

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

GUY DREXEL : CIVIL ACTION  
 :  
 v. :  
 :  
 MARTIN F. HORN, et al. : No. 96-3918

MEMORANDUM AND ORDER

Norma L. Shapiro, J.

June 20, 1997

In May, 1997, plaintiff Guy Drexel filed a pro se action pursuant to 42 U.S.C. § 1983, against Martin F. Horn, Commissioner, Pennsylvania Department of Corrections, Donald T. Vaughn, Superintendent at State Correctional Institution, Graterford ("SCI-Graterford"), Deputy Superintendent Winder, SCI-Graterford, Correctional Officers Captain Robert Terra, Captain Creighton Caisson, former Lt. Michael Barone, Lt. Kevin Marsh, at SCI-Graterford, Adrian Callendar, Inmate Prison Manager and Program Review Committee ("PRC") member, Psychologist Russell Smith, a PRC member, Sgt R. Cox, Sgt. Britton, CO-1 R. Cavalari and CO-1 J. Kenth. Drexel alleges his substantive and procedural due process rights were violated by the prison employees when he was placed in administrative custody and eventually transferred because he was assisting in an investigation into alleged wrongdoing at SCI-Graterford. The plaintiff maintains that his Fifth, Eighth and Fourteenth Amendment Rights were violated in retaliation for his refusal to plead guilty to false charges.

On August 8, 1996, Drexel's claim against Horn was dismissed as frivolous. Drexel's appointed counsel filed an amended complaint, against all the parties in the original complaint, including Horn, on February 12, 1997. On March 24, 1997, all remaining defendants but CO-1 J. Kenth (never employed by SCI-Graterford) moved for a dismissal of the amended complaint pursuant to Fed. R. Civ. P. 12(b)(6). The court will grant in part and deny in part the motion to dismiss.

### **I. FACTS**

On a motion to dismiss all facts alleged by plaintiff must be accepted as true. Drexel had information on illegal activities surrounding the SCI-Graterford "Mudman" Simon scandal. This information implicated defendants Caison, Terra, Barone, Callender and Winder who were aware Drexel had this information.

On April 19, 1995, without explanation, Lt. Owens escorted Drexel from his former cell to the Restricted Housing Unit ("RHU"). Drexel's property was packed and stored by Sgt. Britton and CO-1 Cavalari, and placed in custody of Sgt. Cox. About five hours after confinement in the RHU, Drexel was given an "Other Report," signed by Lt. Owens and approved by Capt. Terra. The "Other Report" stated that Drexel was placed in administrative custody as a "security risk." Drexel was later given a "Misconduct Report" alleging he possessed contraband tools.

On April 20, a hearing was held on the Misconduct Report and the charge was dismissed. On April 26, there was a PRC hearing before defendants Smith, Callender and Marsh. The

PRC remanded Drexel to the RHU without a stated reason. Drexel appealed to Supt. Vaughn who was required to review and approve each PRC decision, but Vaughn never answered. Another PRC review was held May 24, 1994; the PRC maintained Drexel was being held for "hoarding tools," and would not be released from the RHU until he admitted his guilt. Drexel was also threatened with transfer to another facility if he did not cooperate.

Drexel was brought before the PRC again on June 21 and remanded to the RHU. Plaintiff appealed to Supt. Vaughn on June 22, but again there was no answer. On July 12, Deputy Supt. Winder visited plaintiff and told him, "he knew too much...and that he should keep his mouth shut." Three days later, Drexel met with Lt. Solar and Deputy Stachelek. Lt. Solar told Drexel he had seen his property in storage and requested his cooperation in the staff investigation of the "Mudman" scandal. The July, 1995 PRC review was essentially identical to previous ones.

On August 7, 1995, Drexel had a chance meeting with Winder at SCI-Graterford. Winder was extremely angry about Drexel had met with Lt. Solar and Deputy Stachelek. On August 16, 1995, the PRC advised Drexel he was being transferred for hoarding tools. Drexel was transferred to SCI-Greene on August 25, 1995. Important personal property including names, phone numbers and photos of staff members had been taken while his property was in the control of defendants Cox, Britton and Cavalari.

At SCI-Greene, Drexel was interviewed by a Pennsylvania State Police Officer, a federal agent, and Mike Dotson of the Department of Correction Internal Affairs Division. Drexel was informed a false report that he had set up a homosexual circle had been inserted in his record to explain his transfer. This report was not considered credible and allegedly was deleted.

On February 14, 1996, Drexel testified before a federal grand jury in Philadelphia and was transferred to SCI-Mahanoy in return for his cooperation and testimony.

## II. DISCUSSION

Plaintiff's Amended Complaint can only be dismissed for failure to state a claim if the court concludes that beyond a doubt and under no set of facts or circumstances would plaintiff be entitled to the relief sought in the complaint. See Stone v. Pennsylvania Merchant Group, 915 F. Supp. 727 (E.D. Pa. 1996). The court is required not only to accept all well-pleaded facts as true, but must also resolve all factual disputes in the light most favorable to the nonmoving party. See Scarborough v. Eubanks, 747 F.2d 871 (3d Cir. 1984). A motion to dismiss should only be granted in the clearest case. See Poulis v. State Farm Fire and Cas. Co., 747 F.2d 863 (3d Cir. 1984).

### A. Eleventh Amendment Bar

The complaint sues defendants individually and in their official capacity. The Eleventh Amendment<sup>1</sup> bars federal courts

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1. The Amendment states: "The Judicial power of the United  
(continued...)"

from hearing actions by private parties against a state and its agencies, unless the state has consented to filing such action. See Papasan v. Allain, 478 U.S. 265, 267 (1986); Alabama v. Pugh, 438 U.S. 781, 782 (1978)(per curiam). This immunity extends to actions asserting violations of constitutional rights where the state is the named defendant. See Laskaris v. Thornburgh, 661 F.2d 23 (3d Cir. 1981). The Eleventh Amendment bar "extends to suits against departments or agencies of the state having no existence apart from the state." Id. at 25 (quoting from Mount Healthy City Bd. of Educ. v. Doyle, 429 U.S. 274, 280 (1977)).

The Commonwealth has not waived its rights under the Eleventh Amendment. The Department of Corrections ("DOC") is an agency of the state. See 71 Pa. Cons. Stat. Ann. § 61. Drexel has conceded he is not suing defendants in their official capacity, but rather as individuals. Therefore, the motion to dismiss is granted as to violations of Section 1983 by state employees in their official capacity.

**B. Personal involvement by Defendants Horn, Vaughn and Cox.**

A state official cannot be held liable under § 1983 unless he participated in, had personal knowledge of, or acquiesced in the wrongdoing. See Rode v. Dellarciprete, 845 F.2d 1195, 1207 (3d Cir. 1988)(governor not liable for sexual

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(...continued)

States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against any one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

harassment carried out by a Pennsylvania state employee where he had little or no knowledge of the incident). Defendant cannot recover on a theory of vicarious liability or respondeat superior. See Hampton v. Holmesburg Prison Officials, 546 F.2d 1077, 1082 (3d Cir. 1976).

**1. Commissioner Martin F. Horn**

The action against Horn in the original complaint was dismissed as frivolous. He was renamed a defendant in the amended complaint, but there are no factual allegations pertaining to him; the claim against Horn is dismissed.

**2. Superintendent Donald T. Vaughn**

The facts alleged in Drexel's complaint, if read fairly in light of the deferential standard of review, are that Vaughn refused to consider Drexel's appeals despite personal knowledge that Drexel was being held in the RHU illegally. Prison regulations require Vaughn to review and approve all RHU placements. See Commonwealth of Pennsylvania, Department of Corrections, Administrative Custody Procedures (DC-ADM 802), § VI(B)(4) (June 29, 1992). Vaughn had the authority to have Drexel removed from the RHU and had sufficient knowledge of Drexel's situation. This claim withstands the motion to dismiss.

**3. Sergeant R. Cox**

The complaint identifies Cox as the person in charge of Drexel's property at SCI-Graterford. Some of the property disappeared while the property was under Cox's control. In his amended complaint, Drexel alleges personal involvement by Cox

not respondeat superior liability.<sup>2</sup> The complaint alleges Cox intentionally converted Drexel's property.

Negligent deprivation of property, even if done under color of state law, does not in and of itself amount to a violation of Section 1983. See Parratt v. Taylor, 451 U.S. 527, 537-38 (1981) The Fourteenth Amendment protects only against deprivations without due process of law. See id. at 537. "While Parratt is necessarily limited by its facts to negligent deprivations of property, it is evident . . . that its reasoning applies as well to intentional deprivations of property." See Hudson v. Palmer, 468 U.S. 517, 533 (intentional destruction of inmate's court documents during search of his cell does not state a valid Section 1983 claim).

Since the state cannot "anticipate and control in advance the random and unauthorized intentional conduct of its employees," adequate state post-deprivation remedies are sufficient to satisfy due process. See Hudson, 468 U.S. at 533; see also Parratt, 451 U.S. at 538. Other adequate remedies need not provide Drexel with all the relief that may be available under Section 1983, but to satisfy due process, they must sufficiently compensate Drexel for the loss of his property. See

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2. As to both Cox and Vaughn, the Strain v. Strackhouse, 920 F.2d 1135 (3d Cir. 1990), variables to determine responsibility of state employees in § 1983 claims may apply. They include (1) amount of information known to various defendants; (2) scope of duties and authority; (3) training and expertise; (4) allocation of decision making power; (5) reporting and review powers; (6) established procedures; and (7) informal custom.

Parratt, 451 U.S. at 544; Hicks v. Feeny, 770 F.2d 475, 378 (3d Cir. 1985). Drexel alleges that the Pennsylvania Department of Corrections provides no specific remedy for the loss of the property.

A grievance system has been recognized as adequate post-deprivation remedy. See Iseley v. Horn, No. 95-5389, 1996 WL 510090, at \*6 (E.D. Pa. Sept. 3, 1996) (confiscation of television set); Austin v. Lehman, 893 F. Supp. 448, 454 (E.D. Pa. 1995) (withholding cigarettes from inmate). The SCI-Graterford grievance process is a state post-deprivation satisfying due process and precluding a § 1983 claim. See Pew v. Cox, No. 93-4128, 1993 WL 418357, at \*1 (E.D. Pa. Oct. 15, 1993). Since Drexel had an adequate state remedy with respect to his lost property, his due process rights have not been violated and he has not stated a valid Section 1983 claim against defendant Cox. Similarly, the only alleged wrongdoing by Cavalari and Britton was the loss or conversion of Drexel's property. The claims against all three defendants will be dismissed.

### **C. Fifth Amendment Claims**

Drexel alleges violation of Fifth Amendment due process rights. The Fifth Amendment states: "No person shall . . . be subject for the same offence to be put twice in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. The rights Drexel claims to have been violated include double jeopardy and

self-incrimination. Neither of these claims are applicable to this case.

### **1. Double Jeopardy Claim**

Drexel alleges being "tried" twice on the same charges of "hoarding tools" in different disciplinary proceedings. Internal discipline proceedings in prisons do not constitute jeopardy for double jeopardy purposes. See United States v. Goldberg, 855 F. Supp. 725, 731, rev'd on other grounds, 67 F.3d 1092 (M.D. Pa. 1995) A prisoner who is punished by internal prison proceedings can be subjected to later criminal prosecution. See United States v. Newby, 11 F.3d 1143, 1144 (3d Cir. 1993); United States v. Stuckey, 441 F.2d 1104, 1105 (3d Cir. 1971)(per curiam). The Fifth Amendment Double Jeopardy claim will be dismissed.

### **2. Self-incrimination claim**

The right not to be forced to incriminate oneself does not apply in the prison setting, since the due process "full panoply of rights" are not due in prisoner hearings. See Morrissey v. Brewer, 408 U.S. 471, 480 (1971). The minimum process due in a prison disciplinary hearing includes only: (1) written notice at least 24 hours before the hearing; (2) the opportunity to call witnesses "if consistent with institutional safety and correctional goals;" and (3) a written statement of the reasons for the action. See Wolff v. McDonnell, 418 U.S. 539, 563-67 (1974). There is no privilege against self-

incrimination. The court will grant dismissal on this second Fifth Amendment claim.

**D. Eighth Amendment claim under Cruel and Unusual Punishment Clause**

The Eighth Amendment, as applied to states through the Due Process Clause of the Fourteenth Amendment, prohibits infliction of cruel and unusual punishment. See Robinson v. California, 370 U.S. 660, 666. Only "unnecessary and wanton infliction of pain" implicates the Eighth Amendment. See Gross v. Georgia, 428 U.S. 153 (1976). Solitary confinement is not cruel and unusual punishment per se. See Young v. Quinlan, 960 F.2d 351, 364 (3d Cir. 1992).

A two part test determines if punishment is cruel and unusual under the Eighth Amendment. See id. at 359-60. First, there must be a denial of "minimal civilized measures of life's necessities." See Rhodes v. Chapman, 452 U.S. 337, 347 (1981). Second, the punisher must have a sufficiently culpable state of mind. See Wilson v. Seiter, 501 U.S. 294, 297 (1991). The fact that a transfer hinders Drexel's ability to see family members fails to give rise to an Eighth Amendment claim. See Olim v. Wakinekona, 461 U.S. 238 (1983)(transfer of prisoner from Hawaii to California prison was not a denial of Eighth Amendment rights); Wright v. Caspari, 779 F. Supp. 1025 (E.D. Mo. 1992)(transfer of prisoner across state is not cruel and unusual punishment despite hardship on his marriage).

Drexel has not claimed confinement to the RHU denied him minimal civilized measures of life's necessities. This claim will be dismissed as frivolous.

**E. Fourteenth Amendment Due Process and Retaliation Claims**

The Fourteenth Amendment provides that no state shall "deprive any person of life, liberty or property, without due process of law." U.S. Const. amend. XIV. Drexel alleges that his "retention in the RHU constituted an atypical and significant hardship on the plaintiff as related to the ordinary incidents of prison life." Amended Complaint, ¶ D. He also alleges that he was denied due process because he was (1) prevented from calling witnesses and presenting evidence at the PRC hearings, see id. ¶ E, and (2) held in administrative custody for failing to plead guilty to false charges against him, see id. ¶ F. Drexel alleges the actions taken against him were purely retaliatory.

A protected liberty interest requires proof of an "atypical and significant deprivation" of liberty to implicate the due process clause. In Sandin v. Conner, 115 S. Ct. 2293 (1995), Sandin alleged his due process was violated when he was placed in disciplinary custody, but the Court ruled this was not a "dramatic departure from the basic [prison] conditions," so the Due Process Clause was not violated. See id. at 2299-2300. Under Sandin, an inmate charged with misconduct has no protected liberty interest in remaining in the general prison population. See, e.g., Murray v. Terra, No. 95-003 (E.D. Pa. Sept. 8, 1995); Brown v. Stachelek, No. 95-522, 1995 U.S. Dist. LEXIS 10312 (E.D.

Pa. July 20, 1995). Drexel had no protected liberty interest in remaining in the general prison population rather in the RHU. See id.; see also Griffin v. Vaughn, 112 F.3d 703 (3d Cir., May 5, 1997)(placement of prisoner suspected of raping a guard did not implicate the due process clause).

Even absent a finding of a liberty interest, Drexel still has a valid due process claim under § 1983. Drexel asserts he was confined to the RHU in retaliation for his testimony in the ongoing investigation at SCI-Graterford. "An act in retaliation for the exercise of a constitutionally protected right is actionable under Section 1983 even if the act taken for different reasons would have been proper." Franco v. Kelly, 854 F.2d 584, 590 (2d Cir. 1988)(prisoner stated claim under section 1983 when he alleged the filing of false charges in retaliation for exercising his right to testify)(emphasis added); see also Hale v. Townley, 19 F.3d 1068, 1074 (5th Cir. 1994)(allegations that police harassed defendant after he won a law suit against them withstands summary judgment); Soranno's Gasco, Inc. v. Morgan, 874 F.2d 1310, 1316 (9th Cir. 1989). "[O]rdinary citizens enjoy a constitutional privilege to freely participate in governmental investigations," Cornell v. Woods, 69 F.3d 1383, 1388 (8th Cir. 1995)(prisoner retains rights to answer investigators' questions while incarcerated), although prisoners are not "ordinary citizens," they still enjoy this First Amendment right. See Pell v. Procunier, 417 U.S. 817, 819, 821-23 (1974); Cruz v. Beto, 405 U.S. 319, 321-22 (1972).

In Anderson v. Horn, No. 95-6582, 1997 WL 152801 (E.D. Pa. March 28, 1997), Judge J.M. Kelly denied a defense motion for summary judgment where it was alleged the plaintiff was confined to the RHU and denied supplies in retaliation for exercising First Amendment speech. Id. at \*3. Drexel also was exercising his constitutional rights; Drexel's activity regarding prison corruption, a matter of grave public concern, implicated rights under the First Amendment.

The other disciplinary action allegedly taken against Drexel, transfer from one prison to another, is actionable under § 1983 if done in retaliation for exercising a constitutionally protected right. See Majid v. Henderson, 533 F. Supp. 1257 (N.D.N.Y.), aff'd 714 F.2d 115 (2d Cir. 1982). The filing of charges against a prisoner, later proven to be unsubstantiated, also gives rise to a § 1983 claim if the charges were filed by the officials in retaliation for exercising a constitutional right. See Flanagan v. Shively, 783 F. Supp. 922 (M.D. Pa. 1992).

Drexel must ultimately prove his conduct was a substantial and motivating factor in defendants' decisions, see Mount Healthy, 429 U.S. at 287 (1977); Cornell, 69 F.3d at 1388; Majid, 533 F. Supp. at 1270, but he has sufficiently alleged that the defendants' actions were retaliatory. Defendants learned Drexel was assisting in an investigation of corruption before sending him to the RHU, allowing him to remain there, and then

transferring him.<sup>3</sup> These allegations of retaliation for Drexel's exercise of constitutional rights are sufficient to withstand the motion to dismiss plaintiff's Fourteenth Amendment Section 1983 claim.

#### **F. State Law Tort Claims**

Drexel alleges eighteen pendent state law claims.<sup>4</sup> The Commonwealth of Pennsylvania is a sovereign immune from liability without its consent. See 1 Pa. Cons. Stat. Ann. § 2310 ("[O]fficials acting within the scope of their duties, shall continue to enjoy sovereign immunity and remain immune from suit except as the General Assembly shall specifically waive immunity."); Shoop v. Dauphin County, 766 F. Supp. 1327, 1333-34 (M.D. Pa.), aff'd 945 F.2d 396 (3d Cir. 1991), cert. denied, 112 S. Ct. 1178 (1992); LaFrankie v. Miklich, 618 A.2d 1145, 1149 (Pa. Commw. Ct. 1992). Agents of the Commonwealth are immune from suit for those actions taken within the scope of their duties except with respect to nine narrow areas dealing only with

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3. The actions that harmed Drexel were the confinement to the RHU and his subsequent transfer, not the verbal threats made by Deputy Winder or any other officials. Verbal threats, in and of themselves, are not actionable under Section 1983. See Hodgin v. Agents of Montgomery County, 619 F. Supp. 1550, 1552 (E.D. Pa. 1985); Ricketts v. Derello, 574 F. Supp. 645, 647 (E.D. Pa. 1983).

4. These claims include Due Process of Law, Fictitious Reports, Retaliation, Intentional Infliction of Emotional Distress, Invasion of Privacy, False Incrimination, Outrageous Conduct, Intimidation with Malicious Intent, Witness Intimidation, False Imprisonment, Misrepresentation, Malicious Prosecution, Misfeasance, Negligence, Gross Negligence, Negligent Hiring, Retention and/or Supervision, Nonfeasance, and Conversion and Theft. Amended Complaint, ¶ G, Nos. 1-18.

negligence.<sup>5</sup> Defendants are immune even if the state violations required a level of intent. See Collins v. Bopson, 816 F. Supp. 335, 342 (E.D. Pa. 1993); Yakowicz v. McDermott, 548 A.2d 1330 (Pa. Commw. Ct. 1988). Unlawful conduct by the defendants, does not abrogate the Commonwealth's immunity. See Shoop, 766 F. Supp. at 1334 (alleged wrongdoing by Commonwealth officials does not mean those officials were acting outside the scope of their duties).

Acts of employees may be considered within the scope of their duties even if they acted disobediently, abused authority, or behaved tortiously or criminally. See First Nat'l Bank of Altoona v. Turchetta, 181 A.2d 285, 288 (Pa. 1962); Potter Title & Trust Co. v. Knox, 113 A.2d 549, 551 (Pa. 1955); Commonwealth, Dept. of Transp. v. Cox, 476 A.2d 1012, 1014 (Pa. Commw. Ct. 1984). Defendants were acting within the scope of their duties as prison officials. Since each was acting within the scope of his duties, Drexel has no pendent state claims.

Drexel alleges the defendants Cox, Britton and Cavalari, stole his address book and photo album, and that this cause of action falls under the property exception set forth at Pa. Cons. Stat. Ann. § 8522(b)(3). However, Pennsylvania courts

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5. The Commonwealth has waived sovereign immunity in negligence actions involving: (1) vehicle liability; (2) medical-professional liability; (3) care, custody and control of personal property; (4) Commonwealth real estate, highways or sidewalks; (5) potholes and other dangerous conditions; (6) care, custody and control of animals; (7) liquor store sales; (8) National Guard activity; and, (9) toxoids and vaccines. 42 Pa. Cons. Stat. Ann. § 8522(b).

interpret this exception narrowly. See Iseley v. Horn, No. 95-5389, 1996 WL 510090, at \*6 (E.D. Pa. Sept. 3, 1996)(prisoner denied recovery for confiscation of television set); see also Collins, 816 F. Supp. at 342. “[T]he personal property waiver only applies where the personal property itself causes plaintiff’s injury . . . .” Bufford v. PennDOT, 670 A.2d 751, 753 (Pa. Commw. Ct. 1996). Drexel has not alleged the property has caused him any physical injury as under the case law. Defendants’ retention or confiscation of Drexel’s property is not sufficient to qualify for the exception to sovereign immunity conferred by statute.

### III. CONCLUSION

Claims against defendants Vaughn, Terra, Caisson, Barone, Marsh, Callender, Smith and Winder, under 28 U.S.C.A. § 1983 for violation of Drexel's Fourteenth Amendment due process rights arising out of retaliation for his exercise of a constitutional right, remain; all other claims are dismissed.

An appropriate order follows.

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

GUY DREXEL : CIVIL ACTION  
 :  
 v. :  
 :  
 MARTIN F. HORN, et al. : No. 96-3918

AND NOW, this 20th day of June, 1997, upon consideration of Defendant's Motion to Dismiss, and Plaintiff's Memorandum in Opposition thereto, it is **ORDERED** that:

(1) the Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(6) is granted in respect to:

(A) Section 1983 claims against prison officials in their official capacity;

(B) Violation of due process claims against defendants for loss of Drexel's property;

(C) Fifth Amendment Due Process claims including Double Jeopardy and Self-incrimination claims;

(D) Eighth Amendment claims alleging Cruel and Unusual Punishment;

(E) State Tort Law Claims.

(2) Claims against defendants Vaughn, Terra, Caisson, Barone, Marsh, Callender, Smith and Winder, under 28 U.S.C.A. § 1983 for violation of Drexel's Fourteenth Amendment due process rights arising out of retaliation for his exercise of a constitutional right, remain.

(3) Defendants Vaughn, Terra, Caisson, Barone, Marsh, Callender, Smith and Winder shall answer said claims within ten (10) days.

(4) The caption is **AMENDED** as follows:

GUY DREXEL	:	CIVIL
	:	ACTION
v.	:	
	:	
DONALD T. VAUGHN, Superintendent	:	
at State Correctional Institution,	:	
Graterford; CAPTAIN ROBERT TERRA;	:	
CAPTAIN CREIGHTON CAISSON; LT.	:	
MICHAEL BARONE; LT. KEVIN MARSH,	:	
and, ADRIAN CALLENDAR, and	:	
RUSSELL SMITH, members of the	:	
Program Review Committee at the	:	
State Correctional Institution,	:	
Graterford, DEPUTY SUPERINTENDENT	:	No.
WINDER	:	96-3918

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J.