# Protecting the Dignity of Transgender Litigants And the Justice System

Materials Drafted

*for*

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*Judges must refrain from speech, gestures, or other conduct that could reasonably be perceived as prejudiced or biased or as harassment and must require the same standard of conduct of others subject to their direction or control.*

—Commentary to Georgia Code of Judicial Ethics Rule 2.3

## I. Introduction: The Science of Gender and the Art, and Importance, of Vocabulary

*In the majority of the population, a high degree of congruence exists between sex and gender, such that an individual fitting all the characteristics of the male sex also identifies with the masculine gender. Transgendered individuals are but one example of a group of people exhibiting incongruence between their natal sex and their gender identity.*[1]

The Georgia judicial code of conduct requires judges to refrain from exhibiting bias in their courtroom based on, among other bases, "gender or sex" – which includes gender identity[2] – and to ensure that lawyers refrain from doing so. *See* Ga. Code of Judicial Ethics Rule 2.3 (App. 1). Use of respectful language is a starting point for interacting appropriately with transgender and gender non-conforming[3] individuals who enter the judicial system. However, a deeper understanding of gender and the experience of those who are transgender or gender non-conforming will yield better results, in a more genuine way. An important place to start is by understanding the distinction between gender assigned (by other) and gender identified (by self). Doing so is essential to deconstructing the implicit bias that leads to indignity and injustice for transgender individuals.

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[1] Jill Pilgrima, et. al, *Far From the Finish Line: Transsexualism and Athletic Competition*, 113 Fordham Intell. Prop. Media & Entm't. L.J., 495, 498 (2003) (citing R. Rhoades & R. Pflanzer, *Human Physiology*, 958-59 (3d ed. 1996)).

[2] *See Glenn v. Brumby*, 663 F.3d 1312, 1317 (11th Cir. 2011) ("discrimination against a transgender individual because of her gender-nonconformity is sex discrimination, whether it's described as being on the basis of sex or gender.")

[3] As used herein, "gender non-conforming" means not conforming to gender stereotypes. According to Mirriam-Webster, "gender non-conforming means "a state in which a person has physical and behavioral characteristics that do not correspond with those typically associated with the person's sex." < www.merriam-webster.com/dictionary/gender%20nonconformity>; *see also* Lisa M. Diamond et al., Handbook of Child Psychology and Development Science, 7th edition, 2015 ("Gender identity refers to an individual's internalized psychological experience of being male or female, whereas gender nonconformity refers to the degree to which an individual's appearance, behavior, interests, and subjective self-concept deviate from conventional norms for masculinity/femininity."). Gender non-conforming people may or may not be transgender.

## A. Gender

Until recently, gender[4] has been understood as a binary condition (*i.e.*, male and female) solely and finally determined at birth by external genitalia. Our legal and social structures concerning gender are formed around these two unquestioned assumptions. That is, a child is born, identified as male or female based on external genitalia and their gender is recorded – *i.e.*, assigned to them – on a birth certificate. Laws, regulations and social expectations are thereafter based on the gender assigned. However, research and the realities of scores of people from across the world[5] show that these assumptions can be inaccurate. In fact, sexual biology is a complicated process that occurs in utero and does not always lead to unambiguous external genitalia or to congruence between the external genitalia and the gender of the individual.[6]

As described in a law review article exploring transgender athletes in athletic competition, *Far From the Finish Line: Transsexualism and Athletic Competition*,[7] external genitalia is but one determinate of sex, all others occur internally and are rarely assessed. For example, several ways in which gender can be determined include "chromosomal sex," determined by the presence of X or Y chromosomes and "phenotypic sex" which refers to the presence of anatomical and/or biochemical features such as hormonal dominance. Indeed, there are believed to be up to eight determinates of sex.[8] One of those biologically-based means of

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[4] As used herein, the term "gender" is synonymous with the term "sex."

[5] One survey suggests a prevalence of one out of 12,000 to 37,000 people for male-to-female transsexuals and one out of 30,000 to 150,000 for female-to-male. *See* O. Bodlund & G. Kullgren, *General Outcome and Programmatic Factors: A Five-Year Follow-Up Study of Nineteen Transsexuals in the Process of Changing Sex*, 25 Archives Sexual Behav. 303, 303-13 (1996); *and see* Robin Marantz Hening, *How Science Is Helping Us Understand Gender*, National Geographic (Jan.2 2017) http://www.nationalgeographic.com/magazine/2017/01/how-science-helps-us-understand-gender-identity/.

[6] *See* Note 1, at 498 (citing R. Rhoades & R. Pflanzer, Human Physiology 958-59 (3d ed. 1996)).

[7] *See* Note 1, *supra*.

[8] *See e.g.*, *Brown v. Zavaras*, 63 F.3d 967, 971 (10th Cir. 1995) (stating that research concluding gender identity may be biological suggests reevaluating whether transgender people are a protected class for purposes of the Equal Protection Clause); *In re Heilig*, 816 A.2d 68, 73 (Md. 2003) (listing seven medically recognized factors composing a person's gender, including "personal sexual identity" (citing Julie A. Greenberg, *Defining Male and Female: Intersexuality and the Collision Between Law and Biology*, 41 Ariz. L. Rev. 265, 278 (1999)); *In re Estate of Gardiner*, 22 P.3d 1086 (2001); *Maffei v. Kolaeton Indus., Inc*., 626 N.Y.S.2d 391 (N.Y. Sup. Ct. 1995))); *In re Lovo-Lara*, 23 I & N Dec. 746, 747, 752 (BIA 2005), available at http://www.justice.gov/eoir/vll/intdec/vol23/3512%20.pdf (explaining that "[a]ccording to medical experts" there are eight criteria which determine an individual's sex, including "sexual identity"); *Schroer v. Billington*, 424 F. Supp. 2d 203, 211-13 (D.D.C. 2006) (recognizing that scientific observation may confirm that "'sex is not a cut-and-dried matter of chromosomes"' but rather consists of "different components of biological sexuality" (quoting *Ulane v. E. Airlines, Inc*., 581 F. Supp. 821, 825 (N.D. Ill. 1983)); Julie A. Greenberg & Marybeth Herald, *You Can't Take it With You: Constitutional Consequences of Interstate Gender Identity Rulings*, 80 Wash. L. Rev.

determining sex is "brain sex," which also is believed to occur in utero based on hormones. As one researcher explained, "brain sex" is an individual's "innate sexual identity" and expert opinion concludes that "biological sex is multidimensional" and "ultimately determined by the sexual differentiation of the human body part rather than by body parts." Rachael Wallbank, *Re Kevin In Perspective*, 9 Deakin L. Rev. 461, at 461-62, 467, 493 (2004).[9] Increasingly, research supports what transgender people have long inherently known, which is that brain sex is more powerful than any external qualifier of gender. Indeed, "research appears to support the hypothesis that transgender people should be classified as intersex because 'there is a brain sex difference between men and women and transsexual people have the brain sex of that gender group to which they maintain they belong.'" Jaime Johnson, *Recognition of the Nonhuman: The Psychological Minefield of Transgender Inequality in the Law*, 34 Law & Psychol. Rev. 153, 159 (citing Stephen Whittle, *Respect and Equality: Transsexual and Transgender Rights* 1, 10 (2002). In 2015, researchers at Boston University School of Medicine published a review article that analyzed multiple studies on people with sexual development disorders and concluded that gender identity is a biological condition unaffected by the gender to which one is assigned at birth. [10]

Notwithstanding other determinants of gender, brain sex—the sex that is hardwired in the brain—refers to gender identity. As S.J. Langer explains in his article, *Our Body Project: From Mourning to Creating the Transgender Body*, from a clinical perspective, gender dysphoria—the clinical term for the diagnosis involving a difference between one's experienced/expressed gender and assigned gender—is less a "belief" or "desire for the opposite sex genitals and secondary sex characteristics" and more a "sensation" and "self-knowledge" for "what one never had but should have had."

All of the above is to put forward this one essential take-away position that has the capacity to fundamentally, and innately, alter your interactions with transgender individuals, if not all individuals, which is: Your brain determines your sex. Just as you know yourself to be male or female based on your brain sex, not because your birth certificate reflects a M or F, so too does every transgender or gender non-conforming person know their gender identity. It should also inform the way you describe and characterize someone who is transgender, where "biologically" male or female is revealed as inaccurate.

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819, 825-26 (2005) (discussing eight factors that contribute to a person's sex, including gender identity); Norman P. Spack, *An Endocrine Perspective on the Care of Transgender Adolescents*, 13 J. Gay & Lesbian Mental Health 309, 312-13 (2009) (explaining that surgeons have little to do with the transition process aside from plastic surgery "because the individual has already assigned his or her own gender and sex").

[9] *And see* Karen Gurney, *Sex and the Surgeon's Knife: The Family Court's Dilemma . . . Informed Consent and the Specter of Iatrogenic Harm to Children with Intersex Characteristics*, 33 Am. J.L. & Med. 625, 625–26 (2007) ("Recently the importance of the brain's sex as a biological factor influencing sex determination has gained wider recognition.") (citations omitted).

[10] *Transgender: Evidence on the biological nature of gender identity*, Boston University Medical Center (Feb. 2015).

*At the root of the widespread discrimination, harassment, and violence-- both systemic and individual--that transgender people face is a lack of understanding or affirmation that transgender people are who they say they are*

…

*Justice for transgender people is linked to the validation of self-identity--you are who you know yourself to be.*[11]

**B. Vocabulary**

*For transgender people to be recognized as full human beings under the law, the legal system must make room for the existence of transgender people--not as boundary-crossers but as people claiming their birthright as part of a natural variation of human sexual development.*[12]

There are many words to describe gender identities and the spectrum and experience of people who reject the assertion that gender is a binary choice. These descriptions form the bases for academic exploration and current discourse. For purposes of this presentation, and for ensuring gender non-conforming individuals have access to justice, two definitions are critical for those in the justice system to *understand*, which are the following terms: 1) "gender identity" and 2) "cisgender."

As set out above, "gender identity" means "brain sex." Gender identity is the self-perception of one's gender as that understanding is hardwired in the brain.[13] Gender identity is not a "perception" that one is "born into the wrong body" or a "social construct." It is a fact. And everyone has one. You may disagree with this assertion on a religious or intellectual level, but if you are committed to ensuring justice, you will endeavor to absorb this concept and apply it when you put on your robe, suit or uniform. Gender is determined by the part of the body between the ears, not between the legs.

For those unfamiliar with transgender issues yet committed to ensuring justice, the other essential word to understand may be the word "cisgender." From an epistemological standpoint, the word is essentially an antonym of "transgender" where both words share Latin roots, with "trans" meaning "across, beyond, or on the other side of" and "cis" meaning "on this side of." As prefixes to the word "gender" both terms are strictly descriptive adjectives.[14] Although the word has been recognized in print literature for the past two decades, the word is not everyone's

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[11] M. Dru Levasseur, *Gender Identity Defines Sex: Updating The Law To Reflect Modern Medical Science Is Key To Transgender Rights*, 39 Vt. L. Rev. 943, 945–46 (2015).

[12] *Id*.

[13] *See, e.g.*, William Reiner, *To be Male or Female--That Is the Question*, 151 Archives Pediatric & Adolescent Med. 224, 225 (1997) ("[T]he organ that appears to be critical to psychosexual development and adaptation is not the external genitalia, but the brain.").

[14] *See, e.g.*, Sunnivie Brydum, *The True Meaning of the Word 'Cisgender' It's not complicated: Cisgender is the opposite of transgender*, The Advocate (July 31 2015) available at http://www.advocate.com/transgender/2015/07/31/true-meaning-word-cisgender.

vocabulary, and is rarely if ever mentioned in law school and legal circles. It should be, and it is finally finding its way into legal pleadings, briefings, and opinions.[15] The assumption that everyone is cisgender leads to violence, discrimination and injustice against those who are not.

The reason understanding, and using, the term "cisgender" is so important is because everyone has a gender identity. The only question is whether the gender assigned to that person at birth – the letter on their birth certificate – aligns with their gender identity. A cisgender person is someone whose gender identity matches the gender that person was assigned at birth.[16] A transgender person is someone whose assumed gender identity/brain sex does not match the gender that person was assigned at birth. It is that simple. By incorporating the term cisgender, or at least conceptualizing that nearly everyone is either cisgender or transgender, you give language and context to a lived privilege most people have never considered or examined. Doing so will lead to an expansive understanding of everyone with whom you interact, including yourself. It may be a new word, a new identity, a new label – but it is one that has applied to our lived experience all along. Identifying yourself as a cisgender male or female (if you are) is useful because it helps to break down the idea that transgender people are abnormal or mentally ill. It replaces the harmful binary Normal/Transgender with the much more neutral Cisgender/Transgender. As implicated above and set out in the appendices, (see App. 2) this suggestion is not meant to imply that these are the only two gender identities that exist. However, if you have never thought about your own gender identity, using the term cisgender is an important step toward helping understand how to respect the diversity of gender identities and expressions.

*Oti, nine, was assigned male at birth but never felt that way. When she learned to speak, she didn't say, "I feel like a girl," but rather "I am a girl.*[17]

Beyond these two terms, it is important to know that there are dozens of words describing gender identities that reflect individuals' understanding and description of their gender – agender, bigender, cisgender, female, F2M[18], gender fluid, gender nonconforming, genderqueer, intersex male, M2F,trans, transgender, transsexual, transmasculine, transfeminine,

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[15] *See, e.g., Norsworthy v. Beard*, 87 F.Supp.3d 1104, 1120 (N.D. Cal. 2015) (explaining that the government "articulate no important governmental interest, much less describe how their gender classification—which makes it more difficult for a transgender person to receive vaginoplasty than it is for a cisgender woman—is substantially related to that interest."); *Students and Parents for Privacy v. United States Dep't. of Educ.*, No. 16-cv-4945, 2016 WL 6134121, at *2 (N.D.Ill., 2016) ("the District has made clear that any cisgender high school student who does not want to use a restroom or a locker room with a transgender student is not required to do so.").

[16] The Oxford English Dictionary describes the word "cisgender" as an adjective and defines it as "Denoting or relating to a person whose self-identity conforms with the gender that corresponds to their biological sex; not transgender." Katy Steinmetz, This is What ' Cisgender' Means, Time (Dec. 23, 2014) <http://time.com/3636430/cisgender-definition/>

[17] Robin Marantz Henig, *How Science Is Helping Us Understand Gender*, NATIONAL GEOGRAPHIC (Jan. 2017), FN 5, *supra*.

[18] F2M is understood to mean Female-to-Male.

transqueer, transman, transwoman, twospirit – among others. *See* App. 2. While officers of the court do not need to know the definitions and distinctions of all the terms and ways people self-identify, it is important is to understand that terminology within the transgender community varies and has changed over time, and to recognize the need to be sensitive to usage within particular communities. Accepting what academics and advocates point out – that the original way of understanding gender as a binary choice is inaccurate and insufficient to identify a position on a spectrum – should aid in a transformative shift to which those obligated to justice should aspire. The shift in perspective will move you from unintentional ignorance and inaccurate presumptions toward awareness and non-dismissiveness with respect to individuals' inherent right to live authentically in conformity with their gender identity.

The above discussion also should inform how you refer to non-cisgender individuals – where necessary to do so – in court and on the record. The most accurate and respectful way to refer to a non-cisgender person is by the term they use to identify themselves. Doing so with the "biologic sex" caveat, *i.e.*, referencing a transwoman as "biologically male," is unnecessary, disrespectful and inaccurate. Biology includes neuroscience, which includes brain sex. The appropriate reference is that she is a woman and, where necessary, a woman who was assigned the sex of male at birth.

### B. Understanding the individualized nature of gender transition

*Trans people typically describe gender transition through the same language we use to talk about journeys. There are "steps" and "stages" in the transition process, which correlate with actions taken to "move forward" toward the identified gender category.*[19]

In dispensing justice it is important to dispense with the idea that transgender people have to undergo any particular procedure or take legal steps in order to be recognized in accordance with their gender identity. One critical misconception about transgender people is that sex "reassignment" surgery, more accurately described as "sex confirming surgery," (SCS) is an essential part of transition, but that is not the case for all transgender people. Transition is individualized and case-dependent. It generally includes hormone therapy and gender immersion (where a person lives as the gender with which they identify), and, in some cases, SCS or other surgeries that alter internal or external sex characteristics. Hormones, surgeries and other medical procedures that alter physiology to reflect gender are frequently inaccessible and entail costs and risks that not all people can undergo. None of the foregoing changes a person's gender identity or the requirement that court officials make every effort to provide dignity and access justice to every person.

In providing equal justice it is important to understand the phrase "gender transition," which refers to the time period during which a person begins to live in accordance with their gender identity, rather than the gender they were thought to be at birth. While not all transgender people transition, a great many do at some point in their lives. The extent to which people

[19] *Transgender individuals' language evokes journeys* (April 2015) (interview with linguist Jenny Lederer on her research concerning how transgender individuals talk about themselves published as "Exploring the metaphorical models of transgenderism" in Metaphor and Symbol, April 6, 2015)< https://news.sfsu.edu/transgender-individuals-language-evokes-journeys>

physically and/or socially transition varies. Gender transition looks different for every person. Some people undergo hormone therapy or other medical procedures to change their physical characteristics and make their body better reflect the gender they know themselves to be. It is often, but not always, in conjunction with medical treatment. Possible steps in a gender transition may or may not include changing clothing, appearance, name, or the pronoun people use to refer to you (*i.e.*, "she," "he," or "they"). Some people are able to change their identification documents, like their driver's license or passport, to reflect their gender. Although changing one's birth certificate or driver's license to accurately reflect a gender identity can be critical to a trans person's safety and well-being, doing so may be neither legally or practically possible for many people.[20]

Transitioning can help many transgender people lead healthy, fulfilling lives. No specific set of steps is necessary to "complete" a transition—it's a matter of what is right for each person. All transgender people are entitled to the same dignity and respect, regardless of which legal or medical steps they have taken.

## II. Policies and best practices

In 2012, Lambda Legal—a national organization committed to achieving full recognition of the civil rights of LGBT people and those living with HIV through impact litigation, education and public policy work—conducted a national study to explore government misconduct by the police, courts, prisons and school security against LGBT people as well as people living with HIV in the United States. A total of 2,376 people completed the individual survey. Lambda Legal's survey found a wide range of complaints and reports of disrespect, bias and discrimination from LGBT people and people living with HIV in the areas explored by the survey. This survey, titled and published as *Protected and Served?*, is one of only a few that has explored the bias and discrimination LGBT people and people living with HIV experience in the court system.

In this survey, almost three-quarters of respondents (73%) reported having face-to-face contact with the police in the past five years. An alarming percentage of them reported negative, hostile and violent interactions. One quarter of respondents with police contact reported at least one type of misconduct or harassment such as verbal assault, being accused of an offense they did not commit, sexual harassment or physical assault.

Consistent with the data about police interactions, it points to some of the ways the promise of fair and impartial proceedings is tainted by homophobia, transphobia and HIV bias. LGBT people and people living with HIV are particularly vulnerable and are often targeted when incarcerated. This survey highlights the fact that in a climate that is already unsafe, prison guards and other staff often contribute to and exacerbate the danger by committing acts of violence against LGBT and HIV-positive people in their custody and by failing to protect them from dangerous or potentially dangerous situations.

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[20] *See* FN 10, at 78-79 ("The rules for changing gender-marker designations, however, are complex and vary across jurisdictions and administrative bodies, making it challenging, and sometimes impossible, for many transgender people to have updated and consistent IDs.") (citations omitted).

Of the survey respondents, 43% (965 respondents) had been involved in the court system as an attorney, juror, witness or a party to a legal case in the previous five years. Of those 965:

- 19% were attorneys
- 21% were witnesses
- 44% were jurors
- 61% were a party to a case

Respondents in each of those roles within the court system told us that they heard negative comments about the sexual orientation, gender identity, gender expression or HIV status of individuals in court room proceedings. Some of our respondents also had their sexual orientation, gender identity, gender expression or HIV status disclosed improperly.

While respondents from each of those four categories reported mistreatment, as with other forms of government misconduct, there were significantly higher numbers of reports from members of the community who are more often targeted by police, including transgender or gender-nonconforming individuals, as well as those who, in addition to being LGBT or living with HIV, are people of color, low-income or have physical or learning disabilities.

The following recommendations are from *Protected and Served?* [21]

**COURTS**

Lawmakers, judicial governing bodies, and/or legal associations should adopt the following rules, policies and practices to help protect LGBT people and people living with HIV participating or otherwise involved in judicial proceedings:

- Adopt measures to safeguard the privacy of people who are LGBT or living with HIV.

- Incorporate in judicial canons and attorneys' rules of professional responsibility prohibitions on language and conduct by any court participants manifesting bias or discrimination based on sexual orientation, gender identity or expression, and HIV status.

- Institute clear and accessible procedures for complaints about bias by judges, lawyers, court officials and court staff.

- Conduct studies, with community input, of courts' treatment of individuals based on sexual orientation, gender identity or expression or HIV status.

- Encourage diversity, including in sexual orientation and gender identity or expression, in the appointment and election of judges.

- Support and/or enact laws that explicitly prohibit discrimination in jury selection on the basis of sexual orientation, gender identity or expression, and HIV status.

[21] Available at <http://www.lambdalegal.org/protected-and-served>

- Interpret discrimination on the basis of sex to include discrimination on the basis of sexual orientation and gender identity, and adopt policies and procedures that implement this understanding.

**In addition, attorneys and judges should:**

- Promptly respond to jokes or disrespectful comments about an individual's actual or perceived sexual orientation, gender identity or expression or HIV status.

- Address transgender and gender-nonconforming (TGNC) individuals according to their preferred pronouns ("he" and "him," or "she" and "her").

- Oppose the introduction of evidence of actual or perceived sexual orientation, sexual conduct, gender identity or expression or HIV status unless these characteristics are relevant to an issue in the proceeding.

- Conduct *voir dire* that respects people's right to confidentiality regarding their sexual orientation, gender identity or expression and HIV status, and that avoids involuntary outing.

- Ensure that jurors are not discriminated against on the basis of sexual orientation, gender identity or expression or HIV status.

**Judges should:**

- When instructing jurors that biases are to play no role in their decisions, explicitly include bias, prejudice and other preconceived notions about sexual orientation, gender identity or expression and HIV status.

**Attorneys should:**

- When appropriate, ask questions during *voir dire* to expose juror biases and prejudices based on sexual orientation, gender identity or expression and HIV status, and seek to remove biased jurors for cause.

- Challenge peremptory strikes (removals of jurors without explanation) that appear to be based on sexual orientation, gender identity or expression, or HIV status.

**Correctional departments, jails and prisons should:**

- Ensure that transgender people receive an individualized assessment for housing placement in accordance with the federal Prison Rape Elimination Act (PREA), taking into account the person's gender identity and safety.

- Adopt and fully implement policies, including PREA, to protect LGBT people from sexual abuse and other violence while incarcerated.

- Prohibit the use of solitary confinement as routine or standard protective placement for people who are LGBT or people living with HIV.

- Eliminate policies and procedures that provide for differential treatment or enhanced disciplinary measures based solely on an inmate's HIV-positive status.

- Follow PREA standards regarding searches, and train staff in conducting professional and respectful searches, particularly as they affect transgender individuals.

- Ensure that transgender people and people with HIV have access to all medically necessary health care. For transgender people, that may include hormone therapy and surgeries. For people living with HIV, that means uninterrupted access to the medication and the range of care they need.

- Implement transparent and effective complaint review processes.

- Require correctional staff to undergo cultural competency trainings about sexual orientation, gender identity and expression and HIV.

## III. Guidance in Lieu of Laws

While Georgia lacks a state-wide anti-discrimination law that protects transgender people from discrimination based on their gender identities, judicial conduct rules and rules of professional conduct provide guidance. Several municipalities prohibit discrimination based on gender and gender identity,[22] either of which should apply to transgender people.[23] In addition, federal guidance applies to transgender inmates[24] (App. 3) and constitutional safeguards set minimum standards for government officials to observe.[25] (App. 4) While the Constitution is a floor, there is no proscription on following the best practices set out above that provide greater access to justice. Courts are free to respect a litigant's gender identity regardless of the sex assigned on the birth certificate and there are various ways of doing so without creating an "inaccurate" record. (App. 5)

[22] *See, e.g.,* Atlanta Ord. No. 114-121, 114-452(5), 114-166(a), 3-502 and 142-12(b)(1).

[23] *See* FN 2, *supra*.

[24] The Prison Rape Elimination Act sets out the following guidance for jails and prisons: "In deciding whether to assign a transgender or intersex inmate to a facility for male or female inmates, and in making other housing and programming assignments, the agency shall consider on a case-by-case basis whether a placement would ensure the inmate's health and safety, and whether the placement would present management or security problems." C.F.R. T. 28, Ch. I, Pt. 115.42(c) t.

[25] *See, e.g.,* Jordan Rogers, *Being Transgender Behind Bars In The Era Of Chelsea Manning: How Transgender Prisoners' Rights Are Changing*, 6 Ala. C.R. & C.L. L. Rev. 189 (2015).

**Appendix**

1. Codes of Conduct
    a. Judicial Code
    b. ABA Model Rules
2. Vocabulary
3. DOJ Guidance
4. Sample of Cases Recognizing Constitutional Rights of Transgender Prisoners
    a. *Powell v. Shriver*, 175 F.3d 107 (2nd Cir. 1999)
    b. *Fields v. Smith*, 653 F.3d 550 (7th Cir. 2011)
    c. Chelsea Manning Order, Army No. 201 30739 (March 4, 2016)
5. Partial List of Cases Respecting Transgender Litigant's Name and Pronouns

# APPENDIX 1

**SUPREME COURT OF GEORGIA**

Atlanta May 14, 2015

The Honorable Supreme Court met pursuant to adjournment.
The following order was passed:

In 2012, the Supreme Court of Georgia established a Study Committee to comprehensively review the Georgia Code of Judicial Conduct and to recommend appropriate revisions. The Study Committee met on numerous occasions. On November 21, 2014, the Court published a draft revised Code of Judicial Conduct and solicited comments on the draft from the bench, bar, and public. The comment period ended on January 12, 2015; approximately 50 comments were received from a variety of individuals and organizations. The Study Committee then reconvened to review the comments, and it revised the draft as deemed appropriate. In particular, the Study Committee decided, based on comments received from representatives of the American Bar Association, to reorganize the draft – without significantly revising the substance thereof – to correspond to the format of the ABA Model Code of Judicial Conduct, which has been adopted by most other states. Among other things, this format will allow easier cross-jurisdictional research on judicial ethics issues. The Study Committee recently submitted a final draft to this Court for review and approval.

Upon careful consideration, and in keeping with the long tradition of ethical and professional conduct by Georgia's judges, the Court hereby approves the revised Code of Judicial Conduct set out below, which will take effect on January 1, 2016. Upon the effective date, the current Georgia Code of Judicial Conduct shall be revoked in its entirety, and the revised Code of Judicial Conduct shall be adopted in its place.

The Court expresses its great appreciation to the members of the Study Committee and to its reporter, Richard D. Reaves, for their diligent and thoughtful work on this important project.

The revised Code of Judicial Conduct will read as follows:

# CANONS, RULES, AND COMMENTARY

## Canon 1

## *JUDGES SHALL UPHOLD THE INDEPENDENCE, INTEGRITY, AND IMPARTIALITY OF THE JUDICIARY AND SHALL AVOID IMPROPRIETY AND THE APPEARANCE OF IMPROPRIETY IN ALL OF THEIR ACTIVITIES.*

### Rule 1.1 Complying With the *Law*

Judges shall respect and comply with the *law*.

### Rule 1.2 Promoting Public Confidence in the Judiciary

**(A)** Judges shall act at all times in a manner that promotes public confidence in the *independence*, *integrity*, and *impartiality* of the judiciary.

**(B)** An independent and honorable judiciary is indispensable to justice in our society. Judges shall participate in establishing, maintaining, and enforcing high standards of conduct, and shall personally observe such standards of conduct so that the *independence*, *integrity*, and *impartiality* of the judiciary may be preserved. The provisions of this Code should be construed and applied to further that objective.

# Canon 2

## *JUDGES SHALL PERFORM THE DUTIES OF JUDICIAL OFFICE IMPARTIALLY, COMPETENTLY, AND DILIGENTLY.*

### Rule 2.1 Giving Priority to Judicial Duties in General

The judicial duties of judges take precedence over all their other activities. Their judicial duties include all the duties of their offices prescribed by *law*. But primarily, judges serve as the arbiters of facts and *law* for the resolution of disputes.

### Rule 2.2 *Impartiality* and Fairness

Judges shall dispose of all judicial matters fairly, promptly, and efficiently.

*Commentary:*

*[1] In disposing of matters fairly, promptly, and efficiently, judges must demonstrate due regard for the rights of the parties to be heard and to have issues resolved without unnecessary cost or delay. Competence in the performance of judicial duties* requires *the legal* knowledge, *skill, thoroughness, and preparation reasonably necessary to perform a judge's responsibilities of judicial office.*

*[2] Containing costs while preserving fundamental rights of parties also protects the interests of witnesses and the general public. Judges should monitor and supervise cases so as to reduce or eliminate dilatory practices, avoidable delays and unnecessary costs.*

*[3] Prompt disposition of the court's business* requires *judges to devote adequate time to their duties, to be punctual in attending court and expeditious in determining matters under submission, and to insist that court officials, litigants, and their lawyers cooperate with the courts to achieve that end.*

### Rule 2.3 Bias, Prejudice, and Harassment

**(A)** Judges shall perform judicial duties without bias or prejudice.

**(B)** A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, or engage in harassment, including but not limited to bias, prejudice, or harassment based upon age, disability, ethnicity, gender or sex, marital status, national origin, political affiliation, race, religion, sexual orientation, or socioeconomic status. Judges shall not permit court staff, court officials, or others subject to the judge's direction and control to do so.

**(C)** Judges shall *require* lawyers in proceedings before the court to refrain from manifesting bias or prejudice, or engaging in harassment, based upon attributes including, but not limited to, age, disability, ethnicity, gender or sex, marital status, national origin, political affiliation, race, religion, sexual orientation, or socioeconomic status, against parties, witnesses, lawyers, or others.

**(D)** This Rule does not preclude legitimate advocacy when age, disability, ethnicity, gender or sex, marital status, national origin, political affiliation, race, religion, sexual orientation, or socioeconomic status, or other similar factors are issues in the proceeding.

*Commentary:*

*[1] Judges must refrain from speech, gestures, or other conduct that could reasonably be perceived as prejudiced or biased or as harassment and must* require *the same standard of conduct of others subject to their direction and control.*

*[2] Judges must perform judicial duties* impartially *and fairly. Judges who manifest bias on any basis in a proceeding impair the fairness of the proceeding and bring the judiciary into disrepute. Facial expression and body language, in addition to oral communication, can give to parties, lawyers, jurors, the media, and others an appearance of judicial bias. Judges must be alert to avoid behavior that may be perceived as prejudicial.*

*[3] Sexual harassment includes, but is not limited to, sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature that is unwelcome.*

*[4] Judges who permit others to manifest bias or prejudice on any basis in a proceeding impair the fairness of the proceeding and bring the judiciary into disrepute.*

# APPENDIX 2

# Gender Identity Definitions[1]

**Agender:** A term for people whose gender identity and expression does not align with man, woman, or any other gender. A similar term used by some is gender-neutral.

**Androgynous:** Identifying and/or presenting as neither distinguishably masculine nor feminine.

**Bigender:** Someone whose gender identity encompasses both man and woman. Some may feel that one side or the other is stronger, but both sides are present.

**Binary:** The gender binary is a system of viewing gender as consisting solely of two identities and sexes, man and woman or male and female.

**Cisgender:** A term used to describe someone whose gender identity aligns with the sex assigned to them at birth.

**Gender dysphoria:** Clinically defined as significant and durational distress caused when a person's assigned birth gender is not the same as the one with which they identify.

**Gender expression:** The external appearance of a person's gender identity, usually expressed through behavior, clothing, haircut or voice, and which may or may not conform to socially defined masculine or feminine behaviors and characteristics.

**Gender fluid:** A person who does not identify with a single fixed gender, and expresses a fluid or unfixed gender identity. One's expression of identity is likely to shift and change depending on context.

**Gender identity:** A person's innermost concept of self as man, woman, a blend of both, or neither – how individuals perceive themselves and what they call themselves. Gender identity can be the same or different from one's sex assigned at birth.

**Gender non-conforming:** A broad term referring to people who do not behave in a way that conforms to the traditional expectations of their gender, or whose gender expression does not fit neatly into a category.

**Gender questioning:** A person who may be processing, questioning, or exploring how they want to express their gender identity.

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[1] This is a non-exhaustive list of common gender identity definitions as defined by the Human Rights Campaign, GLAAD, The Trevor Project, and the National Center for Transgender Equality. Language in the LGBTQ communities is often an evolving process, and there may be regional differences.

**Genderqueer:** A term for people who reject notions of static categories of gender and embrace a fluidity of gender identity and often, though not always, sexual orientation. People who identify as genderqueer may see themselves as being both male and female, neither male nor female or as falling completely outside these categories.

**Misgender:** Referring to or addressing someone using words and pronouns that do not correctly reflect the gender with which they identify.

**Non-binary:** Any gender that falls outside of the binary system of male/female or man/woman.

**Passing:** A term used by transgender people which means that they are perceived by others as the gender with which they self-identify.

**Queer:** An umbrella term people often use to express fluid identities and orientations.

**Sex:** The classification of a person as male or female at birth. Infants are assigned a sex, usually based on the appearance of their external anatomy.

**Transgender:** An umbrella term for people whose gender identity and/or expression is different from cultural and social expectations based on the sex they were assigned at birth.

**Transitioning**: The social, legal, and/or medical process a person may go through to live outwardly as the gender with which they identify, rather than the gender they were assigned at birth. Transitioning can include some or all of the following: telling loved ones and co-workers, using a different name and pronouns, dressing differently, changing one's name and/or sex on legal documents, hormone therapy, and possibly one or more types of surgery.

**Transsexual person:** A generational term for people whose gender identity is different from their assigned sex at birth, and seek to transition from male to female or female to male. This term is no longer preferred by many people, as it is often seen as overly clinical, and was associated with psychological disorders in the past.

**Two-spirit:** A term that refers to historical and current First Nations people whose individual spirits were a blend of male and female. This term has been reclaimed by some in Native American LGBT communities to honor their heritage and provide an alternative to the Western labels of gay, lesbian, bisexual, or transgender.

# APPENDIX 3

# PRISON RAPE ELIMINATION ACT

# PRISONS AND JAIL STANDARDS

## United States Department of Justice Final Rule

**National Standards to Prevent,
Detect, and Respond to Prison Rape
Under the Prison Rape Elimination Act (PREA)**

**28 C.F.R. Part 115**
**Docket No. OAG-131**
**RIN 1105-AB34**
**May 17, 2012**

§ 115.42 Use of screening information.

(a) The agency shall use information from the risk screening required by § 115.41 to inform housing, bed, work, education, and program assignments with the goal of keeping separate those inmates at high risk of being sexually victimized from those at high risk of being sexually abusive.

(b) The agency shall make individualized determinations about how to ensure the safety of each inmate.

(c) In deciding whether to assign a transgender or intersex inmate to a facility for male or female inmates, and in making other housing and programming assignments, the agency shall consider on a case-by-case basis whether a placement would ensure the inmate's health and safety, and whether the placement would present management or security problems.

(d) Placement and programming assignments for each transgender or intersex inmate shall be reassessed at least twice each year to review any threats to safety experienced by the inmate.

(e) A transgender or intersex inmate's own views with respect to his or her own safety shall be given serious consideration.

(f) Transgender and intersex inmates shall be given the opportunity to shower separately from other inmates. 21

(g) The agency shall not place lesbian, gay, bisexual, transgender, or intersex inmates in dedicated facilities, units, or wings solely on the basis of such identification or status, unless such placement is in a dedicated facility, unit, or wing established in connection with a consent decree, legal settlement, or legal judgment for the purpose of protecting such inmates.

# U.S. Department of Justice
# Report and Recommendations
# Concerning the Use of Restrictive Housing

## GUIDING PRINCIPLES

**January 2016**

# Guiding Principles

The U.S. Department of Justice's Report and Recommendations Concerning the Use of Restrictive Housing includes a series of "Guiding Principles," which are intended as best practices for correctional facilities within the American criminal justice system.[1] (See pp. 94-103.) These aspirational principles should serve as a roadmap for correctional systems seeking direction on future reforms. When a correctional system possesses the resources, staffing, and legal authority to fully implement these principles, it should do so. When a correctional system lacks the resources, staffing, or legal authority, it should develop a clear plan for building the necessary capacity and then proceed expeditiously toward that goal. Officials at prisons and jails should work with policymakers, correctional officer labor unions, advocacy organizations, and other stakeholders to develop responsible and humane restrictive housing policies that both protect inmates and enhance officer safety. . . .

## Lesbian, Gay, Bisexual, Transgender, Intersex (LGBTI) and Gender Nonconforming Inmates

46. Inmates who are LGBTI or whose appearance or manner does not conform to traditional gender expectations should not be placed in restrictive housing solely on the basis of such identification or status.

47. When an inmate who is LGBTI or a gender nonconforming inmate faces a legitimate threat from other inmates, correctional officials should seek alternative housing, with conditions comparable to those of general population to the extent possible.

48. Correctional officials can sometimes avoid the unnecessary use of restrictive housing for protective custody reasons by making different classification assignments. In deciding whether to assign a transgender or intersex inmate to a facility or program for male or female inmates, correctional officers must consider on a case-by-case basis whether a placement would ensure the inmate's health and safety, giving serious consideration to the inmate's own views.

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[1] These Guiding Principles do not have the force of law and do not create or confer any rights, privileges, or benefits to past, current, or future inmates or detainees housed by federal, state, or local correctional or detention systems, including the Federal Bureau of Prisons. The Guiding Principles were developed for correctional systems that detain or incarcerate inmates in connection with criminal proceedings in civilian courts. Other correctional or detention systems may wish to review these Guiding Principles to determine which are applicable to their unique circumstances and to make appropriate changes accordingly.

Both implementation and application of these Guiding Principles involve the exercise of judgment of relevant Department officials, including those at the Federal Bureau of Prisons and the U.S. Marshals Service. Nothing in these Guiding Principles should be construed to limit the authority of the Attorney General to impose Special Administrative Measures pursuant to 28 C.F.R. §§ 501.2-501.3. Nor should they be construed to limit the Department's ability to implement administrative detention for any inmate or detainee as imposed by the Attorney General pursuant to 28 C.F.R. §§ 501.2(a) or 501.3(a), or as needed to implement any Special Administrative Measure or any court order issued pursuant to 18 U.S.C. § 3582(d).

# APPENDIX 4

456 (holding that less is required to establish probable cause to arrest than to make a prima facie showing of criminal activity). Smith's success in state court therefore had little bearing upon whether there was probable cause to support his arrest. Lastly, in order to secure a protective order, Sally needed to demonstrate a "continuous threat of present physical pain or physical injury," Conn.Gen.Stat. § 46b–15 (1993), and there was no comparable element in any of the criminal offenses with which Smith was charged. In light of these considerations, there is simply no basis to conclude that it would have been "critical to the evaluation of probable cause" for Edwards to have alerted the magistrate judge to the state court ruling. *Brown,* 35 F.3d at 99. Edwards was therefore entitled to summary judgment and the action against him should have been dismissed.

III. Municipal Liability

**[10]** Under 42 U.S.C. § 1983, a municipality may be held liable for a constitutional violation if the plaintiff can prove that the violations resulted from a municipality's customs or policies. *See Monell v. Department of Soc. Servs.,* 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). Because we have held that Smith suffered no constitutional violation, summary judgment must be granted to the Town of Fairfield as well. *See Ricciuti,* 124 F.3d at 132 (citing *City of Los Angeles v. Heller,* 475 U.S. 796, 799, 106 S.Ct. 1571, 89 L.Ed.2d 806 (1986)).

## CONCLUSION

We vacate the district court's order denying summary judgment and remand for entry of judgment in favor of defendants and for dismissal of Smith's federal claims. We also direct that the lower court dismiss plaintiff's supplemental state law claims for lack of subject matter jurisdiction. *See Tierney,* 133 F.3d at 199 ("Since the federal claims must be dismissed, we also direct dismissal of the state claims for lack of jurisdiction.").


**Wayne POWELL, as Executor of the estate of Dana Kimberly Devilla, Plaintiff–Appellant,**

**v.**

**Sunny SCHRIVER, Superintendent; Thomas A. Coughlin, III; C.O. Lynch; C.O. Crowley, Defendants–Appellees.**

**No. 543, Docket 97–2851.**

United States Court of Appeals,
Second Circuit.

Argued Dec. 7, 1998.

Decided April 2, 1999.

Prison inmate sued guard and supervisor, alleging that her privacy and Eighth Amendment rights were violated by guard's disclosure that she was transsexual. The United States District Court for the Western District of New York, Leslie G. Foschio, United States Magistrate Judge, granted judgment notwithstanding verdict in favor of defendants on privacy claim and dismissed Eighth Amendment claim on grounds of qualified immunity. Appeal was taken. The Court of Appeals, Jacobs, Circuit Judge, held that: (1) transsexual inmate had privacy right of confidentiality in his medical records; (2) supervisor had qualified immunity on confidentiality claim, as there was no clearly established right to confidentiality of prison medical records at time in question; and (3) there was no qualified immunity from claim that guard and supervisor were deliberately indifferent to safety of inmate, in violation of her Eighth Amendment rights, as result of disclosure of inmate's transsexual status.

Affirmed in part; vacated and remanded in part.

**1. Constitutional Law ⚿82(7)**

Individuals who are transsexuals are among those who possess a constitutional right to maintain medical confidentiality.

**2. Constitutional Law ⚿43(1)**

The constitutional right to maintain confidentiality of one's transsexuality may be subject to waiver.

**3. Prisons ⚿4(6)**

Prisoner had constitutional right to privacy regarding her transsexuality, violated when guard disclosed status to other inmates; there was no valid penological interest in disclosing status, overcoming prisoner's privacy right.

**4. Federal Courts ⚿772**

Party obtaining entirely favorable judgment may defend against appeal by urging any matter appearing in record, even though argument may involve attack upon reasoning of lower court or an insistence upon matter overlooked or ignored by it, without filing of cross-appeal.

**5. Federal Courts ⚿772**

Prison guard supervisor, absolved from liability for violating privacy rights of inmate on other grounds, could argue on appeal that he was entitled to qualified immunity, even though district court rejected that argument and supervisor did not file cross-appeal.

**6. Civil Rights ⚿214(2)**

In determining whether a particular legal principle was "clearly established," for purposes of qualified immunity, courts are to consider (1) whether the right was defined with reasonable specificity, (2) whether the decisional law of the Supreme Court and the applicable circuit court supports its existence, and whether, under preexisting law, a defendant official would have reasonably understood that his acts were unlawful.

See publication Words and Phrases for other judicial constructions and definitions.

**7. Prisons ⚿10**

Doctrine of qualified immunity shielded prison guard supervisor from liability for failing to train guards to safeguard medical records of inmates; as of date that guard disclosed to other inmates that suing inmate was transsexual there was no clearly established right to confidentiality of prison medical records.

**8. Prisons ⚿10**

Prison guard and supervisor did not have qualified immunity in suit by inmate claiming her Eighth Amendment rights were violated by guard's disclosure to other inmates of suing inmate's transsexuality, and by failure of supervisor to train guards to observe medical records confidentiality; at time in question it was clearly established that prison staff could not remain deliberately indifferent to possibility that inmate would suffer violence at hands of other inmates, or that disclosure of transsexual status could place inmate in harm's way. U.S.C.A. Const.Amend. 8.

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James Ostrowski, Buffalo, NY (Salvatore P. Abbate, on the brief), for plaintiff-appellant.

Daniel Smirlock, Assistant Attorney General, Albany, NY (Dennis C. Vacco, Attorney General; Peter H. Schiff, Deputy Solicitor General; Nancy A. Spiegel, Assistant Attorney General, on the brief), for defendants-appellees.

Before WINTER, Chief Judge, and OAKES and JACOBS, Circuit Judges.

JACOBS, Circuit Judge.

Plaintiff Dana Kimberly Devilla filed suit in the United States District Court of the Western District of New York (Foschio, *M.J.*), alleging that while she was an inmate at Albion Correctional Facility,

Correction Officer Jeffrey Lynch disclosed to other inmates and staff members that she was an HIV-positive transsexual, thereby violating (*inter alia*) her constitutional right to privacy, as well as her Eighth Amendment right to be free from cruel and unusual punishment. Devilla's complaint also named Lynch's supervisor, Sunny Schriver, on the theory that Lynch's disclosure resulted from Schriver's failure to properly train Lynch.

Prior to trial, the court dismissed the Eighth Amendment claim, apparently on the ground of qualified immunity. The privacy claim proceeded to trial, and the jury returned a verdict in favor of Lynch but against Schriver. The district court concluded that a verdict absolving the actor and holding the supervisor liable was fatally inconsistent and set it aside, entering judgment in favor of both Lynch and Schriver. Devilla appeals, seeking reinstatement of the verdict.

With respect to Devilla's Eighth Amendment claim, we conclude that the district court erred in granting qualified immunity. With respect to Devilla's privacy claim, we conclude that Schriver (the defendant found liable by the jury) is protected by the doctrine of qualified immunity, and on that ground we affirm the entry of judgment in Schriver's favor.

## BACKGROUND

In 1974, long before her imprisonment, Devilla began a series of operations to change her sex from male to female. In 1991, while in the custody of the New York State Department of Corrections, Devilla tested positive for Human Immunodeficiency Virus ("HIV"), the virus that eventually causes Acquired Immune Deficiency Syndrome ("AIDS").

In December of 1991, Devilla was incarcerated at the Albion Correctional Facility in New York. On December 31, 1991, Correction Officers Lynch and Crowley were escorting Devilla to Albion's medical facility when Lynch told Crowley—in the presence of other inmates and staff members—that Devilla had had a sex-change operation and that she was HIV-positive. Devilla maintains that as a result of Lynch's comment, word about her sex-change operation and her HIV-positive status became known throughout the prison and that she thereafter became the target of harassment by guards and prisoners.

Devilla filed a *pro se* complaint in the District Court for the Western District of New York. After retaining an attorney, she filed an amended complaint naming Officers Lynch and Crowley; Sunny Schriver, Albion's superintendent; and Thomas Coughlin, the Commissioner of the Department of Correctional Services of the State of New York. After filing the amended complaint, Devilla consented to proceeding before Magistrate Judge Leslie G. Foschio. In April of 1995, Devilla died, and her executor, the Reverend Wayne Powell, was substituted as plaintiff. (Notwithstanding this substitution, for ease of reference, this opinion continues to refer to Devilla as the plaintiff.)

The amended complaint alleged under 42 U.S.C. § 1983 (1994) that the defendants had violated her constitutional right to privacy, deprived her of her constitutional rights to life, liberty, due process of law and equal protection as guaranteed by the Fifth and Fourteenth Amendments, and inflicted cruel and unusual punishment in violation of the Eighth Amendment. Devilla also alleged negligent failure to care, intentional infliction of emotional distress, and violation of two state statutes, § 137(5) of New York's Correction Law, which prohibits the use of corporal punishment to discipline inmates as well as the "degrading treatment" of inmates, and § 2782(3) of New York's Public Health Law, insofar as it affords persons the right to maintain the confidentiality of their HIV status.

During the course of the trial, the court dismissed Crowley and Coughlin, as well as several of Devilla's causes of action, including—on the ground of qualified im-

munity—Devilla's claim that the defendants had violated her Eighth Amendment right to be free from cruel and unusual punishment. As a result of these pre-deliberation rulings, the jury was left to decide only the following questions: (i) whether, by divulging her HIV-positive status and transsexualism, Lynch had violated either Devilla's constitutional right to privacy or § 2782(3) of New York's Public Health Law, and (ii) whether, by "fail[ing] to properly train . . . Lynch[ ] regarding a person's constitutional right to privacy," Schriver had violated Devilla's constitutional right to privacy.

After two days of deliberations, the jury returned a verdict in favor of Lynch but against Schriver. The jury awarded Devilla $5,000 in compensatory damages and $25,000 in punitive damages.

The district court entered judgment in accordance with both the jury's verdict and the pre-deliberation rulings. After entry of judgment, Devilla filed a motion for attorney's fees and costs, and Schriver filed a motion asking that the verdict against her be set aside both (i) because she was protected by the doctrine of qualified immunity and (ii) because the verdict was against the weight of the evidence and inconsistent with the verdict in Lynch's favor. The district court granted Schriver's motion on the ground that the verdict against Schriver was fatally inconsistent with the verdict in Lynch's favor because (in the court's words) "[i]t is well settled that a claim of inadequate training and supervision under 42 U.S.C. § 1983 cannot be made against a supervisor without a finding of a constitutional violation by the persons supervised." The court denied Devilla's application for attorney's fees and costs on the ground that Devilla was not a prevailing party. An amended judgment was entered in favor of all of the defendants.

Devilla appeals the dismissal of her Eighth Amendment claim on the basis of defendants' qualified immunity, the denial of her oral application to dismiss a prospective juror for cause, the grant of Schriver's motion to set aside the verdict, and the denial of Devilla's application for attorney's fees and costs.

As to Devilla's right to privacy claim, we affirm the entry of judgment in Schriver's favor on the ground that Schriver is protected from liability by the doctrine of qualified immunity. We therefore do not reach Devilla's claim that the court erred by refusing to dismiss a prospective juror for cause. As to the dismissal of the Eighth Amendment claim on the ground of qualified immunity, we vacate the judgment and remand for further proceedings consistent with our opinion. Because we vacate the dismissal of the Eighth Amendment claim, we also vacate the denial of Devilla's application for an award of attorney's fees, which was predicated on the court's conclusion that Devilla was not a prevailing party, a determination that cannot yet be made.

## DISCUSSION

### A. The Right to Privacy Claim

Devilla's privacy claim presents the question: does the Constitution protect a prisoner's right to maintain the confidentiality of HIV-positive status or transsexualism? As the Supreme Court recommends, we consider Schriver's qualified immunity defense only after first deciding whether Devilla "has alleged a deprivation of a constitutional right at all." *County of Sacramento v. Lewis*, 523 U.S. 833, —— n.5, 118 S.Ct. 1708, 1714 n.5, 140 L.Ed.2d 1043 (1998).

Bearing on this question is our opinion on HIV status in *Doe v. City of New York*, 15 F.3d 264, 267 (2d Cir.1994): "Individuals who are infected with the HIV virus clearly possess a constitutional right to privacy regarding their condition." In *Doe*, the plaintiff was not a prison inmate. *See id.* at 265. This appeal therefore raises two previously unresolved issues: first, whether the holding in *Doe* means that transsexuals have the right to confidential-

ity, and second, whether the right to confidentiality recognized in *Doe* exists in prison. We address each of these questions, and then proceed to consider Schriver's invocation of qualified immunity.

*1. The Right to Confidentiality*

We conclude that the reasoning that supports the holding in *Doe* compels the conclusion that the Constitution does indeed protect the right to maintain the confidentiality of one's transsexualism. Our analysis in *Doe* begins with the principle, recognized by the Supreme Court, "that there exists in the United States Constitution a right to privacy protecting 'the individual interest in avoiding disclosure of personal matters.' " *Id.* at 267 (quoting *Whalen v. Roe,* 429 U.S. 589, 599, 97 S.Ct. 869, 876, 51 L.Ed.2d 64 (1977)). We explained that "this right to privacy can be characterized as a right to 'confidentiality,' to distinguish it from the right to autonomy and independence in decisionmaking for personal matters." *Id.* We then concluded that "the right to confidentiality includes the right to protection regarding information about the state of one's health," reasoning that "there are few matters that are quite so personal as the status of one's health, and few matters the dissemination of which one would prefer to maintain greater control over." *Id.* Finally, we noted that the interest in the privacy of medical information will vary with the condition. Thus, *Doe* decided that the interest is at its zenith in the context (presented in *Doe* ) of a person's HIV status. The reasons stated are particular to HIV, but in critical respects invite application to secret transsexualism:

> Clearly, an individual's choice to inform others that she has contracted what is at this point invariably and sadly a fatal, incurable disease is one that she should normally be allowed to make for herself. This would be true for any serious medical condition, but is especially true with regard to those infected with HIV or living with AIDS, considering the unfortunately unfeeling attitude among many in this society toward those coping with the disease. An individual revealing that she is HIV seropositive potentially exposes herself not to understanding or compassion but to discrimination and intolerance, further necessitating the extension of the right to confidentiality over such information.

*Id.*

Individuals who have chosen to abandon one gender in favor of another understandably might desire to conduct their affairs as if such a transition was never necessary. That interest in privacy, like the privacy interest of persons who are HIV positive, is particularly compelling. Like HIV status as described in *Doe,* transsexualism is the unusual condition that is likely to provoke both an intense desire to preserve one's medical confidentiality, as well as hostility and intolerance from others.

The excrutiatingly private and intimate nature of transsexualism, for persons who wish to preserve privacy in the matter, is really beyond debate. *See, e.g., Farmer v. Moritsugu,* 163 F.3d 610, 611 (D.C.Cir. 1998) (per curiam) (describing transsexualism as "a gender identity disorder, the sufferers of which believe that they are 'cruelly imprisoned within a body incompatible with their real gender identity,' " and noting that "[t]he disorder is commonly accompanied by a desire to change one's anatomic sexual features to conform physically with one's perception of self" (quoting *The Merck Manual of Medical Information* 418 (1997)); *Maggert v. Hanks,* 131 F.3d 670, 671 (7th Cir.1997) (describing transsexualism as a "profound psychiatric disorder," the cure for which (in the case of the male transsexual) "consists not of psychiatric treatment designed to make the patient content with his biological sexual identity—that doesn't work—but of estrogen therapy designed to create the secondary sexual characteristics of a woman followed by [genital surgery]"). It is similarly obvious that an individual who reveals that she is a transsexual "potentially

exposes herself . . . to discrimination and intolerance." *Doe*, 15 F.3d at 267.

**[1, 2]** Within narrow parameters, the question of whether the privacy of certain medical conditions should be constitutionalized has been answered by *Doe* in the affirmative. We now hold, as the logic of *Doe* requires, that individuals who are transsexuals are among those who possess a constitutional right to maintain medical confidentiality.[1]

*2. The Right to Confidentiality in Prison*

**[3]** We next consider whether this constitutional right to privacy exists in prison. "Prison inmates do not shed all fundamental protections of the Constitution at the prison gates." *Hernandez v. Coughlin*, 18 F.3d 133, 136 (2d Cir.1994) (citing *Turner v. Safley*, 482 U.S. 78, 95, 107 S.Ct. 2254, 2265, 96 L.Ed.2d 64 (1987)). Rather, inmates "retain[ ] those [constitutional] rights that are not inconsistent with [their] status as . . . . prisoner[s] or with the legitimate penological objectives of the corrections system." *Pell v. Procunier*, 417 U.S. 817, 822, 94 S.Ct. 2800, 2804, 41 L.Ed.2d 495 (1974). A regulation that "impinges on inmates' constitutional rights" is therefore valid only if it "is reasonably related to legitimate penological interests." *Turner*, 482 U.S. at 89, 107 S.Ct. at 2261.

As explained earlier in this opinion, this Court already has accorded constitutional stature to the right to maintain the confidentiality of previously undisclosed medical information. It follows that prison officials can impinge on that right only to the extent that their actions are "reasonably related to legitimate penological interests." [2] We further conclude that the gratuitous disclosure of an inmate's confidential medical information as humor or gossip—the apparent circumstance of the disclosure in this case—is *not* reasonably related to a legitimate penological interest, and it therefore violates the inmate's constitutional right to privacy.[3]

It is easy to think of circumstances under which disclosure of an inmate's HIV-positive status *would* further legitimate penological interests. Several circuits 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 anti-contagion

**1.** As is the case with HIV status, the right to maintain the confidentiality of one's transsexualism may be subject to waiver. *See Doe v. Marsh,* 105 F.3d 106, 111 (2d Cir.1997) ("[O]ur decision in *Doe v. City of New York* indicates that a plaintiff with HIV may have waived his right to privacy by entering into a settlement agreement that he knew would become a matter of public record . . . .").

**2.** In *Doe* —a case in which the party claiming the right to confidentiality was *not* a prisoner—we held that the right to maintain the confidentiality of personal information is something less than a fundamental right. *See Doe,* 15 F.3d at 269–70 (stating that "some form of intermediate scrutiny or balancing approach is appropriate as a standard of review" and that the state actor's interest in dissemination must be "substantial"). The "reasonably related to legitimate penological interests" test nevertheless applies. *See Washington v. Harper,* 494 U.S. 210, 221, 223, 110 S.Ct. 1028, 1036, 1037, 108 L.Ed.2d 178 (1990) (applying test where the prisoner's liberty interest—"avoiding the unwanted administration of antipsychotic drugs"—was less than fundamental, and stating that the test applies "*even when* the constitutional right claimed to have been infringed *is fundamental,* and the State under other circumstances would have been required to satisfy a more rigorous standard of review" (emphasis added)).

**3.** In *Hudson v. Palmer,* 468 U.S. 517, 526, 104 S.Ct. 3194, 3200, 82 L.Ed.2d 393 (1984), the Supreme Court held "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 right to maintain the confidentiality of medical information is sufficiently distinct from the right to privacy protected by the Fourth Amendment such that the Supreme Court's holding in *Hudson v. Palmer* has no bearing on this case.

measure even though it incidentally and necessarily effects disclosure. *See, e.g., Moore v. Mabus,* 976 F.2d 268, 271 (5th Cir.1992); *Harris v. Thigpen,* 941 F.2d 1495, 1521 (11th Cir.1991). And the Seventh Circuit has held 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. *See Anderson v. Romero,* 72 F.3d 518, 525 (7th Cir.1995).

It is harder to think of circumstances in which the disclosure of an inmate's transsexualism—a condition which (obviously) is not contagious—serves legitimate penological interests, especially given that, in the sexually charged atmosphere of most prison settings, such disclosure might lead to inmate-on-inmate violence. *Cf. Farmer v. Brennan,* 511 U.S. 825, 849, 114 S.Ct. 1970, 1985, 128 L.Ed.2d 811 (1994). We do not suggest that a prison official's disclosure of an inmate's transsexualism—or, for that matter, the failure of a prison official to help a prisoner conceal her transsexualism where that condition is easily discernable—cannot in some circumstances be viewed as reasonably related to legitimate penological concerns. But in this case, no legitimate penological concern has been posited, nor do the facts lend themselves to such an inference.

*3. Qualified Immunity*

Schriver maintains that irrespective of whether Devilla had a right to confidentiality and apart from whether the jury's verdict was inconsistent (as the district court found), the verdict in Schriver's favor should be affirmed by the doctrine of qualified immunity.

**[4, 5]** A preliminary issue is Devilla's assertion that immunity has been waived. Devilla argues that because Schriver did not file a cross-notice of appeal, she cannot seek affirmance on the basis of a legal argument—immunity—that was rejected by the district court. The argument is meritless. The judgment entered was entirely in Schriver's favor. It is "settled that the appellee may, without taking a cross-appeal, urge in support of a decree any matter appearing in the record, although his argument may involve an attack upon the reasoning of the lower court or an insistence upon matter overlooked or ignored by it." *International Ore & Fertilizer Corp. v. SGS Control Servs., Inc.,* 38 F.3d 1279, 1285 (2d Cir.1994) (quoting *United States v. American Ry. Express Co.,* 265 U.S. 425, 435, 44 S.Ct. 560, 563–64, 68 L.Ed. 1087 (1924)).

**[6, 7]** The doctrine of qualified immunity "shields government officials from liability for damages on account of their performance of discretionary official functions 'insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.' " *Rodriguez v. Phillips,* 66 F.3d 470, 475 (2d Cir.1995) (quoting *Harlow v. Fitzgerald,* 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982)). In determining whether a particular legal principle was "clearly established" for purposes of qualified immunity, this Court has considered three factors: " 'whether the right was defined with reasonable specificity; whether the decisional law of the Supreme Court and the applicable circuit court supports its existence; and whether, under preexisting law, a defendant official would have reasonably understood that his acts were unlawful.' " *Horne v. Coughlin,* 155 F.3d 26, 29 (2d Cir.1998) (quoting *Rodriguez,* 66 F.3d at 476). Consideration of these factors demonstrates that the right of a prisoner to maintain the privacy of medical information was not clearly established on December 31, 1991—the date of Lynch's disclosure.

This Court's controlling precedent on the right to maintain the confidentiality of medical information issued in 1994 with the holding in *Doe v. City of New York,* 15 F.3d 264 (2d Cir.1994), and even so, that

case did not address the applicability of that right to prison inmates. As of 1991, our sister circuits were in disagreement or noncommittal on the question decided in *Doe*. *Compare, e.g., Harris,* 941 F.2d at 1513 (11th Cir.1991) ("We ... believe and assume *arguendo* that seropositive prisoners enjoy some significant constitutionally-protected privacy interest in preventing the non-consensual disclosure of their HIV-positive diagnoses to other inmates, as well as to their families and other outside visitors to the facilities in question."), *with J.P. v. De Santi,* 653 F.2d 1080, 1090 (6th Cir.1981) ("[T]he Constitution does not encompass a general right to nondisclosure of private information." (emphasis added)), *with United States v. Westinghouse Elec. Corp.,* 638 F.2d 570, 577 (3d Cir.1980) (recognizing, in a nonprison context, the right to maintain the confidentiality of one's medical history). Devilla has cited to us no pre–1992 appellate case (and we have found none) holding that this right to confidentiality exists in the prison environment. *Accord Anderson,* 72 F.3d at 523 (stating, in 1995, that there existed no "appellate holding that prisoners have a constitutional right to the confidentiality of their medical records").

It cannot be said that at the time of Lynch's disclosure, Devilla's right to maintain the confidentiality of her HIV-positive status and transsexualism was clearly established.[4] We therefore affirm the entry of judgment in Schriver's favor on Devilla's right to privacy claim and do not reach Devilla's claim that the court erred by refusing to dismiss a prospective juror for cause.

### B. The Eighth Amendment Claim

[8] The district court dismissed Devilla's Eighth Amendment claim on the ground of qualified immunity, reasoning that "it was not clearly established as of this incident in 1991 that a corrections officer could be liable for an Eighth Amendment claim in committing such an unauthorized disclosure of personal medical information." We disagree.

In order to overcome a defendant's assertion of qualified immunity, a § 1983 plaintiff must demonstrate that at the time of the violation, the contours of the allegedly violated right were "sufficiently clear that a reasonable official would understand that what he [was] doing violate[d] that right." *Anderson v. Creighton,* 483 U.S. 635, 640, 107 S.Ct. 3034, 3039, 97 L.Ed.2d 523 (1987). "This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful." *Id.* Rather, the unlawfulness must be apparent "in the light of pre-existing law." *Id.*

By December of 1991, a reasonable prison official would have known that under the Eighth Amendment he could not remain deliberately indifferent to the possibility that one of his charges might suffer violence at the hands of fellow inmates. In August 1991, we considered an inmate's claim under the Eighth Amendment that prison officials failed to protect him from assault by other inmates, and concluded:

> Imprisoning a guilty defendant serves a number of penological purposes amongst which is administering just punishment. But once incarcerated, protecting the guilty defendant from inmates' violence ordinarily involves no competing penological policies. In fact, taking measures to ensure inmates' safety aids in the maintenance of order in prison. Hence, an inmate's claim that prison officials failed, as a result of their deliberate indifference, to protect him from the violent actions of other inmates may state a viable § 1983 cause of action.

**4.** In *Doe v. Marsh,* 105 F.3d 106, 110 (2d Cir.1997), we "assume[d], without deciding, ... that ... in September 1992 there existed a clearly established constitutional, confidentiality-based right to privacy which precluded the state from disclosing that the [non-prisoner] plaintiffs were persons with HIV."

*Hendricks v. Coughlin,* 942 F.2d 109, 113 (2d Cir.1991); *see also Al–Jundi v. Mancusi,* 926 F.2d 235, 240 (2d Cir.1991) (denying qualified immunity defense where prisoners alleged that prison officials, in violation of the Eighth Amendment, condoned brutal reprisals against them after prison was retaken from rioting inmates).

In our view, it was as obvious in 1991 as it is now that under certain circumstances the disclosure of an inmate's HIV-positive status and—perhaps more so—her transsexualism could place that inmate in harm's way. Accordingly, we hold that "under preexisting law," a reasonable prison official in December of 1991 would have known that such disclosure, under certain circumstances and absent legitimate penological purposes, could constitute deliberate indifference to a substantial risk that such inmate would suffer serious harm at the hands of other inmates. *Cf. Anderson,* 72 F.3d at 523 (stating that prison employees would violate an inmate's Eighth Amendment rights if, "knowing that an inmate identified as HIV positive was a likely target of violence by other inmates yet indifferent to his fate, gratuitously revealed his HIV status to other inmates and a violent attack upon him ensued"). We therefore reverse the district court's ruling, with respect to Devilla's Eighth Amendment claim, that the defendants were protected from liability by the doctrine of qualified immunity. We remand this sole remaining claim to the district court. Because the basis for remand is an analytical flaw at a threshold point in the district court's reasoning, we express no view as to whether the defendants enjoy qualified immunity on some other ground or whether Devilla's allegations state a claim under the Eighth Amendment. *See, e.g., Farmer v. Brennan,* 511 U.S. 825, 835–48, 114 S.Ct. 1970, 1977–84, 128 L.Ed.2d 811 (1994); *Hudson v. McMillian,* 503 U.S. 1, 9–10, 112 S.Ct. 995, 1000, 117 L.Ed.2d 156 (1992).

## CONCLUSION

With respect to Devilla's right to privacy claim, we affirm the entry of judgment in Schriver's favor. As to Devilla's Eighth Amendment claim, we vacate the judgment in favor of defendants, and remand for further proceedings consistent with our opinion. We also vacate the court's order denying an award of attorney's fees, which was predicated on the court's conclusion that Devilla was not a prevailing party, a determination that cannot yet be made.


**Kevin McHALE, Petitioner–Appellant,**

**v.**

**UNITED STATES of America, Respondent–Appellee.**

**Docket No. 97–2966.**

United States Court of Appeals, Second Circuit.

Submitted Oct. 21, 1998.

Decided April 5, 1999.

Motion to vacate conviction for conspiracy to distribute marijuana was denied by the United States District Court for the Northern district of New York, Thomas J. McAvoy, Chief District Judge, and defendant appealed. The Court of Appeals, Newman, Circuit Judge, held that: (1) defendant moving to vacate on ground of ineffective assistance of original appellate counsel in failing to perfect a direct appeal did not need to demonstrate that, but for the ineffectiveness of counsel, such an appeal would have succeeded or even would have had merit, and (2) the proper remedy was for the Court of Appeals to recall its mandate dismissing the direct appeal and to reinstate the appeal, and it was not

relief went unanswered." *See Parkins,* 163 F.3d at 1038.

We further question whether the nature of Yancick's complaints would have been sufficient (even if directed to the right person) "to make a reasonable employer think there was some probability" that he was being racially harassed. *Id.* at 1035 (discussing sexual harassment). Similarly, although Andrews complained to Plant Manager Becerra about Johnson's workplace bullying, and notice may come from someone other than the victim, *see Cerros v. Steel Tech., Inc.,* 398 F.3d 944, 952 (7th Cir.2005) ("[T]he employer's knowledge of the misconduct is what is critical, not how the employer came to have that knowledge."), there is no evidence that Andrews reported Johnson's conduct as race-related. The record doesn't reveal the content of Andrews' discussion with Becerra and vague complaints unrelated to racial hostility are insufficient to establish employer liability. *Montgomery,* 626 F.3d at 391–92 (finding insufficient notice where complaints were too vague to put plaintiff on notice of racial harassment). Accordingly, nothing in the record would allow a reasonable jury to conclude that Hanna Steel was negligent in failing to discover or remedy the alleged racially hostile environment.

AFFIRMED.


**Andrea FIELDS, et al., Plaintiffs–Appellees, Cross–Appellants,**

**v.**

**Judy P. SMITH, et al., Defendants–Appellants, Cross–Appellees.**

**Nos. 10–2339, 10–2466.**

United States Court of Appeals, Seventh Circuit.

Argued Feb. 7, 2011.

Decided Aug. 5, 2011.

**Background:** Wisconsin Department of Corrections (DOC) inmates, who were diagnosed with Gender Identity Disorder (GID), brought § 1983 action against DOC officials, alleging, among other things, that officials violated Eighth and Fourteenth Amendments by enforcing statutory provision preventing DOC medical personnel from providing hormone therapy or sexual reassignment surgery to inmates with GID and from evaluating inmates with GID for possible hormone therapy, and seeking permanent injunction barring enforcement of statute against them and other inmates. The United States District Court for the Eastern District of Wisconsin, Charles N. Clevert, Jr., Chief Judge, 712 F.Supp.2d 830, granted judgment on behalf of plaintiffs. Defendants appealed.

**Holdings:** The Court of Appeals, Gottschall, District Judge, sitting by designation, held that:

(1) enforcement of statute constituted deliberate indifference to inmates' serious medical needs;

(2) statute facially violated Eighth Amendment;

(3) deference to prison administrators in implementing ban was not warranted; and

(4) district court did not abuse its discretion in enjoining entirety of Wisconsin Inmate Sex Change Prevention Act.

Affirmed.

**1. Federal Courts ⚿814.1**

The Court of Appeals evaluates both the district court's grant of injunctive relief and the scope of that relief for abuse of discretion.

**2. Federal Courts ⚿776, 850.1**

A district court's factual findings are reviewed for clear error, and any legal determinations are reviewed de novo.

**3. Prisons ⚿204**
**Sentencing and Punishment ⚿1546**

Enforcement of provision of statute governing prison medical services preventing Wisconsin Department of Corrections (DOC) medical personnel from providing hormone therapy to state prison inmates with Gender Identity Disorder (GID), and from evaluating inmates with GID for possible hormone therapy against inmates who were diagnosed with GID, constituted deliberate indifference to those inmates' serious medical needs, in violation of Eighth Amendment, despite medical uncertainty as to causes of GID, since GID was serious condition, hormone therapy was effective treatment, and there was no medical evidence that alternative treatments for GID were effective. U.S.C.A. Const.Amend. 8; W.S.A. 302.386(5m).

**4. Sentencing and Punishment ⚿1546**

Prison officials violate the Eighth Amendment's proscription against cruel and unusual punishment when they display deliberate indifference to serious medical needs of prisoners. U.S.C.A. Const. Amend. 8.

**5. Sentencing and Punishment ⚿1546**

The Eighth Amendment's ban on cruel and unusual punishment does not permit a state to deny effective treatment for the serious medical needs of prisoners. U.S.C.A. Const.Amend. 8.

**6. Sentencing and Punishment ⚿1546**

Refusing to provide effective treatment for a serious medical condition serves no valid penological purpose and amounts to torture. U.S.C.A. Const.Amend. 8.

**7. Prisons ⚿204**
**Sentencing and Punishment ⚿1546**

Wisconsin statute governing prison medical services that prevented Wisconsin Department of Corrections (DOC) medical personnel from providing hormone therapy to inmates with Gender Identity Disorder (GID), and from evaluating inmates with GID for possible hormone therapy, facially violated Eighth Amendment, since DOC doctors prescribed hormones only when treatment was medically necessary; thus, statute was irrelevant to inmates who were not diagnosed with severe GID and in medical need of hormones and any application of statute necessarily would violate Eighth Amendment. U.S.C.A. Const. Amend. 8; W.S.A. 302.386(5m).

**8. Constitutional Law ⚿656**

A facial challenge to the constitutionality of a law can succeed only where plaintiffs can establish that no set of circumstances exists under which the Act would be valid; nonetheless, the proper focus of constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant.

**9. Prisons ⚿204**
**Sentencing and Punishment ⚿1546**

Wisconsin statute governing prison medical services that prevented Wisconsin Department of Corrections (DOC) medical personnel from providing hormone therapy or sexual reassignment surgery to inmates with Gender Identity Disorder (GID), and from evaluating inmates with GID for possible hormone therapy, did not provide any

security benefits, and thus deference to prison administrators in implementing ban was not warranted under Eighth Amendment; although more feminine male inmates became targets for sexual assault in prisons, transgender inmates may be targets for violence even without hormone therapy. U.S.C.A. Const.Amend. 8; W.S.A. 302.386(5m).

**10. Prisons ⚿301**

Deference to prison administrators 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 does not extend to actions taken in bad faith and for no legitimate purpose.

**11. Federal Courts ⚿773.1**

Wisconsin Department of Corrections (DOC) admitted that district court's injunction which enjoined Inmate Sex Change Prevention Act in its entirety, including its prohibition against sex reassignment surgery, did not violate Prison Litigation Reform Act (PLRA), and thus DOC could not challenge it on appeal on basis that prisoners did not demonstrate need for sex reassignment surgery, where court had asked DOC counsel twice at subsequent status conference "whether or not the Defense believes the order as tendered is as narrow as is required" and counsel replied that it was. 18 U.S.C.A. § 3626(a).

**12. Statutes ⚿63**

District court did not abuse its discretion in enjoining entirety of Wisconsin Inmate Sex Change Prevention Act, even if prisoners did not demonstrate need for sex reassignment surgery, where statute was facially invalid. 18 U.S.C.A. § 3626(a).

* The Honorable Joan B. Gottschall, United States District Judge for the Northern District of Illinois, sitting by designation.

West Codenotes

**Held Unconstitutional**

W.S.A. 302.386(5m)

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John A. Knight (argued), Attorney, Roger Baldwin Foundation of ACLU, Inc., Chicago, IL, for Plaintiffs–Appellees.

Abigail C.S. Potts (argued), J.B. Van Hollen, Attorneys, Office of the Attorney General, Wisconsin Department of Justice, Madison, WI, for Defendants–Appellants.

Before ROVNER and WOOD, Circuit Judges, and GOTTSCHALL, District Judge.*

GOTTSCHALL, District Judge.

In this appeal, we are asked to review the decision of the district court invalidating a Wisconsin state statute which prohibits the Wisconsin Department of Corrections ("DOC") from providing transgender inmates with certain medical treatments.[1] The Inmate Sex Change Prevention Act ("Act 105") provides in relevant part:

(a) In this subsection:

1. "Hormonal therapy" means the use of hormones to stimulate the development or alteration of a person's sexual characteristics in order to alter the person's physical appearance so that the person appears more like the opposite gender.

2. "Sexual reassignment surgery" means surgical procedures to alter a person's physical appearance so that the person appears more like the opposite gender.

1. A group of medical and mental health professionals sought leave from the court to submit a brief as *amici curiae*. The motion is granted.

> (b) The [Wisconsin Department of Corrections] may not authorize the payment of any funds or the use of any resources of this state or the payment of any federal funds passing through the state treasury to provide or to facilitate the provision of hormonal therapy or sexual reassignment surgery. . . .

2005 Wis. Act 105, codified at Wis. Stat. § 302.386(5m) (2010). The district court concluded that this provision violates the Eighth Amendment's ban on cruel and unusual punishment and the Fourteenth Amendment's Equal Protection Clause. Defendants, various DOC officials, now appeal.

## I

A number of DOC inmates filed this lawsuit as a putative class action in the Eastern District of Wisconsin on behalf of all current and future DOC inmates with "strong, persistent cross-gender identification." The district court denied plaintiffs' motion for class certification, but permitted the case to proceed to trial on the individual claims of three plaintiffs.

The three plaintiffs—Andrea Fields, Matthew Davison (also known as Jessica Davison), and Vankemah Moaton—are male-to-female transsexuals. According to stipulated facts, each has been diagnosed with Gender Identity Disorder ("GID"). GID is classified as a psychiatric disorder in the DSM–IV–TR, the current edition of the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders. Individuals with GID identify strongly with a gender that does not match their physical sex characteristics. The condition is associated with severe psychological distress. Prior to the passage of Act 105, each of the plaintiffs had been diagnosed by DOC physicians with GID and had been prescribed hormones.

After a trial in which both sides presented expert testimony about GID, its treatment, and its potential effects on prison security, the district court ruled in favor of plaintiffs. The court ruled that Act 105 was unconstitutional, both as applied and on its face, under the Eighth and Fourteenth Amendments. The district court ultimately issued an injunction barring defendants from enforcing Act 105. We need not recount all the evidence presented at trial—the district court's 40–page opinion thoroughly describes the trial testimony, *see Fields v. Smith*, 712 F.Supp.2d 830 (E.D.Wis.2010)—but a brief review of the district court's critical factual findings is warranted.

The district court credited much of the testimony from plaintiffs' witnesses, including three experts in the treatment of GID. Plaintiffs' experts testified that, collectively, they had treated thousands of patients with GID and published numerous peer-reviewed articles and books on the subject. One expert had specifically studied transsexuals in the correctional setting. These experts explained that GID can cause an acute sense that a person's body does not match his or her gender identity. Even before seeking treatment and from an early age, patients will experience this dysphoria and may attempt to conform their appearance and behavior to the gender with which they identify.

The feelings of dysphoria can vary in intensity. Some patients are able to manage the discomfort, while others become unable to function without taking steps to correct the disorder. A person with GID often experiences severe anxiety, depression, and other psychological disorders. Those with GID may attempt to commit suicide or to mutilate their own genitals.

The accepted standards of care dictate a gradual approach to treatment beginning with psychotherapy and real life experi-

ence living as the opposite gender. For some number of patients, this treatment will be effective in controlling feelings of dysphoria. When the condition is more severe, a doctor can prescribe hormones, which have the effect of relieving the psychological distress. Hormones also have physical effects on the body. For example, males may experience breast development, relocation of body fat, and softening of the skin. In the most severe cases, sexual reassignment surgery may be appropriate. But often the use of hormones will be sufficient to control the disorder.

When hormones are withdrawn from a patient who has been receiving hormone treatment, severe complications may arise. The dysphoria and associated psychological symptoms may resurface in more acute form. In addition, there may be severe physical effects such as muscle wasting, high blood pressure, and neurological complications. All three plaintiffs in this case experienced some of these effects when DOC doctors discontinued their treatment following the passage of Act 105.[2]

Plaintiffs also called Dr. David Burnett, the DOC's Medical Director, and Dr. Kevin Kallas, the DOC Mental Health Director, to testify at trial. These officials explained that, prior to the enactment of Act 105, hormone therapy had been prescribed to some DOC inmates, including plaintiffs. DOC policies did not permit inmates to receive sex reassignment surgery. Drs. Kallas and Burnett served on a committee of DOC officials that evaluated whether hormone therapy was medically necessary for any particular inmate. Inmates are not permitted to seek any medical treatment outside the prison, regardless of their ability to pay. The doctors testified that they could think of no other state law or policy, besides Act 105, that prohibits prison doctors from providing inmates with medically necessary treatment.

## II

**[1, 2]** We evaluate both the district court's grant of injunctive relief and the scope of that relief for abuse of discretion. *Knapp v. Nw. Univ.*, 101 F.3d 473, 478 (7th Cir.1996); *see Brown v. Plata*, ——U.S. ——, 131 S.Ct. 1910, 1957, 179 L.Ed.2d 969 (2011) (Scalia, J., dissenting) (noting that under the Prison Litigation Reform Act ("PLRA"), "when a district court enters a new decree with new benchmarks, the selection of those benchmarks is . . . reviewed under a deferential, abuse-of-discretion standard of review"); *Russian Media Group, LLC v. Cable Am., Inc.*, 598 F.3d 302, 307 (7th Cir.2010) ("[T]he appropriate scope of the injunction is left to the district court's sound discretion."); *Thomas v. Bryant*, 614 F.3d 1288, 1321 (11th Cir.2010) (applying abuse of discretion standard to evaluate scope of injunction in conformity with PLRA); *Crawford v. Clarke*, 578 F.3d 39, 43 (1st Cir.2009) (holding that district court did not abuse its discretion in awarding system-wide relief under the PLRA). The court's factual findings are reviewed for clear error, and any legal determinations are reviewed de novo. *Knapp*, 101 F.3d at 478.

**[3, 4]** "Prison officials violate the Eighth Amendment's proscription against cruel and unusual punishment when they display 'deliberate indifference to serious medical needs of prisoners.'" *Greeno v. Daley*, 414 F.3d 645, 652–53 (7th Cir.2005) (quoting *Estelle v. Gamble*, 429 U.S. 97, 104, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976)).

2. Defendants began reducing plaintiffs' hormone levels on January 12, 2006; on January 27, 2006, the district court granted a preliminary injunction barring defendants from continuing to withdraw plaintiffs' hormone therapy and ordering defendants to return plaintiffs to their previous hormone levels.

In this case, the district court held that plaintiffs suffered from a serious medical need, namely GID, and that defendants acted with deliberate indifference in that defendants knew of the serious medical need but refused to provide hormone therapy because of Act 105. Defendants do not challenge the district court's holding that GID is a serious medical condition. They contend that Act 105 is constitutional because the state legislature has the power to prohibit certain medical treatments when other treatment options are available. And defendants argue that Act 105 is justified by a legitimate need to ensure security in state prisons.

Defendants rely primarily on two Seventh Circuit decisions which addressed constitutional challenges to refusals to provide treatment for gender dysphoria or transsexualism. Over twenty-four years ago, in *Meriwether v. Faulkner,* 821 F.2d 408 (7th Cir.1987), this court reversed the dismissal of a complaint which alleged that the plaintiff, who had previously been taking hormones, was denied all treatment for her gender dysphoria upon entering prison. The court held that the plaintiff stated a claim that transsexualism was a serious medical need and that prison officials acted with deliberate indifference in refusing all treatment. The court noted in dicta that "[i]t is important to emphasize, however, that she does not have a right to any particular type of treatment, such as estrogen therapy which appears to be the focus of her complaint." *Id.* at 413.

Ten years later, in *Maggert v. Hanks,* 131 F.3d 670 (7th Cir.1997), this court, in two brief paragraphs, upheld a decision granting summary judgment on a similar deliberate indifference claim where the plaintiff did not come forward with any evidence to rebut defendants' expert witness, who testified that plaintiff did not suffer from gender dysphoria. The court's opinion proceeded to address "a broader issue, having to do with the significance of gender dysphoria in prisoners' civil rights litigation." *Id.* at 671. The court commented, again in dicta, that the Eighth Amendment does not require the provision of "esoteric" treatments like hormone therapy and sexual reassignment surgery which are "protracted and expensive" and not generally available to those who are not affluent. *Id.* at 671–72. A prison would be required to provide some treatment for gender dysphoria, but not necessarily "curative" treatment because the Eighth Amendment requires only minimum health care for prison inmates. *Id.* at 672.

The court's discussion of hormone therapy and sex reassignment surgery in these two cases was based on certain empirical assumptions—that the cost of these treatments is high and that adequate alternatives exist. More than a decade after this court's decision in *Maggert,* the district court in this case held a trial in which these empirical assumptions were put to the test. At trial, defendants stipulated that the cost of providing hormone therapy is between $300 and $1,000 per inmate per year. The district court compared this cost to the cost of a common antipsychotic drug used to treat many DOC inmates. In 2004, DOC paid a total of $2,300 for hormones for two inmates. That same year, DOC paid $2.5 million to provide inmates with quetiapine, an antipsychotic drug which costs more than $2,500 per inmate per year. Sex reassignment surgery is significantly more expensive, costing approximately $20,000. However, other significant surgeries may be more expensive. In 2005, DOC paid $37,244 for one coronary bypass surgery and $32,897 for one kidney transplant surgery. The district court concluded that DOC might actually incur greater costs by refusing to provide hormones, since inmates with GID might require other expensive treatments or en-

hanced monitoring by prison security.[3] *Fields*, 712 F.Supp.2d at 863. In fact, at oral argument before this court, counsel for defendants disclaimed any argument that Act 105 is justified by cost savings. *See* Oral Argument at 15:18, *Field v. Smith*, Nos. 10–2339 and 10–2466, *available at* http://www.ca7.uscourts.gov/fdocs/docs.fwx?dname=arg.

More importantly here, defendants did not produce any evidence that another treatment could be an adequate replacement for hormone therapy. Plaintiffs' witnesses repeatedly made the point that, for certain patients with GID, hormone therapy is the only treatment that reduces dysphoria and can prevent the severe emotional and physical harms associated with it. Although DOC can provide psychotherapy as well as antipsychotics and antidepressants, defendants failed to present evidence rebutting the testimony that these treatments do nothing to treat the underlying disorder. Defendants called their own expert to speak about GID: Dr. Daniel Claiborn, a Ph.D. in psychology who estimated he has treated only about fifty clients with GID over a period of twenty years in his private practice. Dr. Claiborn provided no testimony about the appropriate treatment for plaintiffs. He offered his opinion that GID is not properly characterized as a psychological disorder because a person with GID does not typically suffer from an impairment in psychological functions. However, defendants have now conceded that GID is a serious medical condition. Dr. Claiborn's testimony does not support the assertion that plaintiffs can be effectively treated without hormones.

**[5, 6]** It is well established that the Constitution's ban on cruel and unusual punishment does not permit a state to deny effective treatment for the serious medical needs of prisoners. The Supreme Court articulated this principle in *Estelle v. Gamble:*

> 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.... 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.

429 U.S. at 103–04, 97 S.Ct. 285 (citations omitted). Surely, had the Wisconsin legislature passed a law that DOC inmates with cancer must be treated only with therapy and pain killers, this court would have no trouble concluding that the law was unconstitutional. Refusing to provide effective treatment for a serious medical condition serves no valid penological purpose and amounts to torture. *Id.*; *see also Roe v. Elyea*, 631 F.3d 843, 861–63 (7th Cir.2011) (upholding verdict for plaintiff that prison policy on treatment of Hepatitis C was deliberately indifferent); *Kelley v. McGinnis*, 899 F.2d 612, 616 (7th Cir.1990) (reversing dismissal of complaint alleging that prison provided inadequate treatment for inmate's chronic foot problems). Although Act 105 permits DOC to provide plaintiffs with *some* treatment, the evidence at trial indicated that plaintiffs could not be effectively treated without hormones.

Defendants point to the Supreme Court's decision in *Gonzales v. Carhart*,

3. Plaintiff Moaton, for example, experienced suicidal ideation after DOC officials began withdrawing hormone treatments. *Fields*, 712 F.Supp.2d at 835.

550 U.S. 124, 127 S.Ct. 1610, 167 L.Ed.2d 480 (2007), for the proposition that a legislature may constitutionally limit the discretion of physicians by outlawing a particular medical procedure. In *Carhart*, the Court upheld the constitutionality of the Partial–Birth Abortion Ban Act of 2003 which outlawed a particular procedure used to perform late-term abortions. The Court noted the existence of "medical uncertainty" regarding whether the banned procedure was more dangerous than alternative procedures. *Id.* at 163–64, 127 S.Ct. 1610. Because safe abortion alternatives to the prohibited procedure appeared to exist, the court turned away the facial challenge to the law. *Id.* at 164, 127 S.Ct. 1610.

*Carhart* is not helpful to defendants in this case because they did not present any medical evidence that alternative treatments for GID are effective. As defendants point out, some medical uncertainty remains as to the causes of GID, but there was no evidence of uncertainty about the efficacy of hormone therapy as a treatment. Just as the legislature cannot outlaw all effective cancer treatments for prison inmates, it cannot outlaw the only effective treatment for a serious condition like GID.

**[7, 8]** Defendants argue that even if application of Act 105 to plaintiffs violates the Eighth Amendment, the district court erred in sustaining a facial challenge to the law. Act 105 bans treatment to all prisoners, even those for whom hormones and surgery are not medically necessary. A facial challenge to the constitutionality of a law can succeed only where plaintiffs can " 'establish that no set of circumstances exists under which the Act would be valid.' " *Doe v. Heck*, 327 F.3d 492, 528 (7th Cir.2003) (quoting *United States v. Salerno*, 481 U.S. 739, 745, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987)). Nonetheless, "[t]he proper focus of constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant." *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 894, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992). The district court, in this case, found that DOC doctors prescribe hormones only when the treatment is medically necessary. *Fields*, 712 F.Supp.2d at 866. Thus, the court correctly concluded that Act 105 is irrelevant to inmates who are not diagnosed with severe GID and in medical need of hormones, and any application of Act 105 would necessarily violate the Eighth Amendment.

**[9]** Defendants have also argued that Act 105 is justified by the state's interest in preserving prison security. Defendants' security expert, Eugene Atherton, testified that more feminine male inmates become targets for sexual assault in prisons. Because hormone therapy alters a person's secondary sex characteristics such as breast size and body hair, defendants argue that hormones feminize inmates and make them more susceptible to inciting prison violence. But the district court rejected this argument, noting that the evidence showed transgender inmates may be targets for violence even without hormones. Atherton himself, in his deposition, testified that it would be "an incredible stretch" to conclude that banning the use of hormones could prevent sexual assaults. *Id.* at 868. In the Colorado Department of Corrections, where Atherton worked for many years, the state had a policy of providing necessary hormones to inmates with GID. Atherton testified that this policy was reasonable and had been implemented effectively in Colorado.

**[10]** Defendants cite *Whitley v. Albers* for the proposition that " '[p]rison administrators . . . should be accorded 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 insti-

tutional security.' " 475 U.S. 312, 321–22, 106 S.Ct. 1078, 89 L.Ed.2d 251 (1986) (quoting *Bell v. Wolfish,* 441 U.S. 520, 547, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979)). But deference does not extend to "actions taken in bad faith and for no legitimate purpose." *Id.* at 322, 106 S.Ct. 1078. The district court did not abuse its discretion in concluding that defendants' evidence failed to establish any security benefits associated with a ban on hormone therapy. The legislators who approved Act 105 may have honestly believed they were improving prison security, but courts "retain[ ] an independent constitutional duty to review factual findings where constitutional rights are at stake." *Carhart,* 550 U.S. at 165, 127 S.Ct. 1610.

**[11]** Finally, defendants contend that the district court's injunction violates the PLRA, 18 U.S.C. § 3626(a), because it enjoins Act 105 in its entirety.[4] They argue that plaintiffs have never demonstrated a need for sex reassignment surgery, which the law also prohibits. For their part, plaintiffs argue that defendants waived this argument by failing to raise it before the district court. In fact, the record establishes an admission, not a waiver. On June 9, 2010 plaintiffs requested that the district court supplement its findings relating to the PLRA's so-called "need-narrowness-intrusiveness" standard. At a subsequent status conference, the court asked defendants' counsel not once, but twice, "whether or not the Defense believes the order as tendered ... is as narrow as is required"; counsel replied that it was. (*See* Pls.' App. 19.) As a practical matter, then, defendants are precluded from making this argument now.

**[12]** Regardless, the district court's orders establish that the court evaluated the record as a whole and identified evidence that fully supports the scope of the injunctive relief granted. *See Armstrong v. Schwarzenegger,* 622 F.3d 1058, 1070 (9th Cir.2010) ("[T]he language of the PLRA does not suggest that Congress intended a provision-by-provision explanation of a district court's findings.... [T]he statutory language [means] that the courts must do what they have always done when determining the appropriateness of the relief ordered: consider the order as a whole."); *Gomez v. Vernon,* 255 F.3d 1118, 1129 (9th Cir.2001) (the PLRA "has not substantially changed the threshold findings and standards required to justify an injunction"); *Smith v. Ark. Dep't of Corr.,* 103 F.3d 637, 647 (8th Cir.1996) (same); *Williams v. Edwards,* 87 F.3d 126, 133 n. 21 (5th Cir. 1996) (same). In the district court's May 13, 2010 memorandum order, the court expressly addressed both hormone therapy and sex reassignment surgery. There, the court stated that:

> The defendants acknowledge that Act 105 removes even the consideration of hormones or surgery for inmates with gender issues and that the DOC halted evaluations of inmates with GID for possible administration of hormone therapy because of the Act. However, in determining whether a facial challenge to Act 105 may succeed here, the defendants submit that the court must take into

**4.** The PLRA provides, in part:

> Prospective relief in any civil action with respect to prison conditions shall extend no further than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs. The court shall not grant or approve any prospective relief unless the court finds that such relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right. The court shall give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief.

18 U.S.C. § 3626(a)(1)(A).

account all inmates in DOC custody for whom hormone therapy or sexual reassignment surgery would be considered as treatment for gender issues. If that is done, they maintain that there are circumstances where Act 105 may be applied without violating the Constitution, and that, as a result, the plaintiffs' facial challenge to the law must fail. Unfortunately, the defendants do not support this point.

. . . .

In certain cases, as with the plaintiffs in this case, the effect of Act 105 is to withdraw an ongoing course of treatment, the result of which has negative medical consequences. In other cases, the effect of Act 105 is to prevent DOC medical personnel from evaluating inmates for treatment because such evaluation would be futile in light of Act 105's ban on the treatment they may determine to be medically necessary for the health of the inmate.

. . . .

In this case, Act 105 bars the use of hormones "to stimulate the development or alteration of a person's sexual characteristics in order to alter the person's physical appearance so that the person appears more like the opposite gender," as well as sexual reassignment surgery "to alter a person's physical appearance so that the person appears more like the opposite gender." Wis. Stat. § 302.386(5m)(a). The statute applies irrespective of an inmate's serious medical need or the DOC's clinical judgment if at the outset of treatment, it is possible that the inmate will develop the sexual characteristics of the opposite gender. The reach of this statute is sweeping inasmuch as it is applicable to any inmate who is now in the custody of the DOC or may at any time be in the custody of the DOC, as well as any medical professional who may consider hormone therapy or gender reassignment as necessary treatment for an inmate.

*Fields,* 712 F.Supp.2d at 865–67. The district court's June 22, 2010 "additional findings" further support its conclusion that the statute is facially invalid. There, the court found that the injunction was "narrowly tailored in that enjoining the enforcement of [Act 105] prohibits only unconstitutional applications of the statute[,] which this court has found to be unconstitutional any time it is applied," and the injunction extended no further than necessary to correct the Eighth Amendment violation because "enjoining all applications of [Act 105] is necessary to prevent constitutional violations." The district court also specifically referenced its prior finding that the constitutional violation stemmed from "removing 'even the consideration of hormones or surgery.'" (*See* App. 174–75.) We agree. Evaluating the record as a whole, the district court did not abuse its discretion in enjoining the entirety of Act 105.

Having determined that the district court properly held that Act 105 violates the Eighth Amendment, both on its face and as applied to plaintiffs, we need not address the district court's alternate holding that the law violates the Equal Protection Clause. Plaintiffs have asserted a conditional cross-appeal of the district court's denial of class certification. But because we have upheld the district court's injunction, we also do not address the cross-appeal.

## III

The judgment of the district court is affirmed.

# UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
CAMPANELLA, KRAUSS, and PENLAND
Appellate Military Judges

**UNITED STATES, Appellee**
**v.**
**Private First Class BRADLEY E. MANNING (nka CHELSEA E. MANNING), United States Army, Appellant**

ARMY 20130739

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ORDER
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WHEREAS:

A military judge sitting as a general court-martial convicted appellant of various violations of Articles 92 and 134 of the Uniform Code of Military Justice [hereinafter UCMJ], 10 U.S.C. §§ 892, 934 (2006). The military judge sentenced appellant to a dishonorable discharge, confinement for 35 years, forfeiture of all pay and allowances, and reduction to the grade of E-1. The convening authority approved the adjudged sentence and credited appellant with 1,293 days against the sentence to confinement.

On 4 February 2015, appellant filed a "Motion for Court Order to Use Appellant's Legal Name and to Preclude the Use of Appellant's Former Name in All Court Documents."

On 9 February 2015, appellee filed a "Response to Appellant's Motion for Court Order to Use Appellant's Legal Name and to Preclude the Use of Appellant's Former Name in All Court Documents."

On 18 February 2015, with leave from this court, appellant filed a "Reply to Government Response to [Appellant's] Motion for Court Order to Use Appellant's Legal Name and to Preclude the Use of Appellant's Former Name in All Court Documents."

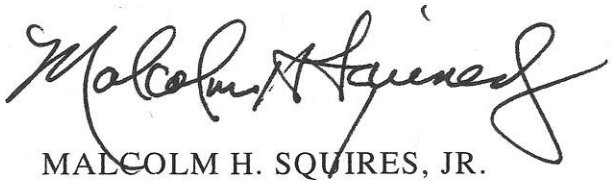
NOW, THEREFORE, IT IS HEREBY ORDERED:

Appellant's "Motion for Court Order to Use Appellant's Legal Name and to Preclude the Use of Appellant's Former Name in All Court Documents" is GRANTED IN PART and DENIED IN PART. In respect to historic fact and this court's standard practice, the caption will remain as is. Reference to appellant in all

future formal papers filed before this court and all future orders and decisions issued by this court shall either be neutral, e.g., Private First Class Manning or appellant, or employ a feminine pronoun.

DATE: 4 March 2015

FOR THE COURT:



MALCOLM H. SQUIRES, JR.
Clerk of Court

CF:
JALS-DA JALS-CR3
JALS-GA JALS-CCR
JALS-CCZ
Nancy Hollander, Esq.
Vincent J. Ward, Esq.

# APPENDIX 5

# Partial List of Cases Granting Name Changes and Respecting Transgender Litigant's Name and Pronouns[1]

***In re Feldhaus*, 340 Ga. App. 83 (2017).**
Two transgender men sought name changes from the names assigned to them at birth, which reflected a female gender identity, to their chosen names which aligned with their male gender identities. After separate hearings, the Columbia County trial court denied both petitions on grounds including that both name changes would "confuse and mislead" the public and amounted to "a type of fraud." On the consolidated appeals, the appellate court agreed with Mr. Feldhaus and Mr. Baumert "that in the absence of any evidence that they were seeking to change their names for fraudulent or other improper purposes, the trial court abused its discretion when it denied their petitions" and reversed.

***Norsworthy v. Beard*, 87 F. Supp. 3d 1104 (N.D. Cal. 2015)**
A transgender woman housed in a men's prison facility applied for a name change in California. *Id.* One of the main arguments that the plaintiff brought before the court was that the denial of a name change violated Equal Protection. *Id.* In holding that the plaintiff had properly stated an Equal Protection claim, the court noted that:

> With respect to her request for a name change, [the plaintiff] has alleged that the Defendants' rationale for denying her request—that a name change to a normatively feminine name is inappropriate until she is eligible to be housed in a women's facility—evidences a clear difference in treatment with regard to name changes based on transgender status.

87 F. Supp. 3d at 1120.

***In re E.P.L.*, 26 Misc. 3d 336 (Sup. Ct. 2009)**
New York court waived the requirement for publication of name change in the case of transgender individuals who do not want to be publicly recognized. New York required that a court ordered name change must be published in a designated county newspaper within sixty days of the order. N.Y. Civ. Rights Law § 63. The publication requirement may be waived if publication of a name change would jeopardize the safety of the person whose name is being changed. N.Y. Civ. Rights Law § 64-a. The petitioner in *In re E.P.L.* applied for a waiver of the publication requirement, citing statistics related to transgender violence in the U.S.

Upon granting the waiver, the court noted that the legislature intended for N.Y. Civ. Rights Law § 64-a to protect victims of domestic violence. However, the court reasoned and held that:

[1] Compilation and descriptions by Beth Littrell, Senior Counsel, Lambda Legal.

> In short, while petitioner did not, and hopefully could not, cite a personal experience of violence or crime against him based on his gender identity, he has made a compelling argument as to why, at the age of twenty, he has a right to feel threatened for his personal safety in the event his transgender status is made public. Accordingly, petitioner's request to be exempted from the publication requirements of Civil Rights Law Article § 63 is GRANTED.

26 Misc. 3d at 337.

***In re Powell*, 95 A.D.3d 1631 (2012)**
A transgender inmate applied for a name change to Shaniece Nyasia Powell. The lower court denied the application, noting that the name change risked confusion and deception. The court also stated that there was no evidence demonstrating that the petitioner had undergone "sex-reassignment" surgery. The appellate court reversed the lower court's decision and held that potential confusion and the petitioner's lack of medical evidence were insufficient grounds for denial of a name change. Additionally, in New York "[t]he law does not distinguish between masculine and feminine names, which are a matter of social tradition." 95 A.D.3d at 1632 (quoting *Matter of Guido*, 1 Misc.3d 825, 828 (2003)).

***In re Harris*, 707 A.2d 225 (Pa. Super. Ct. 1997)**
The Pennsylvania Superior Court granted a transgender woman's name change. Of note, the court argued that a name change would prevent confusion:

> The uncontroverted evidence adduced at the hearing proved that a legal name change would actually prevent the daily confusion and public confrontations which presently plague petitioner's dealings with the public. While saddled with a male name and a female visage, petitioner must constantly convince the public that his name is "Brian." Should petitioner be allowed to change his name to "Lisa," however, the general public's outward perception of petitioner would be reaffirmed by petitioner's legal name. Thus, rather then perpetrating a fraud upon the public, the name change would eliminate what many presently believe to be a fraud; that is, that petitioner is a man.

707 A.2d at 228.

In referencing transgender litigants, court generally recognize and respect their gender identity in court documents and proceedings. *See, e.g.*, *Cole v. Johnson*, No. 14-CV-01059-JPG-PMF, 2015 WL 4037522, at *2 (S.D. Ill. July 1, 2015) ("As a transgender person, the Court will refer to the Plaintiff using feminine pronouns."); *Rumble v. Fairview Health Servs.*, No. 14-CV-2037 (SRN/FLN), 2015 WL 1197415 at 3-5 (D. Minn. Mar. 16, 2015) (where the court uses male pronouns to refer to Plaintiff Jakob Rumble, a transgender man, and engages in a discussion about correct terminology for transgender individuals); and *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 714 (4th Cir. 2016) ("G.G. is a transgender boy now in his junior year at Gloucester High School. G.G.'s birth-assigned sex, or so-called 'biological sex,' is female, but G.G.'s gender identity is male. … G.G. lives all aspects of his life as a boy. G.G. has not, however, had sex reassignment surgery.").