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May 21, 1982

[EXEMPT FROM DISCLOSURE
PURSUANT TO ORS 192.500(2)(h)]

The Honorable Victor Atiyeh
Governor of Oregon
State Capitol
Salem, Oregon 97310

Re: Capps v. Atiyeh
Prison Overcrowding Suit

Dear Governor Atiyeh:

The purpose of this letter is to advise you of recent developments in this case.

The somewhat unusual approach by the Federal Court to the inmates' challenge to Oregon's penal institutions has continued. Over our objections, Judge Burns has scheduled a re-trial of the case on old and new issues in separate segments. We are scheduled for trials on June 9 and 10 with respect to violent guard behavior; June 22 and 23 with respect to protective custody and segregation; August 19 and 20 with respect to shelter, sanitation, physical plant, idleness and classification; August 26 and 27 with respect to mental health care and counseling; and September 9 and 10 with respect to medical care. These trials are to be held at the institutions.

These mini-trials will undoubtedly attract attention to the prisoners' claims throughout the summer months, and these trials could influence behavior within the institutions.

We understand from the plaintiffs' lawyers that they intend to call inmate witnesses to recount episodes of

violence, inadequate medical care and the like. We have no doubt that inmates have a number of complaints. We do not believe that their complaints justify a conclusion that the institutions are below constitutional standards. In fact, we continue to believe that the Oregon institutions are well run, and indeed models when compared with other institutions throughout the country.

We did object to the "several small trials" approach for technical and practical reasons. Attached is our letter of April 20, 1982 to the Court. At a hearing on May 17 the objections were overruled. Judge Burns did acknowledge that our statement to the effect that "proceeding in this manner will require the Court to intrude on the administrative affairs of the three institutions on a number of occasions throughout the summer months" was a legitimate concern. Nevertheless, we are to proceed as outlined above.

With a wrap-up of testimony planned for September and yet-to-be-scheduled expert testimony, an order in late-October or the first few days of November seems likely. Based upon long-term observations of the Court's apparent attitude and approach to this case, we expect the order to be less than favorable, even though recent federal cases have reinforced our opinion that we can ultimately defend the administration of Oregon's institutions. Unfortunately, relief from any adverse trial ruling will not be forthcoming from the appellate courts until 1983 or 1984.

In addition to bringing the matter of scheduling to your attention, the plaintiffs last week asked the Court to order the Civil Rights Division of the United States Department of Justice to intervene and supply experts to assist the plaintiffs' attack on Oregon's penal institutions. This move on the plaintiffs' part is ironic inasmuch as we had previously been in contact with the United States Attorney General and asked that his office intervene on behalf of the State of Oregon to increase our chances of a fair trial and proper result. Our request was not denied but delayed until a new U.S. Attorney for Oregon was appointed.

We have discussed the matter with Charles Turner, the Oregon U.S. Attorney, and he is more inclined to enter the case on behalf of the State of Oregon than to assist the

inmates. Many of the state's district attorneys have joined the defense effort, and the Oregon U.S. Attorney shares their law enforcement concerns. A decision on the federal government's posture, however, will be made in Washington, D.C. Accordingly, we have been in contact with the administration of the U.S. Department of Justice and have learned that the decision may be made in the Civil Rights Division. We feel that intervention during the summer months by the U.S. Department of Justice, as amicus to the Court with the purpose of providing expert testimony to assist the plaintiffs, will cause unrest and concern in several quarters. If they will not join the defense effort, it would be preferable to have the U.S. Department of Justice remain out of the case.

Of course, our strong desire is to have the U.S. Department of Justice decide to allow the U.S. Attorney to assist our office and the Oregon district attorneys in establishing the legitimacy of Oregon's penal system. We are concerned that even with a favorable recommendation from the Oregon U.S. Attorney, decisionmakers in Washington, D.C. may need additional information in order to select the proper course of action. We have advised them that Judge Burns has indicated he will probably invite the U.S. Department of Justice to become involved. Ironically, when we informed Judge Burns that we had asked for the U.S. Justice Department's assistance, he indicated that should they decide to assist Oregon, he would, of course, withdraw his invitation to have them appear as amicus.

We would like to impress upon the decisionmakers in the U.S. Department of Justice that their involvement through the local U.S. Attorney could be of considerable assistance to the State of Oregon. We would also like the opportunity to explain the merits of the case to them and avoid any decision based upon an on-lingering assumption in the Civil Rights Division that all state penal institutions are constitutionally suspect.

It is recognized by knowledgeable individuals that if the Oregon institutions fall to inmate litigation, no state institution in this country can expect to withstand Federal Court scrutiny. It may well be that Oregon's case is a bellwether in an emerging national strategy by inmates and their lawyers to change penal philosophies and programs

throughout the country. Of course, release from custody of large numbers of felons remains the plaintiffs' objective in the Oregon case.

Because of our desire to make sure that the U.S. Department of Justice has appropriate information, we contacted Senator Hatfield's office and asked that they assist us in presenting Oregon's position. We understand that you may have an opportunity to review the situation with Senator Hatfield, and thus we offer this report as background for those discussions.

In summary, although we expect Judge Burns to invite the U.S. Department of Justice to play a role in Capps v. Atiyeh to assist plaintiffs, we would like the U.S. Department of Justice either to remain out of the case or to join with us in establishing that well-run prisons such as Oregon's do meet constitutional standards. We stand ready to provide you with any additional information you may desire.

Yours very truly,

Dave Frohnmayer

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Enclosure

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April 20, 1982

The Honorable James M. Burns
Chief Judge
U.S. District Court for Oregon
P.O. Box 1150
Portland, Oregon 97207

Re: Capps/West v. Atiyeh

Dear Judge Burns:

In accordance with your direction of April 19, we enclose a calendar showing days that I will be available for trial. As per your request, at 4:00 p.m. Friday a conference call will be arranged to review the schedule. After your call, Department of Justice lawyers working on this litigation discussed the procedure that you have set for the future course of this litigation.

As a personal aside, I would like the Court to know that I would have been present in your courtroom, as Mr. Stalker apparently was, if I had known that we were going to take up such an important matter as how the case is to proceed from this juncture. When your clerk called, I thought it was to set a time with the Court that would allow us an opportunity to prepare for the matters the Court wished to take up. I am concerned that the Court might have found me to be unresponsive; that would not have been the case had I known what was at issue.

Because of the importance of how the litigation is to proceed, we ask the Court to enter an order embodying the procedure the Court has determined. If the Court deems it appropriate to enter an order, we request that this letter be regarded as a motion to reconsider. If an order is not appropriate, we want to take this opportunity to summarize our objections.

By way of background, we are proceeding on the basis that the case will be re-tried in light of recent precedent. The defendants' position is that, in light of the age of the complaint and the dramatic intervening change in Eighth Amendment law, an updated statement of the plaintiffs' contentions, in the form of a pretrial order, is essential so that we have a fair opportunity to engage in discovery that is directed toward the plaintiffs' present claims. When last we discussed a pretrial order, it was our understanding that plaintiffs would continue working on the order while the abstention motion was under advisement. Is there to be a pretrial order? Moreover, it remains the defendants' position that a single scheduled trial as opposed to a series of individual proceedings is warranted.

We appreciate that the Court is willing to consider prejudice after we have had some experience with this procedure. However, there are some points that can be made at this time. First of all, we do not know if we are going to be trying the Eighth Amendment claims or the state claims that Mr. Stalker referred to as "window dressing" in the abstention arguments. With respect to the individual hearing of topics, we ask the Court to reconsider our request that the plaintiffs give us the entire list of topics before we commence. In the absence of such notice, we will have but 10 days to prepare for each hearing. In actuality, it will only be eight days because our responsive statement to Mr. Stalker will be due two days before the hearing. Such a procedure means that the defendants will have no opportunity for discovery by interrogatories or depositions. Certainly we can request documents and they might be forthcoming within that period of time. However, this procedure clearly denies the defendants the most effective discovery tools.

Without waiving our objections to proceeding in this manner, we have some suggestions in addition to plaintiffs' statements as to each topic. Plaintiffs should indicate their proposed remedy. We may end up with a shorter list of contested issues if we know in advance what plaintiffs are seeking with respect to each alleged constitutional deficiency.

There is another potential benefit in allowing the defendants to know in advance what they are facing. Among

the first four items, I noted the topic of idleness. On a subject such as that, a motion for partial summary judgment based on Hoptowit should be dispositive.

With respect to the possibility of partial summary judgment motions by the defendants, we have previously discussed the need to understand the Court's view of Chapman v. Rhodes, Wright v. Rushen and now Hoptowit. I strongly believe that the case would be better tried if we had some additional ruling on various legal points that will be central to the ultimate resolution of the case.

There are other reasons why the Court should reconsider this procedure. A series of hearings, which will undoubtedly involve state officials and public employes, will, by necessity, represent a protracted distraction from other duties. Proceeding in this manner will require the Court to intrude on the administrative affairs of the three institutions on a number of occasions throughout the summer months. It would be preferable to have one disruptive period rather than several. In this connection, we note that apparently we are going to try these separate issues for all of the institutions. Thus, in order to be prepared to deal with as yet undefined issues regarding violence, etc., we will have to call on officials from all three institutions. The learning of Rhodes v. Chapman, Wright v. Rushen and Hoptowit v. Ray is that, in adjudicating and remedying alleged constitutional volations in prisons, the federal court should strive to avoid and limit as much as possible the intrusiveness of its involvement in state correctional policy. We submit that, in this attempt to implement the substantive standards of those cases, will result in one of the most disruptive and intrusive possible procedures.

On the matter of plaintiffs' discovery, we are working on a proposed procedure to submit for Mr. Stalker's consideration. Our problems have been made more difficult because it is hard to assess relevance when we do not have the plaintiffs' statement of issues. We have concerns regarding security of documents, and past disagreements have resulted in a desire on our part to memorialize discovery requests and responses.

Finally, we do want to thank you for sending the Sherman and Hawkins book involving imprisonment in America

as well as the other articles you have sent regarding prison reform. Our role in administering the prison is, of course, quite limited. However, we will send these materials along to the appropriate state officials so that they can have the benefit of current thinking regarding policy with respect to the areas of their responsibility.

I wish to assure the Court that, although we want our objections to be made a part of the record, we are proceeding as you have directed, and if reconsideration is not deemed appropriate, we will act on the Court's suggestion to document the prejudice that will result from proceeding in this fashion. I hope that the Court appreciates the depth of our concern that the procedure results in prejudice to the defendants. We are also concerned that the procedure is simply not the best one available to ensure a prompt and cost-conscious adjudication.

Very truly yours,

STANTON F. LONG
Deputy Attorney General

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Enclosure
cc: Governor Atiyeh
Robert Watson
Hoyt Cupp
G.E. Sullivan
Robert Stalker