

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

FRANK RIVERA	:	CIVIL ACTION
	:	
v.	:	
	:	
JOANNE MIRANDA	:	No. 97-7547

MEMORANDUM AND ORDER

Norma L. Shapiro, S.J.

October 2, 2001

This action under 28 U.S.C. § 1983 arises out of the unsuccessful attempts of plaintiff Frank Rivera ("Rivera") to contact his lawyer, George Goldstein ("Goldstein"), while at prison in the summer of 1997. Rivera alleges that the Unit Manager of his cellblock, Joanne Miranda ("Miranda"), by preventing him from calling Goldstein, prejudiced his appeal of a state conviction because he was unable raise an ineffective assistance of counsel claim in his filed Statement of Matters Complained of on Appeal ("Statement of Matters"). Miranda contends that any denial of access to his attorney did not cause Rivera actual injury, because: (1) it did not affect Rivera's ability to raise his ineffective assistance claim; and, (2) the ineffective assistance claim was frivolous.

From April 23, 2001 to April 25, 2001, the court held a trial with an advisory jury panel. The advisory jury returned a verdict in favor of Rivera for \$1.00 in compensatory damages and \$10,000.00 in punitive damages. In accordance with Federal Rule of Civil Procedure 52(a), the court enters the following findings of fact and conclusions of law:

I. Findings of Fact:

1. On January 30, 1997, Rivera was incarcerated at the State Correction Institute at Frackville. Tr. Apr. 23, 2001, at 23.

2. From late May, 1997, to August 2, 1997, Miranda, an employee of the Pennsylvania Department of Corrections (PDOC), was his Unit Manager. Tr. April 23, 2001, at 24-25; Tr. April 24, 2001, at 29.

3. In the Spring of 1997, the PDOC adopted a new inmate telephone policy. Tr. April 23, 2001, at 23.

4. The policy requires an inmate to receive preapproval for any telephone numbers the inmate wishes to call. An inmate with approval receives a personal identification number ("pin") enabling the inmate to place collect calls in blocks of fifteen minutes three times a week. Without approval, an inmate may not make a call. P. Ex. 2. The procedure for obtaining approval is as follows:

a. An inmate completes a DC-8 form. This form identifies the person the inmate wishes to call by name, telephone number, and relation to the inmate. Id. at 5.

b. A completed form is submitted to the block sergeant. Tr. April 23, 2001, at 24.

c. The block sergeant verifies that the inmate who submits a DC-8 is the inmate who signs it, and then transmits the form to the Unit Manager. Tr. April 24, 2001, at 18.

d. The Unit Manager verifies and approves all non-attorney telephone numbers; he or she then forwards the form to the Phone Cite Coordinator. Tr. April 24, 2001, at 18.

e. The Phone Cite Coordinator verifies the attorney phone numbers and enters permissible telephone numbers for each inmate. Tr. April 24, 2001, at 18.

5. An inmate may make additions or deletions to the list of numbers the first five days of each month. Tr. April 24, 2001, at 20. However, additions or deletions of attorney telephone numbers may be made at any time. Id.

6. An inmate is limited to twenty telephone numbers, excluding attorneys. P. Ex. 2, at 5. Inmate calls, excluding those placed to attorneys, are subject to interception, recording, monitoring and disclosure. P. Ex. 2, at 6.

7. An inmate may also make limited calls outside the "pin" system, by "facility authorized telephone calls." Tr. April 23, 2001, at 24-25; P. Ex. 2, at 6.

8. To make such a call, a Unit Manager or higher authority permits the prisoner to make a call to a number not yet authorized. The prison regulation states that such special permission may be given in limited situations, such as calling an "attorney regarding legal matters which, because of an immediate deadline or circumstances, cannot be made via Inmate Phone System." P. Ex. 2, at 6.

9. In practice, facility authorized calls are made very frequently. Tr. April 24, 2001, at 21.

10. On May 11, 1997, Rivera submitted his initial DC-8 form listing fifteen people including two attorneys Tr. April 23, 2001, at 23; P. Ex. 3.

11. Sometime later, the form, signed by Miranda, was returned to Rivera. A box had been checked, approving all telephone numbers except for "attorney." P. Ex. 3; Tr. April 23, 2001, at 25.

12. In May, 1997, Rivera's post-sentencing motion to the trial court was denied.

13. In June 1997, Rivera's family retained Goldstein to represent him in his direct criminal appeal. Tr. April 23, 2001, at 26.

14. Rivera met Goldstein at Frackville on June 6, 1997. Id.

15. Part of the purpose of that conference was to discuss the Statement of Matters to be submitted on appeal. Tr. April 23, 2001, at 27. Goldstein promised Rivera that he would raise an ineffective assistance of counsel claim for failure to object to the trial court's alibi jury instruction. Tr. April 23, 2001, at 27. Goldstein informed Rivera that it was a "good issue for an appeal." Tr. April 23, 2001, at 28.

16. On July 5, 2001, Rivera received a letter from Goldstein dated July 3. P. Ex. 7; Tr. April 23, 2001, at 31. The letter referred to an enclosed Statement of Matters, but no such draft Statement was enclosed. Tr. April 23, 2001, at 31. The letter asked Rivera to call Goldstein immediately if any

issues were to be added to the Statement. P. Ex. 7.

17. Goldstein generally awaited Rivera's instructions before raising issues with the court. Tr. April 24, 2001, at 9.

18. Also on July 5, 1997, Rivera submitted a DC-8 form supplementing the numbers on his existing phone list to include Goldstein and another attorney. Tr. April 23, 2001, at 28. Rivera never received a direct response to this request. Id.

19. Having failed to receive the Statement of Matters with Goldstein's July 3 letter, Rivera attempted to contact him through the inmate automated phone system. Tr. April 23, 2001, at 31-32. Rivera was unable to contact Goldstein because the number had not been added to the list. Tr. April 23, 2001, at 32-33.

20. On July 17, 1997, Rivera submitted a "Request to a Staff Member," a written form in which he petitioned Miranda to have Goldstein's name added to his telephone list, or, in the alternative, to allow him to call Goldstein from Miranda's office. Tr. April 23, 2001, at 42.

21. A Request to a Staff Member is an appropriate form for an inmate to submit a request to make a facility authorized call under the inmate phone system. Tr. April 23, 2001, at 25.

22. Soon afterward, Rivera received the July 17th request back. On this request, someone had written in bold print, "see attached." Attached was Rivera's July 5, 1997, DC-8 request form with the notation "1-5 of the month" in the same bold print. Tr. April 23, 2001, 29-30, 45; P. Ex. 4, 5.

23. It was Miranda's job to decide on the timeliness of a DC-8 request. Tr. April 24, 2001, at 31.

24. On July 21, 1997, still seeking to contact Goldstein, Rivera completed a Request to Staff Member to his prison counselor, Frank Dillman.¹ Tr. April 23, 2001, at 30-31, 53; P. Ex. 6. In this request, Rivera asked Dillman to help him call his lawyer through a facility authorized phone call. Tr. April 23, 2001, at 30.

25. Dillman asked Miranda about Rivera's request. Tr. April 23, 2001, at 54. Miranda responded that she was aware that Rivera had asked to speak with his lawyer. Tr. April 23, 2001, at 55.

26. As a result, Dillman responded to Rivera's July 21, 1997, request by informing Rivera that he should "do as Ms. Miranda advised." Tr. April 23, 2001, at 31.

27. On July 23, 1997, Rivera submitted a grievance to James Forr, the grievance coordinator at the prison. Tr. April 23, 2001, at 34. Rivera never received a response to this grievance. Id.

28. On July 25, 1997, Goldstein visited Rivera at the prison and reviewed the Statement of Matters with him. Tr. April 23, 2001, at 33.

29. Rivera noticed that Goldstein had omitted the ineffective assistance of counsel claim for failing to object to

¹Rivera withdrew his claim against Dillman with prejudice at the beginning of trial. Stipulation, April 23, 2001.

the alibi instruction from the Statement of Matters. Id. Rivera objected to this omission. Id. Goldstein assured Rivera that he would submit a supplement raising the ineffective assistance of counsel claim. Id.

30. On August 1, 1997, Rivera submitted another DC-8 request form with Goldstein's telephone number as well as the numbers of family members. Tr. April 23, 2001, at 33-34. Rivera wished to call Goldstein to ensure that the alibi issue was preserved for appeal. Tr. April 23, 2001, at 34.

31. On August 4, 1997, Miranda approved the telephone numbers of Rivera's family members, but did not approve Goldstein's telephone number. Tr. April 23, 2001, at 36; P. Ex. 15.

32. Rivera did not write to his attorney because he was not aware when the Statement of Matters was to be filed. Tr. April 23, 2001, at 52. Additionally, Rivera is semi-literate: he had to ask for assistance from fellow inmates to complete or read forms. Tr. April 23, 2001, at 42.

33. After Rivera submitted his August 1, 1997, DC-8 form request, he received a letter from Goldstein stating that he would not add the alibi issue to the Statement of Matters. Tr. April 23, 2001, at 35.

34. Rivera again attempted to call Goldstein but was unable to do so for lack of pre-approval. Tr. April 23, 2001, at 34.

35. On August 11, 1997, Rivera submitted another grievance in an attempt to add Goldstein to his approved telephone list.

Tr. April 23, 2001, at 36.

36. On August 2, 1997, Rivera was transferred to a new cellblock. Tr. April 23, 2001, at 37. On August 15, 1997, Rivera submitted a request to his new unit manger to contact Goldstein. Id. Rivera received no response to this request. Id.

37. On August 19, 2001, Rivera was given an opportunity to call Goldstein. When he made the call, he learned that Goldstein had died. Tr. April 23, 2001, at 39.

38. Rivera was assigned new counsel. Tr. April 23, 2001, at 39.

39. On August 29, 1997, Rivera met with new counsel, but did not discuss the allegedly erroneous alibi charge. Rivera believed that it was already too late to submit a supplement to the original Statement of Matters. Tr. April 23, 2001, at 39.

40. The Superior Court brief filed for Rivera omitted the issue of the alibi charge. Tr. April 23, 2001, at 40.

41. Rivera testified that he could not write his attorney because of his illiteracy, Tr. April 23, 2001, at 52, and confusion about the applicable deadlines, Id. at 42: this was credible. It was supported by the testimony of Charles McGuire. Tr. April 24, 2001, at 7.

42. Rivera testified that he instructed Goldstein to raise the alibi issue during their meeting on June 6, Tr. April 23, 2001, at 27: this was credible.

43. Rivera's testimony that he filed at least three unsuccessful DC-8 requests and five Requests to Staff or Grievances in an attempt to call his attorney over a three month span was credible; it was well supported by P. Exs. 4, 5, 6, 11, 15, 17, and 18.

44. Charles McGuire's testimony that Goldstein would wait for Rivera's instruction before raising any issues on appeal, Tr. April 24, 2001, at 9, was credible. McGuire's testimony that Rivera had told him the alibi issue was crucial, Tr. April 24, 2001, at 13, was credible. McGuire's testimony that Rivera needed help to complete forms because he was only semi-literate, Tr. April 24, 2001, at 7, was credible.

45. Miranda's testimony was not credible. Her testimony that she did not receive an inmate's Request to Staff member from Rivera, dated July 17, 1997, Tr. April 24, 2001, at 33, was not credible; it was impeached by the testimony of Mr. Dillman, who the court found entirely credible. Tr. April 23, 2001, at 55. Miranda's testimony that she did not meet with Mr. Dillman to discuss Rivera's requests, Tr. April 24, 2001, at 37 & 41, was not credible; it was impeached by the testimony of Mr. Dillman, Tr. April 23, 2001, at 55. Miranda's testimony that she did not respond to the May 11, 1997 DC-8, Tr. April 24, 2001, at 39, was not credible; it did not conform to the prison's own procedures. Tr. April 24, 2001, at 18. Miranda's testimony that the July 17, 1997 Request to Staff (directed to her) and the July 5, 1997 DC-8 were not created by the same hand, Tr. April 24, 2001, at 41, was not credible; upon examination of the documents, the writing is obviously by the same person.

46. Miranda's conduct in denying Rivera access to his

attorney was wanton, malicious, or deliberately indifferent to his constitutional rights.

II. Discussion:²

A. Jurisdiction and State Action:

This claim arises under 42 U.S.C. § 1983 and the First and Fourteenth Amendments to the United States Constitution. The court has jurisdiction under 28 U.S.C. § 1331. 42 U.S.C. § 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law

The parties do not contest that Miranda acted under color of Pennsylvania law. The issue is whether her actions actually denied or frustrated Rivera's ability to prosecute a non-frivolous constitutional claim.

B. Denial of access to the courts

Prisoners, as citizens, have a constitutional right to access the judicial system. See Lewis v. Casey, 518 U.S. 343 (1996) (limiting this right to denials of access that cause actual prejudice to non-frivolous constitutional claims). However, their ability to access justice may be circumscribed in time and place by "legitimate penological interests." Turney v.

²Any facts in the Discussion section not found in the Facts section are incorporated by reference therein.

Safley, 482 U.S. 78, 87 (1987).

Prison authorities violate the First Amendment right of prisoners to access to courts by "actively interfering with inmates' attempts to prepare legal documents." Lewis, 518 U.S. at 350. Here, Rivera alleges that Miranda knowingly prohibited him from calling his attorney at a time when she knew that he needed to do so to help prepare his appeal. In Bierequ v. Reno the Court of Appeals held that repeated invasions of the privacy of communication between an inmate and his attorney, by invading a "central" component of the right of access to courts, stated a due process claim. 59 F.3d 1445, 1455 (3d Cir. 1995). Although Bierequ was overruled by Oliver v. Fauver, 118 F.3d 175, 178 (3d Cir. 1997) following Lewis, this holding was unaffected. It is clear that impeding an inmate's attempts to call his attorney, when the calls are necessary to enable the inmate to prepare legal documents, would violate the inmate's First Amendment rights. See Williams v. ICC Comm., 812 F.Supp. 1029, 1034 (N.D.Cal. 1992) (denial of access to phone calls where alternative means of contacting a lawyer are unavailable may give rise to a claim for denial of access to court); see also John W. Palmer, Constitutional Rights of Prisoners, 4th ed., at 40 (Anderson Publishing Co. 1991) ("A basic corollary to the right of access to the courts is the inmate's right to communicate with an attorney concerning the validity of his conviction or the constitutionality of conditions within the detention facility").

C. Qualified Immunity

For the first time since an answer filed in 1998,³ Miranda

³This answer was jointly filed by the multiple defendants who Rivera originally sued.

asserts, in her proposed conclusions of law, that she is entitled to qualified immunity. She has never briefed this issue:⁴ the only other time this defense was discussed, it was clearly waived. At a pre-trial Rule 16 conference on December 16, 1998,⁵ the court asked defendant's counsel whether he still intended to assert a qualified immunity defense since he had not raised it in the motion to dismiss. Citing Crawford-El v. Britton, 523 U.S. 574 (1998), defendant's counsel said that he believed qualified immunity might be a good defense. The court agreed that qualified immunity presented a serious issue, and asked that it be briefed within ten days in order to make an informed decision. Defense counsel asked for time to consult with his supervisor. Because defendant had not raised the issue in her motion to dismiss, the court required her to raise it by the end of the year. The court specifically warned defendant's counsel that if defendant did not brief the issue of qualified immunity on or before December 31, 1999, it would be waived.

Defendant did not brief this proposed defense by the end of 1999. Neither did she do so by the end of 2000. Miranda has waived her right to do so now. See U.S. v. Hitachi America, 172 F.3d 1319, 1334 (Fed.Cir. 1999) (affirmative defenses that are not jurisdictional may be voluntarily waived); cf. Eddy v. Virgin Islands Water and Pwr. Auth., 256 F.3d 204, 210 (3d. Cir. 2001) (court must use its "discretion and determine whether there was a reasonable modicum of diligence in raising the defense").

⁴The defendant has had at least four other opportunities to do so: (1) in the joint motion to dismiss; (2) in the joint motion for summary judgment; (3) in pre-trial memoranda; and (4) in her own post-trial brief addressing "the questions of law remaining for the court's determination." Order, April 26th, 2001.

⁵The hearing was not held on the record.

D. Rivera's Injury

A prisoner who alleges denial of access must establish: (1) that he was actually denied access to court; and that (2) such denial prejudiced the prosecution of a non-frivolous constitutional claim. See Lewis, 518 U.S. at 355-56. Denial of access itself is no longer a constitutional injury.

1. Interference with Rivera's ability to contact Goldstein and direct the course of his appeal.

At their initial meeting on June 6, 1997, Goldstein promised his client he would raise an ineffective assistance of counsel claim for failure of prior counsel to object to the trial court's alibi instruction. Tr. April 23, 2001, at 27. Rivera vainly attempted to ensure that Goldstein kept this promise. Despite numerous requests, both ordinary and extraordinary, Miranda refused to either: (1) permit Rivera to make a facility authorized phone call; or (2) explain to him why his request to add Goldstein to his pre-approved list had been denied. Miranda's actions were the proximate cause of Rivera's inability to call Goldstein and help to prepare his defense.

There was no "legitimate penological reason" for this denial. Rivera filed timely DC-8 requests to add Goldstein to his list of pre-approved numbers in both July and August.⁶ He also pursued the avenues of appeal allowed by the institution by filing Requests to Staff on at least three separate occasions. Despite a record of having allowed inmates to call attorneys in

⁶Even were these requests not timely, the policy itself excepted attorney numbers from the requirement that DC-8 additions be filed from the first to fifth days of the month. Tr. April 24, 2001, at 20.

such special circumstances, and despite Rivera's evident need, Miranda did nothing.

In the midst of this delay, Goldstein visited Rivera on July 25, 1997. Goldstein again promised Rivera to add an ineffectiveness claim to Rivera's Statement of Matters, but then wrote Rivera a confusing letter. Miranda again prevented Rivera from calling his lawyer to remedy this confusion by demanding that the Statement of Matters should be amended.

Miranda argues that she did not actually deny Rivera access to Goldstein because Rivera could have written his counsel at any time. She further contends that the July 25, 1997, meeting met Rivera's constitutional needs. Miranda misunderstood both Rivera's needs and his ability.

Miranda's argument that Rivera could have written Goldstein is unpersuasive. It is true that a prisoner has no right to any particular form of access to his attorney. However, the availability of an alternative form of access to an attorney is only relevant in determining the reasonableness of a prisoner regulation; it is not dispositive. See Turney, 482 U.S. at 90. Those cases holding that an inmate who not permitted to call his attorney must also demonstrate that he could not communicate in person or in writing, see, e.g., Ingalls v. Florio, 968 F.Supp. 193, 203-04 (E.D.NJ. 1997), apply an unnecessarily restricted view of the right to access to counsel. Even so, in the circumstances of this case there were no practical alternative methods available for Rivera to contact Goldstein. Goldstein's two visits did not afford Rivera an adequate opportunity to examine and amend the Statement of Matters before filing. Goldstein twice promised Rivera that he would include the ineffective assistance claim, but twice wrote him confusing letters that made it unclear whether he had or would. Rivera's only way to obtain clarity would have been to contact Goldstein

himself.

It was not practical for Rivera to write Goldstein. Rivera is functionally illiterate. Although it is true that McGuire, a literate inmate, helped him write several of his legal documents, it was unrealistic to expect another prisoner to do so repeatedly. After August 3 (when Rivera received Goldstein's letter suggesting the ineffectiveness claim would not be raised) time was clearly of essence because of filing deadlines. Miranda was aware of Rivera's time-sensitive needs.

Given these dual constraints of time and illiteracy, the court finds that Rivera has established, by a preponderance of the evidence, that denying him access to a telephone in the summer of 1997 denied him access to his counsel, and the ability to amend his Statement of Matters.

2. Prejudice in prosecuting a non-frivolous constitutional claim.

Miranda asserts that Rivera has no standing because he suffered no actual injury caused by her conduct. First, she argues, Rivera's inability to speak with any counsel to amend the Statement of Matters before August 19, 1997, did not prevent Rivera from raising any issue in his appeal; second, the issue that Rivera wished to raise - ineffective assistance of counsel - was frivolous.

Pa.R.A.P. 1925(b) provides:

(B) Direction to file statement of matters complained of. If the lower court is uncertain as to the basis for the appeal, the lower court may by order direct the appellant forthwith to file of record in the lower court and serve on the trial judge a concise statement of the matters complained of on appeal. A failure to comply with such direction may be considered by the appellate court as a waiver of all obligations to the order, ruling or other matter complained of on appeal.

The waiver provision of Rule 1925(b) appears discretionary. See Commonwealth v. Silver, 452 A.2d 1328, 1333 (Pa. 1982). However, Pennsylvania appellate courts have given claims not included in a Statement of Matters ordered by a trial court a mixed reception. See, e.g., Commonwealth v. Forest, 629 A.2d 1032, 1035 (Pa.Super.Ct. 1993) (denying review to an ineffective assistance of counsel claim); cf. Commonwealth v. Williams, 753 A.2d 856, 861 n. 4 (Pa. Super.Ct. 2000) (reviewing claims filed in an untimely Statement of Matters). Until recently, the test for whether failure to raise a claim in a Statement of Matters waived it was whether the trial record was sufficiently detailed to afford an appellate court the ability to review the claim. See Williams, 753 A.2d at 861. However, in Commonwealth v. Lord the Pennsylvania Supreme Court held that failure to raise an issue in a Statement of Matters ordered by a trial court waived that issue. 719 A.2d 306, 309 (Pa. 1998).

Lord itself was a prospective decision, see Williams, 753 A.2d at 861, n. 4: the court must predict whether Rivera's failure to raise an ineffective assistance claim in his Statement of Matters would have waived that claim on subsequent appeal. The court has been guided by the Forest court's treatment of ineffective assistance of counsel claims: such claims raise issues best heard first by the judge who actually tried the case. 629 A.2d at 1035.

It is not necessary to conclude that Miranda totally denied Rivera his ability to raise a non-frivolous issue: it is sufficient that Miranda's conduct "hindered his efforts to pursue a legal claim." Lewis, 518 U.S. at 352. It is true that Rivera did not attempt to speak his attorneys after August, 1997, about the Statement of Matters issue. It was therefore theoretically possible that Rivera would have been able to file

a late Statement of Matters, or would have been able to convince the Superior Court to hear the alibi issue notwithstanding his failure to raise it below. But see Forest, 629 A.2d at 1035. These possibilities do not destroy Rivera's standing. Lewis held that an inmate must establish that "a nonfrivolous legal claim had been frustrated or was being impeded." Lewis, 518 U.S. at 353. Rivera's claim was frustrated when Miranda prevented him from: (1) ensuring that the original Statement of Matters included the alibi issue; and, (2) amending the Statement of Matters by calling Goldstein in early August.

Second, Miranda argues that Rivera's frustrated ineffective assistance of counsel claim was frivolous. Justice Scalia, writing for the majority in Lewis, held that denied or frustrated claims must have been non-frivolous: denying someone a non-frivolous claim actually helps them by preventing possible Rule 11 sanction. Lewis, 518 U.S. at 353, n. 3. Neither the Court nor the Court of Appeals have defined frivolous with regard to denial of court access.

In Anders v. California, the Court held that an appeal on a matter of law is frivolous where "[none] of the legal points [are] arguable on their merits." 386 U.S. 738, 744 (1967) (addressing an attorney's responsibility to his client on a criminal appeal). This "arguable" standard is distinct from that used by the few courts interpreting "frivolous" in denial of access civil actions. Some have equated non-frivolous with having "arguable merit." Walters v. Edgar, 973 F.Supp. 793, 798 (N.D.Ill. 1997). Others, distinguishing criminal actions from civil, have suggested that criminal appeals must not only be non-frivolous but also probably meritorious. See Sanders v. Illinois, 2000 WL 1263555, at *5, n. 3 (N.D.Ill. Sept. 5, 2000) (suggesting that prisoner must show "not only that he had an argument that he could have made, but that he would have

prevailed.") .

A non-frivolous claim in the denial of access context ought not to be interpreted as a claim having "arguable merit", or probably meritorious: it is sufficient if an attorney could argue, in good faith, that his client's claim has merit.⁷ Rivera has shown his ineffective assistance of counsel claim would have been arguable on the merits.

Failure to object to an improper alibi instruction can be ineffective assistance of counsel under Pennsylvania law, see Commonwealth v. Allison, 622 A.2d 950, 953 (Pa.Super.Ct. 1993), because failure to give a proper alibi instruction is reversible error, even in light of abundant independent evidence against the defendant. See Commonwealth v. Willis, 553 A.2d 959, 962 (Pa. 1989). Although there are no "magic words," the instruction must make it clear to the jury that "failure to prove alibi was not tantamount to guilt." Commonwealth v. Weinder, 577 A.2d 1364, 1369-71 (Pa.Super.Ct. 1990).

Miranda cites alibi instructions in two cases, Commonwealth v. Ragan, 743 A.2d 390, 399 (Pa. 1999), and Commonwealth v. Saunders, 602 A.2d 816, 817 (Pa. 1992), that she argues are "virtually identical" to the one given at Rivera's trial. Her implicit argument is that if the Pennsylvania Supreme Court has

⁷Judge Weinstein's definition of frivolous is illustrative: "Frivolous" is of the same order of magnitude as "less than a scintilla." It is defined in Webster's Third New International Dictionary (1967) as "of little weight or importance: having no basis in law or fact: light, slight, sham, irrelevant, superficial." The Oxford English Dictionary (1971) defines it as "[o]f little or no weight, value or importance; paltry; trumpery; not worthy of serious attention; having no reasonable ground or purpose ... In pleading: Manifestly insufficient or futile." Eastway Constr. Corp. v. City of New York, 637 F.Supp. 558, 565 (E.D.N.Y. 1986), modified and remanded 821 F.2d 121 (2nd Cir. 1987), cert. denied, City of New York v. Eastway, 484 U.S. 918 (1987).

not disapproved a particular alibi instruction, any objection to a similar instruction is clearly frivolous.

The trial court's primary alibi instruction was not actually identical to those sustained in Ragan or Saunders. It is apparent from the Pennsylvania Supreme Court's treatment of a non-identical instruction in Ragan that trial courts must use great care in the crafting of an alibi instruction. The Supreme Court did not dismiss Ragan's arguments outright, but analyzed them on the merits under the reasonable doubt test. Ragan, 743 A.2d at 398-99. Although Rivera was unlikely to prevail on his ineffectiveness claim, he could have made an argument on the merits before a Court that has been deeply concerned about the effect of improper alibi instructions. It is good practice in Pennsylvania to object to any non-standard alibi instruction; appeals protesting an attorney's failure to do so have the requisite merit to satisfy the standing test.

Second, the alibi instruction given in Rivera's trial had two parts. First, the court gave a lengthy instruction conforming substantially to those given in Ragan and Saunders.⁸

⁸The instruction in Rivera's case was: "Again, I'm going to indicate certain testimony to you, but it doesn't mean that I believe or disbelieve it, it's up to you. But one of the witnesses concluded or testified to you that after he heard shots and walked down the street, across the street the Defendant was standing there. This is sometimes referred to as an alibi. Obviously a Defendant cannot be guilty unless he or she is a participant in the commission of the crime. You should consider any evidence such as an alibi along with all other evidence in the case in determining whether the Commonwealth has met its burden of proving beyond a reasonable doubt that a crime was committed and that this defendant took part in committing that crime. The evidence that he was not present, either by itself or together with other evidence, may be sufficient to raise a reasonable doubt in your mind. If you have a reasonable doubt of defendant's guilt, you must find him not guilty.

An alibi defense, in some cases, may not be wholly believed, but it still may raise a reasonable doubt of his presence at the

However, the instruction only referred to one alibi witness. When reminded of this, the trial court provided a second instruction:

I referred to a possible alibi witness when, in fact, Nieves and Rodriguez both offered opportunity to be someplace else by this Defendant at the time of the killing, therefore, there's two possible alibis.

P. Mem of Law in Support of Position that He Suffered Actual Injury, at 5. Rivera could have argued that this later instruction confused the jury if the alibi witnesses were disbelieved. Unlike the instructions in Saunders and Ragan, this brief "explanation" did not inform the jury that failing to believe either one or the other alibi witness still did not mean that the Commonwealth satisfied its burden of proving the defendant's guilt beyond a reasonable doubt. Ragan, 743 A.2d at 399.

E. Damages

From filing until judgment, defendant never provided any explanation for her failure to allow Rivera to call his attorney. At trial, she denied knowing of his need. The jury evidently did not believe her: neither does the court. It is unacceptable for a prison warden to ignore policies designed to balance penal interests and constitutional rights. Such deliberate action abuses the limited discretion the state vests in individuals of Miranda's relative authority. Rivera's increasingly desperate requests to be allowed to speak with his

scene of the crime at the time the crime was committed. If such a reasonable doubt is raised by the alibi defense, the jury should acquit the defendant."

attorney demonstrate the harm caused by the petty tyranny of those with power over the powerless. Miranda's conduct evinced deliberate indifference to Rivera's constitutional rights. See Smith v. Wade, 461 U.S. 30, 50 (1983) (reckless or callous disregard for plaintiff's rights can give rise to punitive damages). Punitive damages were appropriate.

This case could have been tried to a jury, but plaintiff waived that right. See Order, March 23, 2001. The court empaneled an advisory jury to help decide the difficult issues of fact and intent before it. The advisory jury's decision does not bind this court. See Hayes v. Comm. Gen. Osteopathic Hosp., 940 F.2d 54, 57 (3d Cir. 1991), cert. denied, 502 U.S. 1060 (1992). However, the jury's advice about Miranda's culpability and her indifference was particularly helpful and supports the court's independent conclusions from the evidence.

The court will award damages that both punish Miranda for her culpable conduct as well as warn others who would be similarly tempted to misuse positions of authority. The advisory jury awarded nominal damages of \$1.00 and punitive damages of \$10,000.00. This award was excessive in the circumstances of this case: Miranda's culpability was clear, though petty, but even a relatively small punitive award will have a deterrent effect. The court will accept and adopt the advisory jury's compensatory verdict, but reduce its punitive damage verdict to \$1000.00.

III. Conclusions of Law:

1. The court has jurisdiction over the subject matter and the parties. Venue lies in this district.
2. Miranda waived her right to assert a qualified immunity defense.

3. Miranda denied Rivera access to the court by refusing to allow him to place a telephone call to Goldstein, his attorney.
4. The availability of pen and paper correspondence was not an acceptable alternative means of court access for an illiterate inmate when the inmate faced court ordered deadlines.
5. Rivera suffered actual prejudice when he was unable to direct the content of his Statement of Matters Filed on Appeal.
6. Rivera's ineffective assistance of counsel claim would not have been frivolous had he filed it.
7. Miranda was deliberately indifferent to the deprivation of Rivera's constitutional right of court access.
8. The advisory jury's award to Rivera of \$1.00 in compensatory damages and \$10,000.00 in punitive damages was excessive in light of Miranda's culpability and the need to deter similar conduct from occurring in the future. Judgment will be entered in the amount of \$1.00 in compensatory damages and \$1,000.00 in punitive damages.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

FRANK RIVERA : CIVIL ACTION
 :
 v. :
 :
 :
 JOANNE MIRANDA : No. 97-7547

JUDGMENT

AND NOW, this 2nd day of October, 2001, for the reasons stated in the foregoing memorandum, **JUDGMENT** is entered in favor of Plaintiff Frank Rivera and against Defendant Joanne Miranda in the amount of \$1,001.00.

Norma L. Shapiro, S.J.