constitutional right of access to the courts and has identified the sources of the right of access in the prisoner context as the Due Process Clause, the Equal Protection Clause, and the First Amendment." *Phifer v. Tennessee Bd. of Parole*, 2002 WL 31443204, *10 (Tenn. Ct. App. 2002) (citations omitted). "The right to meaningful access to the courts ensures that prison officials may not erect unreasonable barriers to prevent prisoners from pursuing all types of legal matters." *Id.*, (citations omitted).

"Although the exact contours of this right are somewhat obscure, the Supreme Court has not extended the right to encompass more than the ability to prepare and transmit a necessary legal document to a court. A prisoner must show an actual injury to prevail on an access-to-the-courts claim." *Breshears v. Brown*, 150 Fed.Appx. 323, 325 (5th Cir. 2005) (citations omitted).

While a First Amendment right to access to the courts clearly exists, no claim for interference with this right exists unless plaintiff alleges that defendants prevented him from filing a nonfrivolous legal claim challenging his conviction. The plaintiff must allege that he has suffered an actual injury to state a claim. The plaintiff must allege that a nonfrivolous claim was lost or rejected, or that the presentation of such a claim is currently being prevented. *Clark v. Corrections Corporation of America*, 113 Fed.Appx. 65, 67-68 (6th Cir. 2004) (citations omitted).

Access to the Courts

Reference Number: CTAS-1419

The landmark case in the area of a prisoner's right of access to the courts is *Bounds v. Smith*, 430 U.S. 817, 97 S.Ct. 1491, 52 L.Ed.2d 72 (1977).

In *Bounds*, the Supreme Court noted that prisoners must be afforded meaningful access in their criminal trials, on their appeals as of right, and in their habeas and civil rights actions. In holding that the right to affirmative assistance applies in these contexts, the Supreme Court explained "we are concerned in large part with original actions seeking new trials, release from confinement, or vindication of fundamental civil rights.... Habeas corpus and civil rights actions are of 'fundamental importance ... in our constitutional scheme' because they directly protect our most valued rights."

Phifer v. Tennessee Bd. of Parole, 2002 WL 31443204, *10 (Tenn. Ct. App. 2002).

However, since the United States Supreme Court decided *Bounds*, the scope of the right of access to the courts "has been the subject of further litigation which has served to limit and define the types of litigation to which the [right] applies." *Id.* The Sixth Circuit Court of Appeals has held that it would be "an unwarranted extension of the right of access" to require states to affirmatively assist prisoners "on civil matters arising under state law." *John L. v. Adams*, 969 F.2d 228, 235-236 (6th Cir. 1992). And, in *Knop v. Johnson*, 977 F.2d 996, 1009 (6th Cir. 1992), the court held that the right of access to the courts requires affirmative assistance for inmates "only in the preparation of legal papers in cases involving constitutional rights and other civil rights actions related to their incarceration."

This view was subsequently adopted by the United States Supreme Court: *Bounds* does not guarantee inmates the wherewithal to transform themselves into litigating engines capable of filing everything from shareholder derivative actions to slip-and-fall claims. The tools it requires to be provided are those that the inmates need in order to attack their sentences, directly or collaterally, and in order to challenge the conditions of their confinement. Impairment of any other litigating capacity is simply one of the incidental (and perfectly constitutional) consequences of conviction and incarceration. *Lewis v. Casey*, 518 U.S. 343, 355, 116 S.Ct. 2174, 135 L.Ed.2d 606 (1996).

Reinholtz v. Campbell, 64 F.Supp.2d 721, 730 (W.D. Tenn. 1999). See *Courtemanche v. Gregels*, 79 Fed.Appx. 115, 117 (6th Cir. 2003) ("However, a prisoner's right of access to the courts is limited to direct criminal appeals, habeas corpus applications, and civil rights claims challenging the conditions of confinement.").

The Court in *Lewis* also found that *Bounds* did not create any independent right of access to legal materials. The Court specifically found that *Bounds* did not establish a right to a law library or to legal assistance, but that "[t]he right that *Bounds* acknowledged was the (already well-established) right to access to the courts." 518 U.S. at 350, 116 S.Ct. at 2179. Meaningful access to the courts is the touchstone. It is the capability of bringing contemplated challenges to sentences or conditions of confinement before the courts that is protected, not "the capability of turning pages in a law library." 518 U.S. at 356-57, 116 S.Ct. 2182.

Phifer v. Tennessee Bd. of Parole, 2002 WL 31443204, *11 (Tenn. Ct. App. 2002) (footnote omitted). See also *Benjamin v. Kerik*, 102 F.Supp.2d 157, 162 (S.D. N.Y. 2000) ("The *Lewis* Court repudiated the expansive understanding of its prior decision in *Bounds v. Smith*, and held that prisoners do not have a freestanding right to law libraries or legal assistance.") (citations omitted).

"Although prisoners maintain a right of access to the courts, they do not have the right of access to a law library." *Jackson v. Wiley*, 352 F.Supp.2d 666, 679 (E.D. Va. 2004) citing *Strickler v. Waters*, 989 F.2d 1375, 1385 (4th Cir. 1993). An inmate is not denied his right of access to the courts simply because a jail's law library is inadequate or because an inmate's access to that library has been restricted in some way. *Id.* Access to a jail's law library may be restricted during lockdown where inmates have access to other forms of legal advice. *Id.* at 680, citing *Johnson v. Williams*, 768 F.Supp. 1161 (E.D. Va. 1991). "States have a duty to provide inmates with either an attorney or access to law libraries to prepare for trial. States need not provide both law libraries and advisors." *Id.*

"There is no constitutional right to any particular number of hours in the law library." *Thomas v. Campbell*, 12 Fed.Appx. 295, 297 (6th Cir. 2001), citing *Walker v. Mintzes*, 771 F.2d 920, 932 (6th Cir. 1985). See also *Davidson v. Edwards*, 816 F.2d 679, 679 (6th Cir. 1987) (Table) ("Restricted access to the library is not a per se denial of access to the courts. Rather, access to the library need only be reasonable and adequate.").

The Tenth Circuit Court of Appeals has held that the "availability of law libraries is only one of many constitutionally acceptable methods of assuring meaningful access to the courts, and pretrial detainees are not entitled to law library usage if other available means of access to court exist." *United States v.*

Cooper, 375 F.3d 1041, 1051 (10th Cir. 2004). "It is well established that provision of legal counsel is a constitutionally acceptable alternative to a prisoner's demand to access a law library." *Id.* at 1051-1052. The choice among various methods of guaranteeing access to the courts lies with prison administrators, not inmates or the courts. *Ishaaq v. Compton*, 900 F.Supp. 935, 941 (W.D. Tenn. 1995).

An inmate who has court-appointed counsel on direct appeal has no constitutional right of access to a law library in preparing his defense. *Caraballo v. Federal Bureau of Prisons*, 124 Fed.Appx. 284, 285 (5th Cir. 2005) (citation omitted). See also *United States v. Manthey*, 92 Fed.Appx. 291, 297 (6th Cir. 2004) (same). Moreover, "many federal circuit courts have held that a prisoner who knowingly and voluntarily waives appointed representation by counsel in a criminal proceeding is not entitled to access to a law library." *Degrate v. Godwin*, 84 F.3d 768, 768-69 (5th Cir. 1996) (citing cases).

An inmate's right of access to the courts is not violated merely because his attorney refuses to accept collect phone calls. *United States v. Manthey*, 92 Fed.Appx. 291, 297 (6th Cir. 2004).

A prisoner's right of access to the courts includes the right to receive legal advice from other prisoners only when it is a necessary "means for ensuring a reasonably adequate opportunity to present claimed violations of fundamental constitutional rights to the courts." *Pendleton v. Mills*, 73 S.W.3d 115, 124 n. 10 (Tenn. Ct. App. 2001), citing *Shaw v. Murphy*, 532 U.S. 223, 231 n. 3, 121 S.Ct. 1475, 1480 n. 3, 149 L.Ed.2d 420 (2001); *Bounds v. Smith*, 430 U.S. 817, 825, 97 S.Ct. 1491, 1496, 52 L.Ed.2d 72 (1977). However, "an inmate does not have an independent legal right to help other prisoners with their legal claims." *Thaddeus-X v. Blatter*, 175 F.3d 378, 395 (6th Cir. 1999) (citations omitted). "Rather, a 'jailhouse lawyer's' right to assist another prisoner is wholly derivative of that prisoner's right of access to the courts; prison officials may prohibit or limit jailhouse lawyering unless doing so interferes with an inmate's ability to present his grievances to a court." *Id.* See also *King v. Zamara*, 150 Fed.Appx. 485, 492 (6th Cir. 2005) ("[A]n inmate engages in protected activity by providing legal assistance when his assistance is necessary to provide another inmate with constitutionally-protected access to the courts.").

An inmate's right of access to the courts "does not encompass a requirement that prison officials provide a prisoner with free, unlimited access to photocopies." *Logue v. Chatham County Detention Center*, 152 Fed.Appx. 781, 784 (11th Cir. 2005). In *Logue*, the inmate alleged that jail officials violated his right to access to the courts based on the denial of his requests for multiple photocopies of supporting exhibits, including lengthy transcripts, for his use in an unrelated habeas corpus proceeding. The Eleventh Circuit Court of Appeals upheld the district court's dismissal of Logue's claim because Logue failed to allege an actual injury by showing that the denial of the photocopies actually impeded a nonfrivolous claim. The court stated: "Here, Logue did not assert that the California court rejected his habeas petition because of the missing attachments and, thus, we discern no actual injury giving rise to a violation of his access to the courts." *Id.* See also *Miller v. Donald*, 132 Fed.Appx. 270, 272 (11th Cir. 2005) (finding prison officials did not deny inmate his right to access the courts by refusing his request that they provide him with free photocopies of legal documents he was required to serve on defendants in a civil rights action before a California federal court where the inmate failed to allege that the California federal court would not accept service of, or that he was unable to produce, hand-copied duplicates).

Likewise, in *Courtemanche v. Gregels*, 79 Fed.Appx. 115, 117 (6th Cir. 2003), the Sixth Circuit Court of Appeals recognized that "the right of access does not include a per se right to photocopies in whatever amount a prisoner requests." "[T]he right of access to the courts is not unrestricted and does not mean that an inmate must be afforded unlimited litigation resources." *Thomas v. Rochell*, 47 Fed.Appx. 315, 317 (6th Cir. 2002). See also *Negron v. Golder*, 111 P.3d 538, 544 (Colo. App. 2004) ("There is no constitutional right to photocopy services."); *Walters v. Thompson*, 615 F.Supp. 330, 340 (N.D. Ill. 1985) (Inmates are not entitled to unlimited free photocopying as a matter of right.); *Jones v. Franzen*, 697 F.2d 801, 803 (7th Cir. 1983) ("broad as the constitutional concept of liberty is, it does not include the right to Xerox").

Inmates shall have unrestricted and confidential access to the courts. Inmates shall have the right to present any issue before a court of law or governmental agency. The facility shall establish reasonable hours during which attorneys may visit and/or telephonically communicate. Inmates shall have access to legal materials. Rules of the Tennessee Corrections Institute, Rule 1400-1-.12(8).

Access to Counsel

Reference Number: CTAS-1420

Pursuant to state regulations, the jail must have a written policy providing that prisoners will be allowed to have confidential access to their attorneys and their authorized representatives at any reasonable hour. Rules of the Tennessee Corrections Institute, Rule 1400-1-.12(7).

"Access to counsel is not only a right under the Sixth Amendment, but is one means of insuring access to

the courts." *Arney v. Simmons*, 26 F.Supp.2d 1288, 1296 (D. Kan. 1998) (citations omitted). The opportunity to communicate privately with an attorney is an important part of meaningful access to the courts. *Dreher v. Sielaff*, 636 F.2d 1141, 1143 (7th Cir.1980). "However, the Sixth Amendment does not require in all instances full and unfettered contact between an inmate and counsel." *Arney*, 26 F.Supp.2d at 1296. "The constitutionally relevant benchmark is *meaningful*, not total or unlimited, access." *Campbell v. Miller*, 787 F.2d 217, 226 (7th Cir.), *cert. denied*, 479 U.S. 1019, 107 S.Ct. 673, 93 L.Ed.2d 724 (1986) (emphasis in original).

Prison officials have the authority to impose reasonable regulations and conditions regarding attorney visits, so long as they do not interfere with an inmate's communication with his attorney. *Boyd v. Anderson*, 265 F.Supp.2d 952, 969 (N.D. Ind. 2003) (citations omitted). "The extent to which that right is burdened by a particular regulation or practice must be weighed against the legitimate interests of penal administration and the proper regard that judges should give to the expertise and discretionary authority of correctional officials." *Proconier v. Martinez*, 416 U.S. 396, 420, 94 S.Ct. 1800, 1814-1815, 40 L.Ed.2d 224 (1974). See *Department of Corrections v. Superior Court*, 131 Cal.App.3d 245, 250-255 (Cal. App. 1 Dist. 1982) (upholding termination of personal contact visits with attorney and substitution of specified noncontact visits as reasonable and necessary in the interest of institutional security and public protection). But see *Ching v. Lewis*, 895 F.2d 608, 610 (9th Cir. 1990) (holding that a prisoner's right of access to the courts includes contact visitation with his counsel).

A 24-hour notice requirement prior to legal visitation does not violate an inmate's right to access to counsel. *Campbell v. Miller*, 787 F.2d 217, 226-227 (7th Cir. 1986) ("Despite these restrictions, attorneys may visit inmates four days a week. That provides inmates with a reasonable opportunity to receive professional legal assistance.").

While prisoners have a right to meet with their attorney, they do not have a right to meet as a group with an attorney. *Boyd v. Anderson*, 265 F.Supp.2d 952, 969 (N.D. Ind. 2003) (citations omitted).

County jail inmates who wish to consult with an attorney must be provided with a reasonable degree of privacy. *Nicholson v. Choctaw County*, 498 F.Supp. 295, 310 (S.D. Ala. 1980), *citing Jones v. Diamond*, 594 F.2d 997, 1024 (5th Cir. 1979); *Ahrens v. Thomas*, 434 F.Supp. 873, 898 (W.D. Mo. 1977). See also *Owens-El v. Robinson*, 442 F.Supp. 1368, 1389 (W.D. Pa. 1978) (finding that the attorney visiting room, while occasionally overcrowded, was sufficient to permit attorneys to consult with their clients and to properly prepare a defense, and therefore did not violate inmates' constitutional rights).

Telephone Calls to Attorneys

Reference Number: CTAS-1421

Inmates must be permitted telephone access to contact the courts and their attorneys under certain circumstances. *Green v. Nadeau*, 70 P.3d 574, 578 (Colo. App. 2003). However, some reasonable restrictions on inmates' ability to access counsel by telephone does not deny inmates "their constitutional right to access the courts and counsel." *Mullins v. Churchill*, 616 N.W.2d 764, 770 (Minn. App. 2000) (upholding policies regulating inmate use of telephones that required inmates to provide attorney's name and telephone number and explanation of why inmate could not contact attorney by mail). The right to counsel under the federal Constitution is the right to counsel's effective assistance, and not the right to perfect representation or unlimited access to counsel. The right to confer with counsel does not include the right to confer by telephone with counsel as frequently as the inmate or the attorney desires. *Washington v. Meachum*, 680 A.2d 262, 282 (Conn. 1996). See also *Aswegan v. Henry*, 981 F.2d 313, 314 (8th Cir. 1992) (stating "[a]lthough prisoners have a constitutional right of meaningful access to the courts, prisoners do not have a right to any particular means of access, including unlimited telephone use") (citations omitted).

The federal courts have had a few opportunities to deal specifically with the question of restrictions placed upon telephone communications between attorneys and prisoners. In *Williams v. ICC Committee*, 812 F.Supp. 1029 (N.D. Cal. 1992), for example, the court said that an inmate could state a claim only if he could demonstrate that the phone was his only avenue for meaningful access to his lawyer because he was unable to contact the lawyer by mail, or was denied visits from his lawyer. In another case, *Bellamy v. McMickens*, 692 F.Supp. 205 (S.D. N.Y. 1988), the court ruled that a prisoner's civil rights were not violated simply because he could not telephone his attorney whenever he wanted, but was subject to delays imposed by prison regulations.

Hall v. McLesky, 83 S.W.3d 752, 759 (Tenn. Ct. App. 2001). In *Hall*, the court held that the temporary interruption of telephone service to an inmate's attorney did not prejudice the inmate such that he was deprived of his constitutional right to meaningful access to the courts, and thus, the inmate could not invoke the protections of 42 U.S.C. § 1983. The court found that the restriction imposed upon the inmate's access to his attorney was of limited scope and duration and was related to a legitimate

regulatory purpose on the part of prison administration. *Id.*

In *Ishaaq v. Compton*, 900 F.Supp. 935, 941 (W.D. Tenn. 1995), the court found that denying a convicted inmate's request to make a telephone call to his attorney, on the ground that the inmate lacked sufficient money in his trust fund account, did not deny the inmate access to the courts in violation of the First Amendment and could not be the basis for a § 1983 civil rights claim where the inmate failed to demonstrate actual interference.

"The essence of this right is, however, the access itself, not the convenience of the access. Convenience is not a right of constitutional magnitude. Any inconvenience an inmate experiences in handling a lawsuit is merely 'part of the penalty that criminal offenders pay for their offenses against society.'" *Id.* at 941, (citations omitted).

"The choice among various methods of guaranteeing access to the courts lies with prison administrators, not inmates or the courts." *Id.*, citing *Knop v. Johnson*, 977 F.2d 996, 1008 (6th Cir. 1992). "The alternative avenues open to state authorities to protect a prisoner's right of access to the courts are precisely that – alternatives. The choice between alternatives lies with the state. A prisoner who chooses not to avail himself of the alternative provided has no basis – constitutional or otherwise – for complaint." *Id.* See also *Love v. Summit County*, 776 F.2d 908, 914 (10th Cir. 1985) ("In addition, the state, not the inmate, has the right to choose among constitutionally adequate alternatives.").

Limited access to attorney telephone calls is not a constitutional violation as long as inmates can communicate with their counsel in writing or in person. *Ingalls v. Florio*, 968 F.Supp. 193, 203-204 (D. N.J. 1997). See also *Pino v. Dalsheim*, 558 F.Supp. 673, 675 (S.D. N.Y. 1983) (unlimited personal and mail communication with attorney constitutionally sufficient because state is not required to provide best manner of access). Policies requiring inmates to obtain prior written authorization to telephone their attorneys and limiting those calls to one per week have been found reasonable in light of the inmates' ability to correspond with attorneys through mail and during prison visits. *Robbins v. South*, 595 F.Supp. 785, 789-790 (D. Mont. 1984).

In *Cacicio v. Secretary of Public Safety*, 665 N.E.2d 85, 92 (Mass. 1996), the Massachusetts Supreme Court held that regulations that placed time limits on attorney telephone calls and prohibited toll-free calls did not violate an inmate's right to effective assistance of counsel, where the inmate was permitted to make unmonitored telephone calls to five separate attorneys on the inmate's calling list as well as three legal services organizations. The court found that these limitations, "when viewed in conjunction with an inmate's ability to use the mails and have visits, provide sufficient access to attorneys." *Cf. Beyah v. Putman*, 885 F.Supp. 371, 374 (N.D. N.Y. 1995) (Prison officials can restrict inmates' access to counsel by telephone as long as the inmates have some other avenue of access.); *Bellamy v. McMickens*, 692 F.Supp. 205, 214 (S.D. N.Y. 1988) (Although prisoners have a right to gain access to counsel from prison, they have no right to unlimited telephone calls and "restrictions on inmates' access to counsel via the telephone may be permitted as long as prisoners have some manner of access to counsel.").

In *Tucker v. Randall*, 948 F.2d 388, 390-391 (7th Cir. 1991), the Seventh Circuit Court of Appeals noted that in certain circumstances, denying a pretrial detainee access to a telephone for four days after his arrest may violate the Constitution. The court stated that the Sixth Amendment right to counsel would be implicated if a pretrial detainee was not allowed to talk to his lawyer for the entire four-day period. However, in *United States v. Manthey*, 92 Fed.Appx. 291, 297 (6th Cir. 2004), the Sixth Circuit Court of Appeals stated that the failure of a pretrial detainee's attorney to accept collect telephone calls does not violate the inmate's due process right of access to the courts when the inmate has the assistance of an attorney during the course of his criminal trial.

In *Carter v. O'Sullivan*, 924 F.Supp. 903, 911 (C.D. Ill. 1996), the district court found that a 19-day delay in contacting a convicted state inmate's attorney, after the inmate refused to put the attorney on his call list, did not deprive the inmate of the reasonable opportunity to communicate with his attorney. The court further found that the inmate was unable to show any prejudice to pending or contemplated litigation, which is a requirement for liability under 42 U.S.C. § 1983.

Providing telephone access to counsel is clearly one appropriate way to guarantee an inmate an opportunity to have his or her legal claims, both civil and criminal, properly framed and brought before a court of competent jurisdiction. However, this is only one of several ways of assuring inmates the opportunity to present their legal claims to the courts. Reasonable access to a law library within the correctional facility, consultation with attorneys or their representatives through the mails and personal visits, and consultation with attorneys over the telephone within facility guidelines are all valid methods of ensuring that inmates are not denied the access to the courts. *Washington v. Meachum*, 680 A.2d 262, 285 (Conn. 1996) (citations omitted).

Monitoring Telephone Calls to Attorneys

Reference Number: CTAS-1422

In *Massey v. Wheeler*, 221 F.3d 1030, 1036 (7th Cir. 2000), the Seventh Circuit Court of Appeals noted the importance of unmonitored communication between attorneys and inmates but stated that the court could find no cases that establish a right to unrestricted and unlimited private telephone calls.

In *Robinson v. Gunja*, 92 Fed.Appx. 624, 626-627 (10th Cir. 2004), the Tenth Circuit Court of Appeals upheld the dismissal of a pretrial detainee's claim that his Fourth Amendment rights were violated when prison officials monitored his telephone calls to attorneys and paralegals. Robinson failed to follow prison regulations, which required inmates to submit a request to make unmonitored legal telephone calls. The court found that because Robinson was using the inmate telephone system, which was clearly subject to monitoring, he had no reasonable expectation of privacy and his rights were not violated. The court also found that, because calls placed on the inmate telephone system were subject to recording and monitoring, the district court properly dismissed Robinson's Fifth and Sixth Amendment claims.

The legality of monitoring inmate calls to an attorney is not settled. It has been held that the presence of a custodial officer when prisoners place or receive a phone call is constitutionally objectionable. See *Moore v. Janing*, 427 F.Supp. 567, 576 (D. Neb.1976). It has also been held that prison officials may tape a prisoner's telephone conversations with an attorney if such taping does not substantially affect the prisoner's right to confer with counsel. *Tucker v. Randall*, 948 F.2d 388, 391 (7th Cir. 1991).

Arney v. Simmons, 26 F.Supp.2d 1288, 1296 (D. Kan. 1998) (finding that the automatic monitoring of attorney calls on "facility phones" presented no constitutional infringement where inmates were allowed to make unlimited nonmonitored calls on "inmate phones").

Prison Litigation Reform Act

Reference Number: CTAS-1423

"The Prison Litigation Reform Act requires prisoners bringing actions concerning prison conditions under 42 U.S.C. § 1983 or other federal law to exhaust all available administrative remedies before suing in federal court. When a prisoner fails to exhaust his administrative remedies before filing a civil rights complaint, dismissal of the complaint is appropriate." *Young v. Martin*, 83 Fed.Appx. 107 (6th Cir. 2003) (citations omitted). See also *Williams v. Luttrell*, 99 Fed.Appx. 705 (6th Cir. 2004) (holding pro se pretrial detainee failed to exhaust his administrative remedies, as required under the PLRA, in his § 1983 action against county jail officials alleging that he was subjected to unconstitutional conditions of confinement and excessive use of force, where the detainee specifically stated in his complaint that he did not file any grievances related to his claims); *Jones v. Warren County*, 67 Fed.Appx. 909 (6th Cir. 2003) (holding that the district court properly dismissed pro se inmate's § 1983 claim against the county and two jail employees for failure to exhaust his administrative remedies under the PLRA); *Atman v. Hutchison*, 57 Fed.Appx. 642 (6th Cir. 2003) (holding federal pretrial detainee at county jail could not bring § 1983 lawsuit challenging interference with his legal mail where he failed to comply with the exhaustion requirement of the PLRA). State regulations require that facilities shall provide an inmate grievance procedure to all inmates. The grievance procedure must include at least one level of appeal. Rules of the Tennessee Corrections Institute, Rule 1400-1-.05(12).

The PLRA provides in pertinent part that:

No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.

42 U.S.C. § 1997e(a). In *Porter v. Nussle*, 534 U.S. 516, 122 S.Ct. 983, 152 L.Ed.2d 12 (2002), the Supreme Court held that the PLRA's exhaustion requirement "applies to all prisoners seeking redress for prison circumstances or occurrences," *id.* at 520, 122 S.Ct. 983, irrespective of whether those conditions are general to all prisoners or affect only one prisoner in particular, see *id.* at 532, 122 S.Ct. 983. Previously, in *Booth v. Churner*, 532 U.S. 731, 121 S.Ct. 1819, 149 L.Ed.2d 958 (2001), the Supreme Court noted that the PLRA required exhaustion if available administrative process had the ability to provide "some relief for the action complained of" (emphasis added), even if grievance procedures could not provide the relief sought, *id.* at 738-39, 121 S.Ct. 1819. If no administrative remedies are available, however, then the PLRA does not require exhaustion. *Id.* at 736 n. 4, 121 S.Ct. 1819 ("Without the possibility of some relief, the administrative officers would presumably have no authority to act on the subject of the complaint, leaving the inmate with nothing to exhaust."); see also *Mojias v. Johnson*, 351 F.3d 606, 609 (2d Cir. 2003) ("[The PLRA]

clearly does not require a prisoner to exhaust administrative remedies that do not address the subject matter of his complaint." (internal quotation marks and citation omitted)).

Handberry v. Thompson, 436 F.3d 52, 58-59 (2d Cir. 2006).

Before the district court may adjudicate any claim set forth in a prisoner's complaint, it must determine that the plaintiff has complied with this exhaustion requirement. Not only is a prisoner-plaintiff required to exhaust as to each defendant, he must show that he has exhausted every claim presented in his complaint. If a prisoner fails to show that he has exhausted his administrative remedies, his complaint is subject to sua sponte dismissal.

McCullough v. Barnes, 2005 WL 2704878, *2 (M.D. Tenn. 2005) (citations omitted).

To establish that he has exhausted his administrative remedies, a prisoner-plaintiff must show that he presented his grievance(s) "through one complete round" of the established grievance process. A prisoner does not exhaust available administrative remedies when he files a grievance but "d[oes] not appeal the denial of that complaint to the highest possible administrative level." Neither may a prisoner abandon the process before completion and then claim that he exhausted his remedies, or that it is now futile for him to do so.

Id., (citations omitted).

The plaintiff-prisoner has the burden of proving that a grievance has been fully exhausted, *Baxter v. Rose*, 305 F.3d 486, 488 (6th Cir. 2002), and the prisoner must attach documentation to the complaint as proof. *Brown v. Toombs*, 139 F.3d 1102, 1104 (6th Cir. 1998). Exhaustion is not jurisdictional; it is mandatory, *Wyatt v. Leonard*, 193 F.3d 876, 879 (6th Cir. 1999), even if proceeding through the administrative system would be "futile." *Hartsfield v. Vidor*, 199 F.3d 305, 308-10 (6th Cir. 1999).

Bey v. Johnson, 407 F.3d 801, 805 (6th Cir. 2005) (holding that the PLRA requires a complete dismissal of a prisoner's complaint when that prisoner alleges both exhausted and unexhausted claims). *See also Boyd v. Corrections Corp. of America*, 380 F.3d 989, 995 (6th Cir. 2004) ([A] prisoner-plaintiff may bear his pleading burden either "by attaching a copy of the applicable administrative dispositions to the complaint or, in the absence of written documentation, describ[ing] with specificity the administrative proceeding and its outcome.").

If the jail has no grievance procedure, the exhaustion requirement of the PLRA will be excused. *Rancher v. Franklin County*, 122 Fed.Appx. 240 (6th Cir. 2005).

Inmate Exercise

Reference Number: CTAS-2132

Rules of the Tennessee Corrections Institute, 1400-1-.12(3) states inmates shall have access to exercise and recreation opportunities. A written plan shall provide that all inmates have the opportunity to participate in an average of one hour of physical exercise per day outside the cell. Outdoor recreation may be available when weather and staffing permit.

Prisoners are not entitled to the same amount of exercise per day, nor is there an across-the-board constitutional minimum of daily exercise to avoid an Eighth Amendment violation. *Cammon v. Bell*, 2008 WL 3980469 (S.D. Ohio 2008)

Exercise is one of the "basic human needs" protected by the Eighth Amendment. Prisons should provide regular exercise opportunities because "[i]nmates require regular exercise to maintain reasonably good physical and psychological health." An extended deprivation of exercise opportunities may violate an inmate's Eighth Amendment rights. Under the Eighth Amendment, prison officials must, at a minimum, provide an adequate opportunity for exercise-whether indoors or outdoors. *Gins v. South Louisiana Correctional Center*, 2008 WL 4890884 (W.D. La. 2008)

In *Peterkin v. Jeffes*, 855 F.2d 1021, 1031-33 (3d Cir. 1988) the court determined that the denial of exercise or recreation may result in a constitutional violation. However, a plaintiff must demonstrate that such a denial is sufficiently serious to deprive inmates of the minimal civilized measure of life's necessities (*Tillman v. Lebanon County Corr. Facility*, 221 F.3d 410, 418 (3d Cir. 2000)). Even minimal provision of time for exercise and recreation may satisfy constitutional requirements. (*Wishon v. Gammon*, 978 F.2d 446, 449 (8th Cir. 1992)) (forty-five minutes of exercise per week not constitutionally infirm); *Knight v. Armontrout*, 878 F. 2d 1093, 1096 (8th Cir. 1989) (holding that denial of outdoor recreation for thirteen days was not cruel and unusual punishment). Moreover, "a temporary denial of outdoor exercise with no medical effects is not a substantial deprivation." *May v. Baldwin*, 109 F.3d 557, 565 (9th Cir. 1997). In *Gattis v. Phelps* 344 Fed.Appx 801 C.A.3 (Del.) 2009, Gattis argued that a District Court improperly

dismissed his Eighth Amendment claim. The Court weighing on the above cases agreed with the District Court that Gattis' alleged harm—that his exercise was limited to three days per week and that he was not guaranteed outdoor exercise at all times—was insufficiently serious to implicate the Eighth Amendment.

Travel Restrictions

Reference Number: CTAS-1424

No sheriff, jailer or other person responsible for the care and custody of inmates housed in a county jail may permit any such inmate housed therein to leave this state unless such travel is approved by the sentencing court, the inmate is in need of emergency medical treatment available only in another state, or there is a death or medical emergency in the inmate's immediate family. T.C.A. § 41-2-148(c).

Furloughs

Reference Number: CTAS-1425

In any case in which a defendant has been sentenced to a local jail or workhouse or is at a local jail or workhouse subject to the provisions of T.C.A. § 40-35-212, the sentencing court shall have jurisdiction to grant a furlough for any medical, penological, rehabilitative or humane reason, upon conditions to be set by the sentencing court. This section applies to convictions under T.C.A. § 55-10-401 (DUI/DWI) after the mandatory minimum sentences have been served. T.C.A. § 40-35-316(a).

The sentencing court shall have no authority to grant a furlough to a defendant pursuant to the authority of T.C.A. § 40-35-316(a) for the purpose of allowing the defendant to work unless the defendant is held to and meets all of the eligibility and supervision requirements, testing standards and other criteria imposed by or pursuant to state law. T.C.A. § 40-35-316(b).

In *State v. Moss*, 2000 WL 246227 (Tenn. Crim. App. 2000) the defendant appealed an order entered by the trial court requiring that he be reincarcerated to serve the remainder of his 120-day jail sentence after the trial court had granted the defendant a medical furlough at the request of the sheriff.

The facts of this case are not in controversy. The defendant reported to the Anderson County Jail on April 17, 1998, to serve his 120-day sentence. Within approximately two weeks, he suffered a severe attack of appendicitis. The sheriff, without prior notice to the State, the defendant, or defense counsel, contacted a judge who granted a furlough based on a medical emergency. The only written record of the granting of a furlough was a notation attached to the jail docket. A guard accompanied the defendant to the hospital where, once the defendant's condition was diagnosed and the need for surgery determined, the guard left the hospital. The defendant successfully underwent an appendectomy and was released approximately one week later. The defendant was not contacted by anyone from the jail or any other official concerning the furlough or any particular date for his return to jail. The defendant went home, continued to recuperate, and started a new job.

Some months later, the defendant told his probation officer that he had served only twelve days of his 120-day sentence. The probation officer relayed this information to the prosecutor. Consequently, a hearing was held to determine the defendant's status. An order to serve sentence was issued by the trial court on November 30, 1998, requiring that the defendant be reincarcerated to serve the remaining days of his sentence. The trial court allowed credit for the seven days the defendant was hospitalized.

Id.

On appeal, the defendant presented the following two issues: (1) whether reincarceration of the defendant was fundamentally unfair; and (2) whether the state of Tennessee was responsible for payment of the defendant's medical bills while on furlough for an emergency appendectomy.

Addressing the first issue, the Court of Criminal Appeals noted that, pursuant to T.C.A. § 40-35-316(a), the trial court has jurisdiction to grant furloughs for "any medical, penological, rehabilitative or humane reason" and that the defendant had been placed on medical furlough because of a life-threatening medical emergency. The defendant argued that the following defects in the validity of the furlough granted by the trial court amounted to a waiver of the government's right to reincarcerate him: (1) He did not request the furlough; (2) no furlough order was ever entered; (3) his attorney was not notified; and (4) the real reason for the furlough was for the county to avoid financial liability.

The court concluded that the sheriff's actions in seeking an emergency furlough for the defendant, even if, as the defendant had alleged, was for the purpose of avoiding financial liability for the defendant's medical expenses, were far from being so affirmatively improper or grossly negligent that it would be an affront to justice to require the defendant to serve a legal sentence in the face of such actions. Accordingly, as to

the first issue, the court affirmed the order of the trial court instructing the defendant to return to the Anderson County jail to serve the remainder of his mandatory 120-day sentence.

With respect to the second issue, the court noted that the issue of the county's liability for the defendant's medical expenses was not properly before the court. As to the state's liability, the court found that the state was not liable for the defendant's medical expenses because the defendant was not serving a sentence in the Tennessee Department of Correction but was sentenced to the county jail for a misdemeanor conviction.

Likewise, in *State v. Chapman*, 977 S.W.2d 122 (Tenn. Crim. App. 1997), the Court of Criminal Appeals held that the reincarceration of the defendant to serve the remainder of her 10 day sentence was not fundamentally unfair and thus did not violate the defendant's due process rights where the sheriff had released her from custody to receive necessary medical attention, unavailable in his county, because of her premature labor and birth of her child.

On December 1, 1995, the defendant reported to the Carroll County Jail and began serving her sentence at 6:00 p.m. On her third day of confinement, December 4, 1995, the defendant began showing signs of labor at approximately 1:00 a.m. The jailer and a deputy transported the defendant to Methodist Hospital in McKenzie, Tennessee, at 3:40 a.m. The hospital determined that the defendant had to be transported to a hospital in Jackson, Tennessee, because the baby was in breech. At 4:55 a.m., the Carroll County Sheriff's Department released the defendant from custody. The defendant was then transported to the hospital in Jackson, apparently by ambulance.

On January 8, 1996, the state made an oral motion to grant the defendant a medical furlough. Over the objection of the defendant's trial counsel, the trial court granted the state's motion, stating that "this was a matter, I think, that was addressed to the Court.... And I said she could be released under these medical conditions. There should have been an order to that effect." Because the defendant was not present at the hearing, the trial court continued the case to February 14, 1996, to determine when the defendant could begin serving the remainder of her sentence. On January 24, 1996, the trial court entered an order granting the defendant a medical furlough as of December 4, 1995, finding that it was necessary to release her from jail at 4:55 a.m. due to premature labor.

Id. at 124.

Affirming the trial court's order denying the defendant's motion to declare her sentence served, the Court of Criminal Appeals held that the "sheriff's actions in releasing the defendant to receive necessary medical attention, unavailable in his county, is not 'so affirmatively wrong ... that it would be unequivocally inconsistent with 'fundamental principles of liberty and justice' to require' the defendant to complete her sentence." *Id.* at 126 (citations omitted).

In addition to her due process argument, the defendant argued that she was entitled to the application of the doctrine of credit for time at liberty so as to have her sentence to confinement deemed completed. The court, however, held that the doctrine does not apply under Tennessee law nor would it under the circumstances in this case. *Id.* at 126-127.

In any event, we do not believe the doctrine would require relief under the circumstances in this case. At the time of sentencing, the trial court stated that a furlough would be granted to the defendant for medical purposes, a furlough authorized by law. See T.C.A. §§ 40-35-316 and 41-2-128.

The defendant's initial hospitalization, necessary for the birth of her child, was under the Carroll County Sheriff's custody. At that time, the parties were notified of the need to send the defendant to a better-equipped hospital in another county because the fetus was in the breech position. Needless to say, this was an emergency medical situation with time being of the essence.

With this medical emergency, the sheriff's legal options were limited. Under T.C.A. § 41-4-121(a), the sheriff has legal authority to convey a prisoner to the nearest sufficient jail, including in another county, if his or her jail is insufficient for the safekeeping of a prisoner. In this sense, the inability of the county to supply immediate medical needs might fall into this category. In reality, though, the defendant was already in, and would remain in, the hands of medical personnel and a physical transfer of the defendant to another jail was impossible. Otherwise, the sheriff was left with the choice of seeking judicial order for a furlough or other release for medical purposes. See, e.g., T.C.A. §§ 40-35-316 and 41-2-128. Obviously, an early morning telephone call by the sheriff's office to the trial court would have resulted in a furlough authorization.

However, we do not believe that the failure to get specific furlough authorization from the trial court at the time of the defendant's "release" from the sheriff's custody reflects "negligence" in the release because of the medical emergency at hand. Rather, it was a release of necessity to save the

defendant's and her child's lives. Also, with the defendant being aware that the trial court would grant her a furlough for medical purposes, but not for an extended time with the child, we do not see how she could reasonably expect or consider her time of confinement to continue running after her release.

Thus, she would not be entitled to credit for time at liberty.

Id. at 127. *See also State v. Cardwell*, 1993 WL 231750 (Tenn. Crim. App. 1993) (affirming the trial court finding that appellant had violated the conditions of his probation by leaving the state and county without permission and by exceeding the limitations placed on his medical furlough).

The Tennessee Attorney General has provided an opinion that in the absence of a waiver, the State is liable for expenses incurred from emergency hospitalization and medical treatment provided to any felon imprisoned in the county jail if the felon is admitted to the hospital while on furlough. In the absence of a waiver, the county is liable for all other medical expenses of county jail prisoners released on furlough either pretrial or after conviction. The county is not liable for payment of the medical expenses of jail prisoners on bond either pretrial or after conviction. Op. Tenn. Atty. Gen. No. 06-084 (May 5, 2006).

Jail Fees

Reference Number: CTAS-1426

The county legislative body of each county has the authority to pass a resolution fixing the amount of jailers' fees that may be applied to misdemeanor prisoners. The rate fixed shall apply to such prisoners confined in the county jail or county workhouse or workhouses, but not meeting the conditions required for a state subsidy under Title 41, Chapter 8.T.C.A. § 8-26-105(a). Sample Resolution to fix Jailer's Fees.

Sheriffs and jailers must make written statements of account, properly proven and sworn to, for the keeping of prisoners, specifying distinctly each item and the amount due for each item. T.C.A. § 41-4-129.

The fees of jailers is taxed separately from the general bills of costs of criminal cases. All state costs must be properly proved and sworn to before the clerk of the criminal or circuit court of the county and certified by the clerk for payment. T.C.A. § 41-4-131.

Jailer's fees for county prisoners shall be referred monthly to the county mayor for inspection, who shall audit the fees and cause the clerk to issue a warrant for the amount allowed. T.C.A. § 41-4-136.

Booking Fee

T.C.A. § 40-7-122 provides that in addition to any other fees the sheriff is entitled to demand and receive in accordance with § 8-21-901, a county legislative body may vote to impose an additional fee of not more than ten dollars (\$10.00) for the booking and processing of each person subject to arrest or summons. The fee shall be collected at the same time and in the same manner as other fees are collected by a sheriff in accordance with title 8, chapter 21, part 9. The fee shall not be charged to any person determined by the court to be indigent.

Arrest and Transportation of Prisoners, Bail Bond

1. For executing every *capias*, criminal warrant, summons or other leading process, making arrests in criminal cases and carrying to jail, prison or other place of incarceration and guarding defendant arrested by warrant involving taking custody of a defendant: \$40.
2. For citation in lieu of arrest or criminal warrant not involving physical custody of a defendant: \$25.
3. For every bail bond to be paid as cost at the time there is a disposition of the case: \$10.
4. If a sheriff is required to act as a guard to escort prisoners, the sheriff is entitled to a per mile fee equal to the mileage allowance granted federal employees. The fee shall be separate for each prisoner and computed on the distance actually traveled with the prisoner and shall be for no more than two guards. The fee shall apply only when the sheriff is required to transport a prisoner from county to county or from state to state. Similarly, the sheriff is entitled to the same mileage allowance when required to transport a prisoner to a hospital or other mental health facility in another county or state for a judicially ordered evaluation.
5. When two or more criminal warrants are executed at the same time against the same individual, only one arrest fee is allowed when the fee is chargeable to the county or the state.

T.C.A. § 8-21-901(a)(3). *See also* T.C.A. § 40-9-127.

Payment for Transporting Prisoners – Limitations on Charges

T.C.A. § 40-25-111 provides for payment for transporting prisoners to the department of corrections.

(a) The sheriff or other officer, conveying an inmate to the penitentiary, shall make out an account in writing, stating the number of miles on the usual route from the place of conviction to the penitentiary, the number of guards necessarily employed to ensure the safe conveyance of the inmate, and the distance each of the guards may have traveled, and make oath to the truth of the account before the warden of the penitentiary, or any judge, who shall certify the fact.

(b) Upon presentation of the account thus sworn to and certified, the director of accounts shall issue a warrant for the amount, as in other cases, if satisfied of the correctness of the account.

(c) It is the duty of the sheriff to carry to the penitentiary, at the same time, all inmates in the sheriff's custody, at that time sentenced to the penitentiary, and the sheriff shall not be entitled to charge for more than one (1) trip.

Contracting to House State Prisoners

No county is required to house convicted felons sentenced to more than one year of continuous confinement unless the county, through the authority of its county legislative body, has chosen to contract with the Department of Correction for the purpose of housing certain felons. The department promulgates rules for requirements and procedures for contracting. T.C.A. § 41-8-106(a).

Counties may contract, in writing, with the state or with other counties for responsibility of correctional populations. T.C.A. § 41-8-106(b).

Reimbursement for Keeping State Prisoners

Pursuant to T.C.A. § 8-26-106, upon adoption by the county legislative body of a resolution fixing jailers' fees, it is made the duty of the county clerk to promptly transmit to the judicial cost accountant a certified copy of the resolution. The judicial cost accountant shall allow jailers' fees for that particular county for state prisoners at the amount fixed by the resolution on the same terms as the county according to the provisions of T.C.A. § 8-26-105.

However, pursuant to T.C.A. § 8-26-105(b), in lieu of the reimbursement for jailers' fees allowed in T.C.A. § 8-26-106, the state now provides a subsidy pursuant to Title 41, Chapter 8. Pursuant to T.C.A. § 8-26-105(c), references in other sections of the code to jailers' fees for state prisoners specified in T.C.A. § 8-26-105 are deemed to be references to the subsidies specified in T.C.A. § 41-8-106.

As defined in T.C.A. § 41-8-103(12), the "subsidy" referred to in T.C.A. §§ 8-26-105(b) and 41-8-106 means that amount of money paid by the state to a county in accordance with T.C.A. § 41-8-106. Subsidies paid to counties pursuant to Title 41, Chapter 8, is the only compensation from the state to which counties are entitled for housing state prisoners and are in lieu of the fees allowed in T.C.A. § 8-26-106 or any other section of the code. T.C.A. § 41-8-106(e).

Counties are reimbursed for housing convicted felons pursuant to the general appropriations act and according to rules and regulations for determining reasonable allowable costs as promulgated by the Department of Correction, in consultation with the comptroller of the treasury. The department is authorized to include capital costs within the meaning of reasonable allowable costs. Such capital costs may include, but are not limited to, debt service. T.C.A. § 41-8-106(c)(1).

Pursuant to T.C.A. § 41-8-106(g)(1), the Department of Correction is required to take into its custody all convicted felons from any county that had not contracted with the state as authorized by T.C.A. § 41-8-106(b). The department is not required to take actual physical custody of any such felons until 14 days after the department has received all certified sentencing documents from the clerk of the sentencing court.

The commissioner of correction is authorized to compensate any county that has not contracted with the state as authorized by T.C.A. § 41-8-106(b) for such county's reasonable, allowable cost of housing such felons. The rate of this compensation to the noncontracting counties is determined by and is subject to the level of funding authorized in the appropriations bill. However, the commissioner may not compensate any county that fails or refuses to promptly transfer actual physical custody of an inmate to the Department of Correction after being requested by the department in writing to do so for each day or portion of a day that such county fails to transfer the inmate. The written notice shall include the date it intends to take custody of the inmate for transfer to the department. The notice shall be given as soon as practicable before such transfer date. T.C.A. § 41-8-106(g)(2).

Fees lost by escape of prisoner -- Exception

T.C.A. § 40-25-110 states that:

- (a)** No sheriff, jailer or other officer charged with the custody of the prisoner is entitled to any

allowance for keeping or removing the prisoner, if the prisoner escapes from the custody of the sheriff or jailer, or from the officer during removal.

(b) (1) Where prisoners make their escape from jail by means of force, stratagem or other fraudulent device, and reasonable care and diligence were used by the jailer to prevent the escape, or to secure the prisoner or prisoners in jail, the jailer shall be entitled to fees as jailer; provided, that it shall be clearly made to appear to the satisfaction of the judge of the circuit or criminal court in the county where the escape was made or the cause pending, that the escape was effected in the manner and under the circumstances aforementioned, and that the jailer had used the proper efforts on the jailer's part to recover the prisoner or prisoners.

(2) In all cases falling within this subsection (b), it is the duty of the judge to certify the claim for payment as in other bills of cost, and the sheriff or other officers having custody of the prisoner or prisoners shall have all the benefits of this subsection (b).

See Jailer's Fees under Sheriff's Fees of the Law Enforcement topic for more information.

County Jail Inspectors

Reference Number: CTAS-1427

The county legislative body may, at its January term each year, appoint three householders or freeholders, residents of the county, of lawful age, to act as jail inspectors for the ensuing year, or the court may appoint such inspectors at any other time to act for a shorter period. The county mayor is an *ex officio* inspector of the jail in each county. T.C.A. § 41-4-116(a) and (b).

It is the duty of the inspectors appointed to:

1. Visit and examine the county jail at least once each month;
2. Make rules and regulations to preserve the health and decorum of the prisoners;
3. Decide all disputes between the jailer and the prisoners;
4. Provide for the restraint by ironing or segregation of prisoners who offer violence to fellow prisoners or to the jailer or the jailer's assistants, or for attempting to break jail; and
5. Make a report at each meeting of the county legislative body of the state and condition of the prisoners and the jail.

T.C.A. § 41-4-116(c).

The county commission may not appoint commission members as jail inspectors under T.C.A. § 41-4-116. Op. Tenn. Atty. Gen. No. 04-070 (April 21, 2004).

Jail inspectors do not have the authority to audit or otherwise inquire into the use of county drug funds held under T.C.A. §§ 39-17-328 or 39-17-420. Op. Tenn. Atty. Gen. No. 04-070 (April 21, 2004).

In *Connell v. Davidson County Judge*, 39 Tenn. 189 (1858), the Tennessee Supreme Court held that "[t]he power conferred upon Jail Inspectors, to 'make rules and regulations for the preservation of the health and decorum of the prisoners,' is confined to general sanitary and police regulations. It does not authorize them to charge the county with physicians' bills for medical attention to the prisoners."

The attorney general has opined that the appointed jail inspectors must exercise their powers consistently with other applicable provisions of state law. For example, any rules made by these inspectors must be consistent with standards adopted by the Tennessee Corrections Institute under T.C.A. § 41-4-140 to the extent that statute applies to the county jail. Furthermore, the county legislative body may not expand the jail inspectors' duties beyond those in the statute and consistent with other state laws. Op. Tenn. Atty. Gen. No. 99-153 (August 16, 1999).

The attorney general has opined that whenever the jail inspectors convene to make a decision or to deliberate toward a decision, their gathering is a meeting subject to the notice and other requirements of the Open Meetings Act. At the same time, on-site inspections of the jail, whether the inspectors conduct them alone or with one another, would ordinarily not be meetings subject to the Open Meetings Act so long as the inspectors do not, in conjunction with the inspection, deliberate toward a decision. Op. Tenn. Atty. Gen. No. 04-070 (April 21, 2004).

Tennessee Corrections Institute

Reference Number: CTAS-2467

The Tennessee corrections institute shall:

1. Train correctional personnel in the methods of delivering correctional services in municipal, county

and metropolitan jurisdictions;

2. Evaluate correctional programs in municipal, county and metropolitan jurisdictions. At the request of the commissioner of correction, the institute may also evaluate state correctional programs;
3. Conduct studies and research in the area of corrections and criminal justice in order to make recommendations to the governor, the commissioner of correction and the general assembly; and
4. Inspect all local penal institutions, jails, workhouses or any other local correctional facility in accordance with § 41-4-140.

T.C.A § 41-7-103.

The following links are to the Tennessee Corrections Institute website.

TCI Website

TCI Minimum Standards

Standards Booklet

Pre-Employment Waiver Parameters

Pre-Employment Waiver Request Form

Plan of Action Form

Plan of Action Release Form

Training Requirements

Training Policies and Procedures for Local Agencies

County Corrections Partnership Initiative

Board of Control - TN Corrections Institute

Reference Number: CTAS-1429

The correctional services programs of the Tennessee Corrections Institute are under the direction of its Board of Control. The Board of control shall consist of seven (7) members: (1) The governor or the governor's designee; (2) The commissioner of correction or the commissioner's designee; (3) The chair of the department of criminal justice of an institution of higher education in Tennessee, who shall be appointed by the governor; (4) Two (2) sheriffs, who shall be appointed by the governor. One (1) shall be from a county with a population of two hundred thousand (200,000) or more and one (1) shall be from a county with a population of less than two hundred thousand (200,000); (5) A county mayor, who shall be appointed by the governor; and (6) A chief of police or a county commissioner, who shall be appointed by the governor. T.C.A. § 41-7-105.

Public Chapter 972 (effective July 1, 2012) amends Tenn. Code Ann. § 41-7-104. Provides that a fee of ten cents shall be collected for each completed telephone call made by an inmate housed in a local jail or workhouse. Such fees shall be remitted by the telephone service provider to the state treasurer each quarter and credited to a special account in the state general fund designated as the local correctional officer training fund to be used exclusively to fund certification training provided through the Institute for local correctional personnel within the state. Provides that the Institute's Board of Control shall approve all expenditures from the fund. Funds deposited in the account shall not revert to the general fund at the end of any fiscal year.

Tennessee Minimum Standards for Local Correctional Facilities

Reference Number: CTAS-1430

The Tennessee Corrections Institute has the power and duty to:

1. Establish minimum standards for local jails, lock-ups, and workhouses, including, but not limited to, standards for physical facilities and standards for correctional programs of treatment, education and rehabilitation of inmates, and standards for the safekeeping, health and welfare of inmates. The standards established by the Tennessee Corrections Institute must approximate, insofar as possible, those standards established by the Inspector of Jails, Federal Bureau of Prisons, and by the American Correctional Association's Manual of Correctional Standards, or such other similar publications as the Institute may deem necessary;
2. Establish guidelines for the security of local jails, lock-ups, and workhouses for the purpose of

protecting the public from criminals and suspected criminals by making such facilities more secure and thereby reducing the chances that a member of the public or a facility employee will be killed or injured during an escape attempt or while an inmate is fleeing from law enforcement officials following an escape;

3. Inspect all local jails, lock-ups, workhouses and detention facilities at least once a year and publish the results of such inspections. Inspections must be based on the established standards mentioned above; and
4. Have full authority to establish and enforce procedures to ensure compliance with the standards set out above so as to ensure the welfare of all persons committed to such institutions. Failure on the part of the county to maintain the standards established under T.C.A. § 41-4-140 must be reported by the Board of Control of the Institute to the commissioner of correction, sheriff, judge, or mayor, as appropriate, in the county in which the jail or penal institution is located. This report must specify the deficiencies and departures from the standards and order their correction.

T.C.A. § 41-4-140(a).

Any changes to the TCI minimum standards for local correctional facilities would be new "rules" under the Uniform Administrative Procedures Act (UAPA) and thus must comply with the rule-making provisions of the UAPA. A rule, by definition, includes the amendment or repeal of a prior rule. Tenn. Code Ann § 4-5-102(12). The TCI's establishment of minimum standards for local correctional facilities implements or prescribes law, and thus triggers the UAPA due process requirements of notice and hearing to those whose relationships with the government will be impacted by the adoption of such standards. Such persons or entities would include, but not be limited to, local officials responsible for the building and maintenance of these facilities, contractors charged with meeting these standards and the general public. The TCI's establishment of minimum jail standards does not fit within any of the exceptions of Tennessee Code Annotated § 4-5-102(12). Establishing jail standards does "impact private rights, privileges or procedures available to the public", Tenn. Code Ann. § 4-5-102(12)(A), and is more than a mere statement "concerning inmates of a correctional or detention facility", Tenn. Code Ann § 4-5-102(12)(G). See, e.g., *Abdur' Rahman v. Bredesen*, 181 S.W. 3d 292, 311-12 (Tenn. 2005); *Heritage Early Childhood Development Center, Inc. v. Tennessee Department of Human Services*, No. M2008-02134-COA-R3-CV, 2009 WL 3029595, at 5-7 (Tenn. Ct. App. 2009). Tenn. Attny. Gen. 11-63 (August 26, 2011)

If, after inspection of a local correctional facility as provided in T.C.A. § 41-4-140(a)(3), the facility is determined not to be in compliance with the minimum standards, the Board of Control or any of its authorized staff may grant the facility an extension not to exceed 60 days for the purpose of making such improvements as are necessary to bring the facility into compliance with the minimum standards. During the period of the extension, the facility shall maintain the same certification status as it had prior to the most recent inspection. No additional extensions may be granted, and the certification status given a facility upon reinspection shall be the facility's status until the next annual inspection. T.C.A. § 41-4-140(b)(1).

No local currently certified facility shall be decertified if that local government has submitted a plan within 60 days of the initial annual inspection that is reasonably expected to eliminate fixed ratio deficiencies in that facility and cause the facility to remain certified. T.C.A. § 41-4-140(d).

No local correctional facility shall be denied a certificate of compliance with the minimum standards for the sole purpose of calculating the level of reimbursement upon the certified or not certified determination, if the sole cause is based on overcrowding because of prisoners sentenced to the Department of Correction whose commitments are delayed pursuant to Title 41, Chapter 1, Part 5, or pursuant to a federal court order when such prisoners are being held by a county pending such commitment. T.C.A. § 41-4-140(b)(2).

The total number of prisoners awaiting transfer to the Department of Correction penal system shall be discounted from any computations used to determine compliance with standards used by the Tennessee Corrections Institute if the governor has invoked the power of delayed intake pursuant to § 41-1-504(a)(2) or if a federal or state court has delayed intake into the department penal system, or both. T.C.A. § 41-4-140(e).

Standards Compliance-Tennessee Corrections Institute

Reference Number: CTAS-1431

The attorney general has opined that a jail is not necessarily unconstitutionally overcrowded simply because it houses more inmates than its Tennessee Corrections Institute (TCI) capacity. Op. Tenn. Atty. Gen. 89-65 (April 28, 1989) (citing *Feliciano v. Barcelo*, 497 F.Supp. 14, 35 (D.P.R.1979)). It is clear that TCI and American Correctional Association (ACA) standards do not establish the constitutional standard.

Id. (Citing *Grubbs v. Bradley*, 552 F.Supp. 1052, 1124 (M.D. Tenn. 1982). See also Op. Tenn. Atty. Gen. 02-015 (February 6, 2002) (same).

It is important to note that the Constitution does not require the county to operate the jail in accordance with criminological doctrine or to employ only experts in its management. See *Grubbs v. Bradley*, 552 F.Supp. 1052, 1124 (D.C. Tenn. 1982). "And, while guidelines of professional organizations such as the American Correctional Association represent desirable goals for penal institutions, neither they nor the opinions of experts can be regarded as establishing constitutional minima." *Id.* Likewise, a lack of compliance with Tennessee Corrections Institute requirements does not mandate a finding of a constitutional violation. *Bradford v. Gardner*, 578 F.Supp. 382, 384 (E.D. Tenn. 1984). See also *Jones v. Mankin*, 1989 WL 44924, *7 (Tenn. Ct. App. 1989) ("While we find the Tennessee Corrections Institute's staffing recommendations interesting and helpful, they do not provide a basis to conclude that the sheriff is not able to operate the jail with his existing staff.").

Although violations of state minimum standards or the county's policies regarding operation of the jail may constitute negligence, violations of state law do not constitute deliberate indifference. *Davis v. Fentress County Tennessee*, 6 Fed.Appx. 243, 250 (6th Cir. 2001). See also *Roberts v. City of Troy*, 773 F.2d 720, 726 (6th Cir. 1985), citing *Davis v. Scherer*, 468 U.S. 183, 104 S.Ct. 3012, 82 L.Ed.2d 139 (1984) ("The mere failure to comply with a state regulation is not a constitutional violation.").

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