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REPORT ON MODIFIED OPERATIONS AND STRIP SEARCH COMPLAINTS AT THE TECUMSEH STATE CORRECTIONAL INSTITUTION

June 4, 2019

INITIAL INCIDENT

On April 8, 2019, a cell door was incorrectly opened at the Tecumseh State Correctional Institution (TSCI) Special Management Unit (SMU) resulting in an inmate leaving his cell unrestrained; whereupon, he attacked two staff members. As a result of this incident, and a substantially similar incident on March 21, 2019, the entire SMU was placed on modified operations from the evening of April 8, 2019 until April 13, 2019. The Nebraska Department of Correctional Services (NDCS) announced and explained modified operations via a news release which stated:

> *"Modified operations is defined as, actions taken to more closely control movement of inmates within a facility due safety and security needs. Can include confinement in cells of a portion of the inmate population, cancellation of program/work activities, and direct escort of certain inmates – as determined by the Warden/designee."*[1]

Information was later obtained by the Office of Inspector General (OIG) that the modified operations also included a ban on visits, yard time, telephone calls[2], showers and all programs. However, movement would have been allowed for medical/mental health appointments, parole hearings and emergencies, as necessary. Modified operations were lifted at 0600 hours on Saturday, April 13, 2019.

[1] Attachment A: NDCS News Release

[2] The Office of Inspector General (OIG) was informed that calls were allowed for legal reasons and to the Ombudsman's office. This will be discussed later in the report.

During the time that the SMU was under modified operations, NDCS staff conducted searches of cells and inmates in the SMU to look for various contraband, including weapons. According to NDCS staff, two weapons were found during the searches involving almost 200 inmates and cells. During these searches, inmates were strip searched.[3] One inmate, Inmate X[4], who had cooperatively removed his clothing, was asked to spread his own buttocks so that NDCS staff could inspect his body cavity for possible contraband. Inmate X refused to spread his buttocks. As a result, a use of force team was assembled and they entered the shower where he had been placed and used force to gain his compliance with the order. As the inmate was restrained against the wall, a NDCS staff member spread the inmate's buttocks in order for staff to inspect his body cavity. Staff failed to locate any contraband, nor did they find any indication that there was or had been contraband in the inmate's body cavity. At that point the use of force ended and Inmate X was allowed to return to his cell. Inmate X filed a complaint with the OIG regarding this use of force and that he received disciplinary action, including the loss of 90 days of good time, for not complying with the order.

The initial purpose of investigating the complaint was to determine whether or not NDCS followed the correct procedures regarding the strip search of Inmate X. Additionally, this incident has raised associated issues regarding modified operations at TSCI. As modified operations is the broader issue, we start with that concern.

BACKGROUND

Special Management Unit

The TSCI SMU is a 194-bed unit divided into an east unit and a west unit. Each unit has lower and upper parts that contain three hallways, or galleries, on the upper level and two hallways, or galleries, on the lower level. One of the galleries holds incarcerated individuals who have been sentenced to death. The remaining galleries are utilized to house incarcerated individuals in a restrictive housing setting where they are usually housed in individual cells[5] and typically spend 23 hours a day in their cells, five days a week; however, the other two days of the week they normally spend the entire day in their cells.

According to a facility memorandum on the operations of the restrictive housing unit, the mission statement for the SMU is:

> *"Restrictive housing units at TSCI provide a temporary alternative living environment for inmates who have behaviorally demonstrated they pose a risk to the safety, security and orderly operations of the institution. The goal of the restrictive housing environment is to ensure safety while assisting inmates in their efforts to reintegrate back into the general population. This is accomplished through their participation in available programming opportunities, their involvement with the transformation project, and the use of a structured incentive based levels program. The system enhances an inmate's*

[3] According to TSCI Administration all inmates were searched. During four days of modified operations the searches were conducted by the NDCS CERT Team. A TSCI team conducted the remaining searches on the Monday that followed the ending of the modified operations.

[4] The OIG is using "Inmate X" instead of naming the inmate in this incident (and will later reference Inmate Y). NDCS staff involved in the incident will not be named in the report.

[5] In the past some of these cells contained two individuals.

potential for positive behavioral changes in preparation for successful transition into the general population."[6]

MODIFIED OPERATIONS TIMELINE AND INFORMATION

As a result of the incident on April 8, 2019, and a previous incident on March 21, 2019, all of the SMU was placed on modified operations. As stated previously, the NDCS news release defined "modified operations" and described the consequences of the declaration upon the inmate population housed in SMU. Additionally, the OIG was informed that movement would be allowed for medical/mental health appointments, parole hearings and emergencies, as necessary. Modified operations were lifted at 0600 hours on Saturday, April 13, 2019.[7]

It is the understanding of the OIG that the purpose of placing the SMU on modified operations for this lengthy period of time was to allow NDCS to conduct thorough searches for contraband, specifically weapons, since a weapon was either utilized or possessed during the incidents on April 8, 2019 and March 21, 2019. NDCS staff shared that a search of all of the cells and inmates in the SMU (194 cells) resulted in the discovery of two weapons. The OIG understands that when cells were searched, the inmates were removed from their cells and strip searched.

During the modified operations, the OIG also received a complaint from an attorney of an inmate in the SMU. The attorney shared their concern that inmates were not being allowed to make legal calls, that attorney visits were being impeded and that legal materials were removed from the cell of at least one inmate who had a court hearing the following week. As a result the OIG contacted NDCS and shared these concerns. The OIG also submitted the following to NDCS:

"It is my understanding that the modified operations have not ended and that this has resulted in the suspension of phone calls, showers, etc. It is also my understanding that this was done so that every cell in SMU could be searched. I have nothing against the searches of the cells. I support having a safe and secure environment for staff and incarcerated individuals. However, I am having some difficulty in understanding why an entire SMU continues for days with these added restrictions due to an event that took place as a result of "human error."[8] *In addition, I have also been told that individuals*

[6] June 3, 2018 version of the Operational Memorandum 210.01.01

[7] Concerns regarding the length of time that units are placed on modified operations have been shared in the past with NDCS by the OIG. It is commonly known that the sooner that a unit can be returned to normal the better the outcomes.

[8] The reference to "human error" was related to the NDCS news release. The news release stated the following:

"It appears this situation was the result of human error," explained Scott R. Frakes, director of the Nebraska Department of Correctional Services (NDCS). "Mistakes can lead to bad outcomes in any line of work, and this is especially true in corrections. Modified operations will remain in place until we complete the steps necessary to ensure this does not happen again."

On May 7, 2019 the OIG asked NDCS what steps were completed that allowed for modified operations to end. NDCS responded to the OIG's questions on May 9, 2019 and shared that during the modified operations "staff conducted a thorough search of the unit and maintenance staff members performed a security audit of the physical plant to identify other potential dangers." They also shared that "Since this particular incident, several recommendations have been made. Some of those recommendations are related to training – for employees

are unable to access the telephone and make any legal calls or calls to the Ombudsman's office. I would like to find out if this is true about Mr. [redacted]' legal materials, whether this has impacted anyone else in a similar fashion and whether or not something can be done in the very near future to allow the individuals in the SMU to access the telephone to make legal contacts or to contact the Ombudsman's office."

NDCS informed the OIG that legal property was removed from the cell of Inmate Y but that Inmate Y was informed that his legal material would be returned once it was approved for his possession. Upon contact by the OIG, the materials were to be returned to Inmate Y. However, according to a subsequent court document, not all of the materials were returned to Inmate Y at that time and the court ordered that all materials were to be "returned in full immediately and that they not be removed without order of this Court."[9] We note that in a recent Idaho case the court vacated a conviction after a jailed defendant's legal notes were taken by staff,[10] suggesting that the courts are likely to carefully scrutinize the confiscation of inmates' legal materials.

Additionally, NDCS Central Office staff informed the OIG that legal calls were allowed during the time of modified operations, as were calls to the Ombudsman's office. However, further research found that, while calls apparently were allowed through the afternoon of April 10, 2019, following that time no calls were permitted until the morning of April 13, 2019.[11] In the court order discussed previously, the Court also found that "there is uncontradicted evidence that the Department of Corrections has withheld telephone privileges to the Defendant to call his attorneys."[12] Although NDCS informed the OIG that no inmates requested to make calls to the Ombudsman's office during the time period of April 9, 2019 to April 13, 2019, the Ombudsman's office staff reported that they received multiple calls from inmates the following Monday saying that they had requested to make calls to the Ombudsman's office but were denied by TSCI staff.[13]

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working in SMU, ERT training, as well as additional instruction on proper escort and restraint procedures. Other objectives relate to improving communication. For example, providing an earpiece to those staff members who have contact with inmates and ensuring that they use them. They also utilize a check back procedure – in which the staff member repeats back the radio communication, to ensure the information was interpreted correctly. Additionally, the electronic security company made revisions to the software, which allowed for the creation of a two-step process to open the doors."

Information was later provided to the OIG that all of the searches were not completed prior to the end of modified operations, which was contrary to the information received from the OIG by NDCS. An additional search team was formed on the following Monday comprised of TSCI staff which completed the searches that had yet to take place.

[9] Attachment B: Case No. CR. 17-24 District Court of Johnson County Document

[10] Attachment C: "Idaho Supreme Court Vacates Conviction After D.A. Seizes Jailed Defendant's Legal Notes," Prison Legal News, March 2019, Page 33.

[11] According to a document obtained from TSCI there were two calls allowed to the Ombudsman's office during that time, at 7:24pm on April 8, 2019 and at 3:10pm on April 10, 2019. This is consistent with the information obtained later by the OIG.

[12] See Attachment B

[13] While this was not investigated further due to time constraints, there is evidence that there was a lack of communication between different levels within NDCS regarding the allowing of telephone calls.

In summary, the OIG raises concerns about the practices of the TSCI SMU during modified operations as to the ability to inmates to make legal calls and to contact the Ombudsman's Office, as well as the confiscation of legal materials taken from inmate cells.

STRIP SEARCH OF INMATE X

The second concern relates to strip search procedures and is illustrated by Inmate X who entered the custody of NDCS in 2016 and was recommended to complete a residential substance abuse program while in the custody of NDCS. Inmate X currently has a parole eligibility date of October 29, 2020 and a Tentative Release Date of March 3, 2028; however, he has been in a restrictive housing setting since May 21, 2017, for punching a staff member in the face. Inmate X was found guilty of the assault which resulted in the loss of 730 days of non-restorable good time. During his two years in restrictive housing, Inmate X has completed four different programs and it was recommended that he participate in The Challenge Program on August 9, 2018; however, the inmate has refused to take the program. Due to his making threatening statements to staff in SMU and his refusal to take The Challenge Program/Phase One[14], he continues to be placed in restrictive housing. According to NDCS, the only pathway out of restrictive housing for those who are offered The Challenge Program is the completion of The Challenge Program.

Inmate X's most recent assessment was conducted on February 5, 2019, utilizing the NDCS classification tool. At that time his risk score was "violent" and his custody score resulted in a recommendation of "maximum custody." However, in his February 5, 2018 assessment, which was conducted shortly after he entered restrictive housing for assaulting a staff member in 2017, Inmate X scored as "low-risk" and received the recommendation of placement at "Minimum B or Community A or B." A comparison of the scoring of the two classification results found the following differences:

- Prior property offenses were increased from 3 to 5 in the 2019 assessment;
- Prior drug offenses were decreased from 3 to 2 in the 2019 assessment;
- Prior escapes was increased from zero to 1 in the 2019 assessment;
- Any misconduct charges six months prior to reclassification decreased from 1 to 2 to zero; and,
- In the 2019 classification scoring included "program participation, safety and security concerns and non-compliance with program rules" as the basis for the determination.

The OIG requested additional information from NDCS to explain the differences in the scoring on May 7, 2019. Information was provided on May 10, 2019[15] that shared that his last three reclassifications were audited and that each one was found to have errors. This resulted in a change to the 2017 reclassification. It appears as if the 2017 assault by Inmate X was not considered in his next reclassification which impacted that result. It was not explained to the OIG

[14] The Challenge Program is a type of transitional program that some inmates in restrictive housing are offered as a pathway out of restrictive housing. The first phase consists of taking the program called Moral Reconation Therapy while in restrictive housing. The next two phases are provided in Housing Unit 2B at TSCI where there is limited movement by the inmates that exceeds the movement available in restrictive housing. The three phases of The Challenge Program typically take one year to complete.

[15] Email from Deputy Director Smith to the OIG on May 10, 2019

how the offenses were miscounted despite that being part of the inquiry. The OIG reviewed his past criminal history and his current stay in NDCS and was unable to find any evidence of an escape even though the 2019 assessment indicated that he had a prior escape.[16]

STRIP SEARCH POLICIES AND REGULATIONS

NDCS has policies and regulations, as well as training, regarding strip searches. Administrative Regulation 203.01 states the following regarding contraband and searches:

> *"Written institutional procedure shall provide for unannounced and frequent but irregularly scheduled searches of facilities, inmates, and inmate work areas. Strip searches of inmates will be made by trained and experienced staff, but no penetration of inmate body cavities may be made. Visual inspections of an inmate's rectal area, vaginal area, armpits, navel, nose, ears, or mouth may be performed. Such visual inspection of inmate body cavities shall be conducted by trained staff of the same gender, in private in an area removed from general inmate and personnel traffic where the inmate may not be subjected to undue embarrassment or humiliation."*

The NDCS security manual provides additional information regarding what is to be done by the inmate and staff during a search in regards to visual inspections and possible removals of foreign objects.

Furthermore, the regulation provides the protocol for the correct procedures when there is a suspicion that the inmate is hiding contraband in his or her body cavity:

> *"If staff believe that an inmate has concealed contraband in a body cavity, the inmate should be placed in a room/cell with no running water. Supervision of the inmate should be maintained as deemed appropriate…"*

The regulation is silent on what would happen if an inmate refuses to bend over and spread their own buttocks for a closer inspection of their body cavity.[17]

During NDCS staff training[18], these regulations and practices are shared with staff. The training shares that no cross-gender searches are allowed, that there must be an established need for the search, and that privacy needs to be respected when conducting the search. The training discusses that staff are to instruct the inmate to bend over and spread their buttocks. During that part of the training, the instructor teaches that, if there is a suspicion of contraband inserted in the

[16] The OIG requested that NDCS inform the OIG who is the appropriate person who has expertise in the classification tool in order to interview that person so that the classification tool would be better understood by the OIG. This request was made on May 9, 2019 and again on May 15, 2019. No response had been provided to the OIG by NDCS when the report was submitted to NDCS so no further information regarding the classification tool as it relates to Inmate X's case is included in this report.

[17] According to TSCI Administration, they utilized hand held metal detectors during the second day of the searches and that raised suspicion that an individual was concealing a possible weapon in that particular body cavity. They followed policy and he was placed in a dry cell (basically a cell where everything that would go through one's body can be accounted for). The inmate offered to have an x-ray taken by medical and that was done. It was found that there was no weapon in that body cavity.

[18] This information was provided by the NDCS Staff Training Academy.

anus or vagina, they should instruct the inmate to remove it. If the inmate refuses, or is unable to do so, staff are trained to request that a supervisor be called to the area. In these cases the training teaches that the supervisor shall direct the inmate to squat and cough forcefully to dislodge any suspected contraband.

PREA (Prison Rape Elimination Act) standards discuss cross-gender viewing and searches. Standard 115.15 states:

> *(a) The facility shall not conduct cross-gender strip searches or cross-gender visual body cavity searches (meaning a search of the anal or genital opening) except in exigent circumstances or when performed by medical practitioners.*
> *(b) As of August 20, 2015, or August 20, 2017 for a facility whose rated capacity does not exceed 50 inmates, the facility shall not permit cross-gender pat-down searches of female inmates, absent exigent circumstances. Facilities shall not restrict female inmates' access to regularly available programming or other out-of-cell opportunities in order to comply with this provision.*
> *(c) The facility shall document all cross-gender strip searches and cross-gender visual body cavity searches, and shall document all cross-gender pat-down searches of female inmates.*
> *(d) The facility shall implement policies and procedures that enable inmates to shower, perform bodily functions, and change clothing without nonmedical staff of the opposite gender viewing their breasts, buttocks, or genitalia, except in exigent circumstances or when such viewing is incidental to routine cell checks. Such policies and procedures shall require staff of the opposite gender to announce their presence when entering an inmate housing unit.*
> *(e) The facility shall not search or physically examine a transgender or intersex inmate for the sole purpose of determining the inmate's genital status. If the inmate's genital status is unknown, it may be determined during conversations with the inmate, by reviewing medical records, or, if necessary, by learning that information as part of a broader medical examination conducted in private by a medical practitioner.*
> *(f) The agency shall train security staff in how to conduct cross-gender pat-down searches, and searches of transgender and intersex inmates, in a professional and respectful manner, and in the least intrusive manner possible, consistent with security needs.*

DETAILS OF INCIDENT

NDCS Reports

The account of the incident contained in the NDCS reports provided this information about the incident:

> At 0905 hours on April 10, 2019 Inmate X was directed to submit to a strip search. Inmate X did not completely comply with the strip search due to him refusing directives to bend over and spread his buttocks sufficiently so that staff could visually inspect the area to see if an object was concealed. Permission was given by a TSCI Captain to

assemble a force cell extraction team[19] so that verification could be made regarding whether anything was concealed in the buttocks of Inmate X. The team assembled outside shower number two in the SMU lower A gallery. They entered the shower, placed a shield on the back of Inmate X, placed restraints on him and then removed the shield. A staff member spread the buttocks of Inmate X and did not see any evidence of anything being concealed in his buttocks or anal cavity. The team then exited SMU shower number two. A licensed practical nurse later assessed Inmate X following the use of force at 0935 hours. The report by the nurse stated that Inmate X said they had manually spread his buttocks, that he had never experienced that in his four years in prison, and that he denied the need for additional medical treatment. A staff member recorded the planned use of force on a handheld camera.

Inmate X's Account

In letters to the OIG, Inmate X shared the following details about the incident:

> Inmate X was removed from his cell at approximately 0850 hours due to his cell being searched. He was led to the shower and complied with the strip search by taking off all of his clothes and following each order, including squatting and coughing, until he was told to bend over and spread his buttocks. He stated that he refused due to him feeling it was morally wrong and that he had never been asked to do that in the past. He shared that it was his understanding that if correctional staff believed you had something in your anal cavity that they would take you to medical for an x-ray with medical staff present. The extraction team entered the shower, had him face the wall, used the shield on him until they could put cuffs on him, and then they held him against the wall and told a member of the team to forcefully spread his buttocks. The team left and eventually a nurse came and assessed him. He said he felt violated since he was held down while having his buttocks forcefully spread.

Video

The video of the incident[20] was reviewed by the OIG and a summary of what was viewed is as follows:

> In the video one can view Inmate X's legs through the shower door. His mid-section is covered by a part of the door. However, Inmate X is naked except for a pair of socks. It would appear that this video is being filmed after he objected to bending over and spreading his buttocks and after the force cell extraction team had been ordered to assemble. The shower door is next to another shower door which is at the end of the gallery and close to the entrance of the gallery. After five minutes of video he engages with another inmate and shares that he was told to spread his buttocks and would not do it. A female supervisor later appears and faces the shower door and talks to Inmate X (who is naked) and tells him that he needs to subject himself to a proper strip search which includes spreading his buttocks. He objects and says that he feels it is a "sexual assault-type situation." She states that she is giving him his one directive to submit to the search. He doesn't submit so she opens the door and the team enters. When they enter he

[19] According to NDCS documents the team consisted of staff from facilities other than TSCI.

[20] There is not a date/time stamp on the video from the handheld camera.

is standing against the wall with his hands behind his back. They briefly use the shield until they place restraints on him. He does not hinder their search in anyway. The view from the camera is partially blocked by staff but he states to other inmates that they just forced his buttocks apart. It appears as though the female staff member is facing the shower during this time and viewing the forced search of Inmate X. The rest of the team are male staff members. The team then leaves the shower and he places his hands out of the hatch so they can remove the restraints. The video ends at that time.

Inmate X's Discipline
Inmate X received a misconduct report as a result of the incident and was found guilty of "Interference with/or Refusal to Submit to a Search." As a result he forfeited 90 days of good time.

Follow-up Contacts by Inmate X
Inmate X contacted the OIG several days after the event and expressed concerns regarding the impact on him. These concerns were promptly shared with the appropriate medical professional at TSCI by the OIG.

FINDINGS
The OIG finds the following:

- For over two days, all phone calls were not allowed by residents of the SMU, including legal calls and calls to the Ombudsman's office.
- Legal documents were taken from the cell of an inmate involved in a current court case and were not returned until after intervention from the OIG. The District Court of Johnson County found that not all legal documents were returned at that time and the Court ordered NDCS to return all other legal documents to that particular inmate.
- Inmate X was under the impression that a strip search did not include the bending over and spreading of his own buttocks. He believed that if there was a belief by NDCS staff that there was something in that body cavity that they would take him to the medical area to be assessed.
- Staff are trained that a strip search does include requesting an inmate to bend over and spread his buttocks.
- NDCS regulations state that visual inspections of an inmate's rectal area may be performed and that such an inspection shall be conducted by trained staff of the same gender and that it is done in an area of privacy that is removed from general inmate and personnel traffic so that the inmate is not subjected to undue embarrassment or humiliation. It is not clear if a visual inspection includes the forced spreading of an inmate's buttocks. The shower could possibly be considered a private area but personnel traffic does take place in the hallway in front of the shower. It is not known if any inmates on the other side of the hall were able to view the search.
- NDCS regulations and training materials provides that the inmate is supposed to bend over and spread their buttocks. In this case the inmate was up against a wall and was not asked to bend over which could have impacted the quality of the search. If staff have a reasonable suspicion that something is in the cavity, the inmate is asked to squat and cough. According to Inmate X, the squat and cough took place prior to the request to

bend over and spread the buttocks. In addition, the training materials reviewed by the OIG indicated that a supervisor is supposed to be a part of the squat and cough since that takes place when it is suspected that contraband is in that body cavity.

- NDCS regulations are silent on what to do if the inmate does not comply with the specific request of bending over and spreading their own buttocks. By this, the OIG means that the regulations do not indicate whether or not staff can initiate such a search. NDCS, in their response to this report, indicated that policy does state that if contraband is suspected of being concealed then that person will be placed in a dry cell for a standard time frame of 72 hours.
- PREA Standard 115.15 states that "*The facility shall implement policies and procedures that enable inmates to shower, perform bodily functions, and change clothing without nonmedical staff of the opposite gender viewing their breasts, buttocks, or genitalia, except in exigent circumstances or when such viewing is incidental to routine cell checks."* While the female staff member involved in the incident did not participate in the search she did watch the search of a naked male inmate take place and conversed face to face with a naked male inmate prior to the search. In this case, the female staff member was placed in a position where she could have viewed his genitalia.
- NDCS staff did not act inappropriately during the interaction with Inmate X that was viewed on video.
- TSCI Administration was helpful in the OIG's efforts to learn more about this situation and provided information in a timely manner.

RECOMMENDATIONS FOR PROCESS/POLICY IMPROVEMENTS

1) If an entire unit is subject to modified operations for an extended period of time for cell searches, the galleries in which the searches are completed should be removed from modified operations unless an extenuating circumstance exists. *[NDCS accepted this recommendation.]*

2) Allow legal calls and calls to the Ombudsman's office when a gallery is placed under modified operations. *[NDCS rejected this recommendation for the following reason: "Federal Courts have held that although prisoners have a constitutional right to meaningful access to courts, prisoners do not have a right to any particular means of access, including unlimited telephone use. Aswegan v. Henry, 981 F.2d 313 (8th Cir. 1992). Inmate Y did have access to his attorney during modified operations, by mail. Inmates with scheduled court hearings and/or can demonstrate a need are allowed legal calls during modified operations. In the case of Inmate Y he was able to have an in-person meeting with his attorney while modified operations were ongoing."]*

3) Amend NDCS regulations and training policies regarding strip searches so that they contain more specific information on the viewing of body cavities and how refusals of such searches are to be handled. *[NDCS rejected this recommendation but indicated that they will review and determine if changes are necessary.]*

4) Provide information on any such regulatory changes that result from Recommendation #3 to the inmate population to increase the awareness regarding this issue. *[NDCS accepted this recommendation should a review of policies reveal that changes are necessary.]*

5) Review NDCS regulations and PREA standards so that the use of cross-gender staff is appropriate and follows the appropriate regulations and standards. *[NDCS accepted this recommendation and indicated that they will review them.]*

6) Consider amending the discipline of the loss of 90 days of good time for Inmate X since he appeared to be unaware of the policy, that he was cooperative during the process, and that the attempts to engage and educate him regarding the policy were minimal. *[NDCS rejected this recommendation for the following reason: Inmates are subjected to multiple strip searches during the length of their incarceration, including when they are admitted to the system, assigned a new facility, before and after transportation orders, court appearances, etc. Inmate X was well aware of the policy and process. Refusal to submit to a search is included in Title 68 of the Nebraska Administrative Code and can result in disciplinary sanctions. Inmate X, per his right, appealed the sanction. It was affirmed.]*
7) Review the possibility of having all facility handheld video cameras have an accurate time/date stamp on the video footage. *[NDCS accepted this recommendation and indicated that they will review this.]*

CONCLUSION

The OIG concludes that this was a serious incident that bears closer scrutiny by the NDCS, along with the need to make changes to address the concerns, findings and recommendations of this report. The OIG does want to acknowledge the timely and thorough responses by the TSCI Administration to the OIG requests for information. As is typical, the TSCI Administration was professional and accommodating during this investigation.

NDCS RESPONSE

Director Frakes provided a response to the OIG's report on June 3, 2019. The OIG incorporated the changes suggested by the Director in the final report. The response to the recommendations is included in the report. The final paragraph of the Director's response stated the following:

> *"Finally, I caution that Neb. Rev. Stat. 83-178 protects information in your report and in my response and provides that it may not be made public without a court order. As such, I request that if the decision is made to make this report public, you redact such protected information and not include confidential information contained in my response."*

In a past report, the OIG wrote:

> *"When writing a summary of this report, NDCS shared their concerns regarding the sharing of certain information with the public that falls under Nebraska State Statute 83-178. The statute states that each inmate has an individual file within NDCS and it includes seven specific items and then there is an eighth item listed that is more of what some might describe as a catch-all. It is found in (1) (h) of the statute and it states "Other pertinent data concerning his or her background, conduct, associations, and family relationships." This is problematic in writing the summary of OIG reports due to the fact that later in the statute it states "The content of the file shall be confidential and shall not be subject to public inspection except by court order for good cause shown and shall not be accessible to any person committed to the department." The question that arises is what is all included in the individual file and whether or not the OIG can release any of that information in a report. NDCS no longer keeps an actual individual file but instead information on each inmate is found in a variety of ways, including on the internet. While the OIG has never actually asked for a file, the OIG does have access to many items related to each inmate. With that said, this summary will be an attempt to not share any specific information on an inmate that is specifically mentioned in (1) (a) through (1) (g) in Nebraska State Statute 83-178 (except for the inmate who is deceased). In addition, there may be parts of the summary that are written in a general way although the reader may wish there were more details included. As the OIG moves forward with future reports, it will be necessary to work with appropriate legal counsels and others to determine the best way to abide with the state statutes."*

Since this was written, no entity has come forward to indicate that they believe the OIG has done anything contrary to the intent of the state statute. In this specific case (and has been done in the past) the OIG requested that the Department provide him with specific information in the report that the Department believes is "protected information" or "confidential information." The OIG and Department staff discussed their concerns on June 4, 2019. As a result, two references to the individual that had not been redacted by the OIG were changed to "Inmate X" and a direct quote from the Department's security manual was deleted. It was explained to the OIG that even the judicial branch places the security manual under seal in court hearings. This communication with the Department was greatly appreciated. After having this discussion with the Department, the OIG determined that the report, in its current form, could be released.

Department of Correctional Services

News Release

NEBRASKA
Good Life. Great Mission.

FOR IMMEDIATE RELEASE (19-15)

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Staff member assaulted at TSCI

April 8, 2019 (Lincoln, Neb) – An inmate at the Tecumseh State Correctional Institution (TSCI) assaulted a staff member on Monday, April 8, 2019.

Around 1:40 p.m. the inmate exited his cell when his door was opened by mistake. The inmate hit the staff member in the head and torso with his fists. That staff member was able to help subdue the inmate, along with several other officers who came to assist. One staff member deployed two short bursts of oleoresin capsicum (pepper spray) to bring the inmate under control. A homemade weapon was recovered at the scene, but was not used in the assault.

As a result of this incident and another that occurred on March 2, the Special Management Unit (SMU) at TSCI, has been placed on modified operations*. The SMU holds individuals who are assigned to restrictive housing. The remainder of the facility is operating normally.

"It appears this situation was the result of human error," explained Scott R. Frakes, director of the Nebraska Department of Correctional Services (NDCS). "Mistakes can lead to bad outcomes in any line of work, and this is especially true in corrections. Modified operations will remain in place until we complete the steps necessary to ensure this does not happen again."

Frakes said that initially the door to a shower was supposed to be opened, instead of the cell door. The officer who was assaulted went to Johnson County Hospital where he was assessed. He later returned to the facility.

The incident will be investigated with findings provided to the county attorney for determination of criminal prosecution. The NDCS disciplinary process will be utilized with sanctions, such as loss of good time, applied according to the rules and regulations.

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*Modified operations is defined as, actions taken to more closely control movement of inmates within a facility due safety and security needs. Can include confinement in cells of a portion of the inmate population, cancellation of program/work activities, and direct escort of certain inmates – as determined by the Warden/designee.

Filed in Johnson District Court
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IN THE DISTRICT COURT OF JOHNSON COUNTY, NEBRASKA

STATE OF NEBRASKA,	)	Case No. CR 17-24
	)	
Plaintiff,	)	
	)	
v.	)	**ORDER TO DEPARTMENT OF CORRECTIONS**
	)	
	)	
ERIC RAMOS,	)	
	)	
Defendant.	)	

THIS MATTER comes before the Court for hearing on 23rd of April, 2019. The Plaintiff appeared through its attorneys Mr. Beethe and Mr. O'Brien. The Defendant was present with his attorneys, Mr. Nelsen and Mr. Gaertig. The State takes no position on the Motion. The Court FINDS THAT THE DEPARTMENT OF CORRECTIONS IS INTERFERING WITH THE DEFENDANT'S SIXTH AMENDMENT RIGHTS **AND ORDERS** as follows:

1. There is uncontradicted evidence that the Department of Corrections has withheld telephone privileges to the Defendant to call his attorneys. The Court directs and orders that the Director and the TSCI Warden will ensure that the Defendant may have phone privileges to call his attorneys during regular business hours, Mondays through Fridays, upon request.

2. That TSCI removed from the Defendant his written discovery, and advised that it would be returned if "it was approved". That TSCI staff did return most of the discovery after the motion of the Defendant was filed. The Director and TSCI Warden will ensure that the Defendant's discovery materials are returned in full immediately and they not be removed without order of this Court.

B

4-25-19 copy mailed to Δ c/o TSCI

3. That the Defendant's attorneys have advised the Court that there have been issues of unreasonable amounts of waiting to be allowed to see the Defendant. The Court reiterates that its order allowing Mr. Nelsen and Mr. Gaertig up to 8 hours each day with the defendant is still in full force and effect.

4. Failure of the Director or the TSCI Warden to follow this order may result in contempt proceedings.

5. The Clerk of Court will send a copy of this order to the Director of the Department of Corrections and the Warden of TSCI.

BY THE COURT:

Vicky L. Johnson, District Judge

group of other banks – a $900 million line of revolving credit to GEO Group; had underwritten at least $113 million in bonds for CoreCivic and GEO; and held $166 million in bonds for the two companies as of October 14, 2016.

Sources: *inthesetimes.com, cnbc.com, forbes.com, cnn.com, cjonline.com, inthepublicinterest.org*

Idaho Supreme Court Vacates Conviction After D.A. Seizes Jailed Defendant's Legal Notes

by Matt Clarke

On November 30, 2018, in a substitute opinion, the Supreme Court of Idaho held that a trial court erred when it required a defendant to show he was prejudiced when the prosecution introduced evidence obtained from the seizure of notes from the defendant's jail cell that were made at the direction of his attorney and in anticipation of an attorney-client meeting. The Court also held that the entirety of an incriminating letter from a co-defendant could not be introduced into evidence.

While Anthony J. Robins, Jr. was held at the Ada County jail awaiting trial for aiding and abetting two first-degree murders and an attempted murder, his co-defendant, John Douglas, sent him a letter seeking to coordinate their stories in order to absolve Robins of guilt. The correspondence was intercepted by another prisoner, who provided it to his attorney and told him to use it to get a good plea deal. The prosecutor's reaction, when informed of the letter's existence, was to instruct the sheriff to search the cells of Douglas, Robins and the other prisoner, with the intent of finding it. During the search, deputies seized six pages of handwritten notes made by Robins at the behest of his defense attorney, Scott McKay.

McKay had sent discovery files to Robins and asked him to make notes and identify matters of discussion to be used at a future attorney-client meeting. Robins did so and those notes, which were not marked as privileged attorney-client communications, were seized by the deputies and provided to the prosecutor, Shelly Akamatsu.

Akamatsu reviewed the notes, realized they were intended for McKay and faxed him a copy. McKay then filed a motion to dismiss the charges or, in the alternative, to recuse the D.A.'s office due to the breach of attorney-client privilege. The court held during trial that Robins had the burden of showing he had been prejudiced by the seizure of the notes; the court also denied a motion to sever his co-defendant Douglas from the case. The incriminating letter from Douglas was introduced at trial over Robins' objections; he was convicted and sentenced to two concurrent life sentences plus 15 years.

With the assistance of Boise attorney Dennis Benjamin, Robins appealed.

In a lengthy ruling, the Idaho Supreme Court agreed with the trial court's determination that the notes were privileged. However, it disagreed with that court's remedy. Once Robins had made a *prima facie* case that the government had affirmatively intruded into the attorney-client relationship, the burden shifted to the prosecutor to show there was no prejudice to Robins, such as by proving she had an independent origin for the evidence and argument used at trial.

"This case suffered from an improper pretrial remedy," the Supreme Court wrote. "It bears emphasizing that the impropriety of that remedy cut both ways. By not shifting the burden to the State, the district court failed to recognize the violation of Robins's constitutional right to counsel as defined by the presumption of prejudice we have found he established. Yet, by not shifting the burden, the remedy also denied the State its chance to prove that such a violation did not in fact occur."

Although the prosecutor claimed she had an independent origin, she was never required to prove it at trial. Therefore, Robins' conviction was vacated and the case remanded for the lower court to hold an evidentiary hearing as to prejudice resulting from the review of Robins' notes by the prosecution.

Although the issue of severing Robins' case from his co-defendant was mooted by the reversal of the conviction, the Supreme Court found that under the rules of evidence, the entirety of the letter from Douglas could not be admitted against Robins because the only part that qualified for an exception to the hearsay exclusion was Douglas' admission he had "bodyed [sic] them 2 dudes," referring to a double homicide. See: *State v. Robins*, 431 P.3d 260 (Idaho 2018).

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Please do not send us documents that you need to have returned. Although we welcome copies of verdicts and settlements, do not send copies of complaints or lawsuits that have not yet resulted in a favorable outcome.

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