STATE OF WISCONSIN CIRCUIT COURT COUNTY OF DODGE

In the Matter of
WARREN G. LILLY, JR. #447655

MEMORANDUM DECISION AND ORDER TERMINATING FORCE FEEDING AND INJUNCTION AGAINST FORCE FEEDING

Case No. 07CV392

The undersigned judge has been involved with the involuntary forced feeding by the Department of Corrections of inmate Warren G. Lilly, Jr. since early in 2008. The Wisconsin Department of Corrections (hereinafter referred to as the "DOC") had petitioned this Court for review in order to come into compliance with the Wisconsin Court of Appeals decision in *Wisconsin Department of Corrections v. Saenz*, 2007 WI App 25 (hereinafter referred to as "*Saenz*").

In *Saenz* the Fourth District Court of Appeals set forth a process for trial courts to follow when confronted by a petition from the DOC to force feed one of their inmates. While these types of cases have been around forever, there had been no prior pronouncement by a Wisconsin appellate court as to what procedure should be followed and what interests were being balanced. The Court cited *Cruzan v. Missouri Department of Health*, 497 U.S. 261 (1990). That case, in conjunction with the U.S. Supreme Court's announcement in *Washington v. Glucksberg,* 521 U.S. 702 (1997) established, in essence, that U.S. citizens have a right to die. That is to say that competent, sane individuals have a privacy right to refuse unwanted medical care, even if that medical care would otherwise be required to keep them alive.

This Court marked and received, at is most recent hearing, Exhibit 17, a Stanford Law Review Note authored by Mara Silver entitled "*Testing Cruzan : Prisoners and the Constitutional Question of Self Starvation*", 58 Stan. L. Rev. 631 (November, 2005). As noted by Ms. Silver, there seems to be no law or pronouncement by the U.S. Supreme Court that this right to die is checked at the door by inmates who are serving sentences in U.S. jails and/or prisons. Yet there has been the development of an additional body of law requiring a balancing of that right with the penological interests of the corrections agencies.

One of those cases was also decided by the United States Supreme Court, in *Washington v. Harper*, 494 U.S. 210 (1990). This *Harper* case was cited extensively by the Court of Appeals in *Saenz* despite the fact that *Harper* actually dealt with the question of what policies and procedures must be followed in order to provide mental health treatment and psychotropic drugs to an incompetent mentally ill inmate. As will be discussed below, inmate Lilly is about as far from a mentally ill, incompetent inmate as a person can get. Therefore, his situation, compared to that of Mr. Harper, might be said to be something along the lines of apples and oranges, or probably even more appropriate, apples and golf balls. Presumably, the *Saenz* procedures, and whatever the Court develops in this Lilly case, will focus on sane and competent individuals, because only such individuals have the right to refuse medical care (even unto death as established in *Cruzan*[1]).

Despite *Harper's* dealing with incompetent inmates, the Wisconsin Court of Appeals came up with a rational, and I think workable, approach for trial judges to employ when dealing with these types of cases. The *Saenz* case only goes so far, however. Inmate Lilly maintained the longest running hunger strike ever in the history of the Wisconsin Department of Corrections, at least according to two of the recent witnesses. Five year hunger strikes are relatively unknown anywhere in the State, or for that matter, outside the State. This long running hunger strike by reason of it duration, as well as its location, in six or eight different prisons, as well as its involvement of various treatment staff and security staff who were all operating without any type of consistent protocol or care plan for this inmate, gave rise to many issues probably not anticipated by the Court of Appeals in *Saenz*. This Court can envision at least four different complexes of issues related to force feeding of inmates as those issues have been developed and portrayed through the Lilly case.

***Saenz* I. Standard for obtaining initial order for force feeding inmates.** This is the case law developed by the Court of Appeals two years ago in the *Saenz* case. The Court accepted Saenz' assertion that force feeding is a highly invasive practice, and may cause "substantial pain and discomfort." *Saenz* at ¶22. However, the Court also accepted the DOC's assertion that there are penological interests to be served in

[1] An incompetent person, including inmates, could exercise their right to die only if they had given an advance directive, such as by a living will.

force feeding inmates in order to keep them alive. The Court of Appeals struck a balance by requiring the DOC to prove the following things in order to obtain a force feeding order.

1) That the inmate has refused to consume sufficient food or liquid to maintain his health for an extended period of time;
2) That the inmate has been diagnosed by a physician, is suffering from moderate to severe malnutrition or dehydration; and
3) That medical staff find the inmate to be in imminent danger of suffering serious harm or death unless given immediate treatment, including forced hydration and/or forced feeding. *Saenz* at ¶28.

The Court went on to discuss the procedures, including that there may be an evidentiary hearing, that the Court has no obligation to provide counsel to the subject, that the subject has no right to an independent medical examination, but should have a meaningful opportunity to participate in the hearing, including calling as well as cross examining witnesses.

Through the lens of this Lilly case, the undersigned perceives that the *Saenz* case dealt with about 40%, maybe up to 50%, of the possible issues that these cases can give rise to. The Court is quick to add that despite the fact that over half of the issues were left unsettled by *Saenz* I, the issues that were dealt with in that case would probably take care of at least 95% of the inmate hunger strikes in Wisconsin. It is only through the long term involvement of the Court in a long-term hunger strike that the other complexes, or constellations, of issues arise. So just to make this crystal clear, this Court is not criticizing the Court of Appeals in Saenz, because the Court there dealt with all of the issues that were properly before the Court in that case. It is only through a unique case like the Lilly case that the new issues are given birth.

Through the Lilly case and the testimony and arguments that the Court has heard in various hearings in the last year and a half, it is clear that very few, if any, inmates get beyond the first few weeks or months of a hunger strike. The DOC responds by strapping the inmate into a restraint chair and inserting a nasal-gastric tube (hereinafter referred to as NG tube) through the inmate's nose and down to the stomach, and nutrition and liquids are then dripped, drained, or injected in. According to testimony at the recent hearing, the vast majority of inmates give up at that point and begin to accept

the meal trays again. What the Court is saying here is that the original *Saenz* decision is probably sufficient to govern 95 to 98% of the hunger strikes in Wisconsin prisons today.

Lilly I / *Saenz* II. The standard for obtaining extension orders in force feeding cases. The Court believes that there is already an appeal pending in this same case from this Court's original Lilly decision entered back on January 11, 2008. What *Saenz* had failed to address in any type of express or meaningful way was what the standard would be for an extension of a forced feeding order when the DOC came back before the Court for review and extension. The Court of Appeals in *Saenz* did indicate that these forced feeding orders cannot be indefinite in duration and directed that they be of a limited term.

Even in its first order, this Court was in essence extending previous orders made by the Court down in Racine County some number of years ago. This Court discussed the standard that would have to be demonstrated by the DOC in *Saenz* I above. That standard, frankly, could never be met by the DOC with regard to any inmate with whom they had done at least a halfway decent job of force feeding. In other words, inmates who are being force fed typically, as the result of the forced feeding, are not severely malnourished or dehydrated. Yet, if they are still continuing their strike and are being fed forcibly, presumably if the forced feeding were withdrawn, they would quickly re-enter such a medical condition.

In this Court's order of January 11, 2008, therefore, the Court suggested to the Court of Appeals that a standard be developed similar to what we use on extension orders in involuntary mental commitment cases.

In the Matter of the Mental Condition of W.R.B., 140 Wis.2d 347 (Ct. App. 1987) gave the Court of Appeals an opportunity to review and consider what proof would be necessary to extend treatment for an involuntary mental commitment case. The Court noted that if the State again had to show that there were recent overt acts, and that the patient was actively posing a danger to himself or others, then in fact the State probably could not meet that standard, due to the fact that mental health treatment had been provided for the previous six months or a year. This was also discussed by the Court of Appeals *In the Matter of M.J.*, 122 Wis.2d 525 (Ct. App. 1984). As the Court of Appeals noted in both of the cases cited above, it is not in the public interest to have a

> "**revolving door phenomena** whereby there must be proof of a recent overt act to extend the commitment, but because the patient is still under treatment, no overt acts occurred, and the patient was released from treatment only to commit a dangerous act and to be recommitted. The result was a vicious circle of treatment, release, overt act, recommitment." (Emphasis added) *In the Matter of the Mental Condition of W.R.B.*, *supra* at Pg. 351. See also *In the Matter of M.J., supra* at Pgs. 533-534.

Similarly, in an inmate hunger strike case, we should not require the DOC to stop the force feeding for some sufficient period of time in order to get the inmate back into a situation where he is severely malnourished or dehydrated in order to obtain an extension order to carry on with the force feeding.

Therefore in this Court's order of January 11, 2008, the Court suggested the following standards to the Court of Appeals:

1) That the inmate <u>is still refusing</u> to consume food and fluids sufficient to maintain his health for an extended period of time;
2) That the inmate has been refusing food and fluids for a sufficient length of time that <u>had the forced provision of nutrition and/or hydration been absent, the inmate would have suffered from death or serious bodily harm</u>; and
3) That <u>it is likely that if the forced provision of nutrition and/or hydration were withdrawn, the inmate would continue to hunger strike and suffer serious harm or death</u>.

The Court's order, based on that standard, was appealed by inmate Lilly, but that appeal has not yet been determined by the Court of Appeals. When I asked Mr. Lilly within the past week what the status of that appeal was, he said he doesn't know and hasn't heard from the Court of Appeals for a while.

So that represents a separate complex of issues that grows naturally out of *Saenz* but has not yet been dealt with by the Court of Appeals.

Lilly II / *Saenz* III. Question of trial court's proper role in reviewing/ supervising/ force feeding process. The next complex of issues that arises over a long term hunger strike, and that typically would not reach the Court in the more usual short term hunger strike, is the question of the court's involvement in determining, or monitoring, the processes that are used by the DOC in carrying out the forced feeding. Over many years, and through many different institutions, Mr. Lilly had been provided his nutrition through an NG tube for a period of 8 or 12 minutes. The entire process, including getting him set up in a chair and strapping him in, if necessary, and running the tube in, checking to make sure the tube had entered his stomach and not his lungs, and then doing the feeding, and then withdrawing the tube, etc., might have taken up to 20 minutes altogether.

If the reader would examine Exhibit 16, as marked on May 4th, 2009, the reader will find 179 flow sheets at the back of that exhibit which are essentially detailed records of each and every forced feeding of Mr. Lilly going back to the lunch feeding on January 5, 2006 (the first column of numbers on the left-hand side of page 179 of the flow sheets). About halfway down the page, there is an entry for "length of procedure", and most of those procedures, as the reader can see, were 7 or 8 minutes long, up to 10 minutes long, with one or two 12 minute feedings provided. As you move forward in time (through pages 176, 175, etc.) the reader can see that the feeding time was about the same, although it might have increased slightly on some particular days to 13 or 15 minutes. If you get to pages 171 and 172, practically all of the feedings were only 10 minutes in duration. All of this is consistent with Mr. Lilly's assertions throughout this case that in the early years his feedings were 10 minutes or less.

The length of the feeding, as he described in his own testimony at a short hearing on May 15, 2009, would depend on a number of factors, including the amount of the nutrition provided, its consistency, the size of the tube, and the method of its delivery. It could be a straight gravity feed through a large syringe, which would take 6 or 7 minutes. There was at least one institution where they actually put the plunger in the syringe and injected the feed in him, and he said that would take less than 5 minutes. Either of those situations would require the nurse attendant to stand there and hold the syringe above Mr. Lilly's head. He indicated that some of the nurses got tired of standing, and then they would put the nutrition into a drip bag that would be suspended from a hook. Depending upon whether the cap on the opening to the bag was left very loose, or was tightened up, would in part control the drip rate. There is another mechanism on a drip bag where you can restrict the flow of the contents.

In any event, this Court went through Exhibit 16 and noted that, even as late as February of 2007, there were still pages of flow sheets showing 10 to 12 minute feedings. Towards the end of February, 2007, the feeding times were suddenly up to 20 to 25 minutes, and then eventually up to 30 to 40 minutes.

The Court did conduct a short hearing with Mr. Lilly and DOC staff Attorney Thomas on the afternoon of May 15, 2009, after the Court had already begun dictating this decision. There was some additional evidence that I thought could be helpful to this Court and to the appellate court. In particular, Exhibit 24 was received showing what institutions Mr. Lilly has been confined at during the service of this sentence, and when he was transferred to each such institution. That can be compared to Exhibit 16 to help explain any sudden change in the feeding times or procedures. On Exhibit 24, it is clear that later in February of 2007 is when he was transferred from Racine Correctional to

Fox Lake Correctional. So something different was happening at Fox Lake than what had been happening at Racine in terms of feeding times and procedures.

As mentioned above, there really wasn't any set protocol that was transferred along with inmate Lilly from one institution to the next, and so even during the year and a half this Court has been involved in the case, I have seen many times where the State is, in effect, reinventing the wheel in terms of trying to figure out what they are supposed to be feeding him, when, and how, etc. Some of the processes used by some of the staff at some of the institutions have been much more painful and have involved feedings of much greater duration than what Mr. Lilly had been accustomed to in his earlier years of his hunger strike. Because the feeding processes utilized in the first two or three years seemed to do the job, and did the job effectively and quickly, both for the inmate and for DOC staff, the Court ended up adopting or incorporating some of those procedures into specific orders in this case. This is clearly another phase or complex of issues which the *Saenz* case did not address (nor did it really need to address at that point in time).

When the DOC came back before this Court in the late summer of 2008 to obtain an extension order to continue the force feeding, there had already been some recent events at one or more of the institutions where Mr. Lilly had been Tased or maced during a cell extraction or an effort to get him into the restraint chair for his feedings. The Court's order of August 7, 2008 already contained the following language.

> "Finally, the Court commented on August 4, 2008 [at a hearing] and will comment in this written decision, that in striking a balance in favor of the State's interest of keeping inmate Lilly alive, it was never this Court's intention or expectation that the DOC would employ any unnecessary violence to accomplish the feedings . . . just as a matter of principle, however, this Court would state that it would not allow any type of violent force to be used to overcome purely passive resistance, such as not getting out of bed and walking over to the cell door for removal to HSU.

> Frankly, if the Court believed that there was a regular need to mace or taser Mr. Lilly in order to accomplish the forced feeding, this Court would not likely approve the forced feeding." Decision of August 7, 2008 at pg. 9.

If the Court of Appeals reviews the record in this case in its entirety, the Court will see many discussions and letters, and even some orders, pertaining to such things as the size of the NG tube, the manner in which the nutrition is propelled through the tube, is it merely gravity, or is it injection, or is it through a drip feed bag, or what? Is the nutrition to be provided in the form of Ensure HP, or should it be the more higher protein Ensure Plus? When the nutrition is mixed with water, should an effort be made to mix it with hot or warm water, particularly in the winter? If the feedings can be accomplished in a period of about ten minutes, which the Court finds to have been the case for three years early on in this hunger strike, is there some reason or justification why the DOC should stretch that out to 45 minutes, or even to 2 hours?

The DOC indicated, in our most recent series of hearings, that Mr. Lilly just wants to focus on the processes as a kind of a side show in order to divert the Court's attention from the actual condition of his health. Mr. Lilly countered that the DOC itself was focusing on the processes and was purposefully setting up the feedings and processes in such a way as to maximize his pain and discomfort in order to bring this hunger strike to a quicker conclusion. Lilly argues, in essence, that the specific feeding processes and procedures utilized most recently by the DOC were not designed at all to maintain or promote his health, but merely to create greater discomfort and punishment.

If an inmate like Mr. Lilly is going to be able to maintain a hunger strike for five years or more, and if the trial courts are required to enter feeding orders for limited periods of time and conduct extension hearings on a regular basis, the Court of Appeals should anticipate that the trial court is going to end up being drawn into detailed

discussions of the feeding process, and to the extent that the trial court believes that the process can be accomplished more effectively and more humanely under previous DOC procedures, that the Court will likely require those rather than the later procedures developed by the DOC. To put it another way, if the Court is going to be involved directly approving highly invasive medical procedures that are performed repeatedly every day during an inmate's incarceration, the Court needs to be assured that the process is done in a both a reasonable and humane manner ….i.e., we aren't only approving the force feeding but, by implication, the very processes by which it is done.

Again, this is a complex of issues which really wasn't mentioned in the *Saenz* court, nor was there any reason or basis to mention it. However, the long term hunger strike of Mr. Lilly has revealed the fault lines and problems with having DOC medical staff providing forced provision of medical services over the objection of a highly intelligent, highly committed, and competent inmate.

Whether the appellate court in this case gets to this complex of issues may depend in part on how the court rules on the next complex of issues. If the court affirms the trial court's decision to terminate the forced feeding order and, in fact, to enjoin the DOC from such force feeding in the future, it may render this third complex of issues moot. However, as a trial judge in a county with four prisons, the more clarification we can get of these additional issues the better.

In its extension order of August 7, 2008, this Court did limit the force feeding to six days a week. That was the only specific intrusion the Court made upon the force feeding process, although it seems that this was with agreement of the medical witnesses.

Thereafter, the Court entered an order supplementing the August 7, 2008 order, with an order dated September 23, 2008. By then, some of these debates about processes had come to a head, and the Court set forth very specific restrictions and limitations at the bottom of page 5 and top of page 6 of that order. I believe that about that time this Court wrote to the Fourth District Court of Appeals and encouraged them to add these last two orders to the pending appeal, so that all of these complexes of issues could be reviewed and considered by the Court of Appeals. The Court of Appeals indicated that by rule, they could not add these additional court orders to the pending appeal, and they would have to be the subject of a separate appeal. This Court does not believe that there was actually a separate appeal filed by either side in regard to those orders.

By early 2009, the Court was receiving correspondence very frequently, almost daily, from Mr. Lilly complaining about new ordeals that the DOC was putting him through under the guise of keeping him healthy. He filed several motions, and the DOC countered with motions. Therefore, the Court entered a Scheduling Order on Early 2009 Motions dated March 6, 2009. Relying primarily upon that scheduling order, but as that was affected by three additional orders of the trial court dated March 16, 2009, March 23, 2009, and March 30, 2009, the Court ended up conducting a series of hearings leading up to this decision. This Court heard approximately 5 hours of testimony on April 13, 2009, 2 hours of testimony on April 24, 2009, and an additional 3½ hours of testimony on May 4, 2009. In addition, the Court viewed Exhibit 1 and 2 at home. These are DVD's of three particular forced feeding sessions of Mr. Lilly. Two of them were at Waupun Correctional Institution on February 27, 2009. Exhibit 2 is a DVD of a forced fed breakfast on the morning of February 28, 2009 at Dodge Correctional

Institution. Watching the video of two of the particular meals required the Court to spend another 4½ hours, and even longer, because the Court took notes of what it was observing on the DVD's. Fortunately for the Court of Appeals, this Court dictated summaries of its notes, and I have now marked those, for reference purposes, as Exhibits 1A and 2A. Those documents were already provided much earlier to the parties, but again simply for reference purposes by the Court of Appeals, I have now affixed exhibit labels. Exhibit 1A is this Court's summary of its observations of the second feeding that appears in the Exhibit 1 DVD. Exhibit 2A is the summary of the Court's observation of the morning feeding of February 28, 2009 at DCI. Although the Court of Appeals could review those summaries much quicker than it could watch the videos, I would encourage the Court of Appeals to watch at least one of the meal videos before coming to a decision in this case.

As briefly referenced above, the Court actually conducted a fourth hearing of about 45 minutes, by telephone, on May 15th, 2009, in the midst of working on this decision. A few more exhibits were also received then.

Lilly III / *Saenz* IV. Whether there is a "compelling circumstance" exception to the *Saenz* rationale. All of this leads to the last and ultimate complex of issues on a forced feeding case, and that is whether a trial court may be empowered either to deny a forced feeding order in the first instance or, as in this case, to terminate a forced feeding order, if it finds compelling circumstances warranting such an order. Even in its original pronouncement in *Saenz* the Court of Appeals indicated that Mr. Saenz' liberty interests could be "infringed upon" by the DOC, "under certain circumstances." I think in reading the case, the Court intended the term "under certain circumstances" to refer more directly to the processes and procedures, the medical standards, and the due

process protections afforded to the inmate. What the undersigned judge is suggesting, however, is that in the implementation and the carrying out of a long-term forced feeding order, if certain things happen, or fail to happen, which render the order inappropriate, unjust, unfair, or unconscionable, then such other circumstances also need to be thrown into the balance before a just order can be made.

What the Court is suggesting is that *Saenz* is a good start and creates a general rule, that upon certain medical findings, and with certain due process protectors, the DOC can obtain an order for the forced nutrition and hydration of an inmate. In other words, there is a general rule which has been created and would apply to every inmate case in Wisconsin, absent compelling circumstances which require otherwise.

The law is replete with such "general rules" which govern the mast majority of cases, except those cases in which "compelling circumstances" or "compelling reasons" require otherwise. **These "exception to the rule cases" vest the trial court with some discretion to help assure that justice is done in every case. The underlying assumption is that a "one size fits all" form of justice will ultimately result in grave injustices in individual cases**.

Examples. In *State v. Ciarpaglini*, 2009 WI App 99, the Court of Appeals noted that in most cases where an issue or a case has become moot, the courts will not deal with it. However, there is an exception to that rule when there are "compelling circumstances". *Id* at ¶9. As the Court of Appeals explained:

> "Exceptions may be made when a case presents an issue of great public importance; the constitutionality of a statue is involved; the precise issue under consideration arises so frequently that a definitive decision is essential to guide the trial courts; the issue is likely to arise again and should be resolved to avoid uncertainty; or the issue is capable and likely of repetition but evades review because the appellate process usually cannot be completed or undertaken quickly enough to have a practical effect upon the parties." *Id* at ¶9.

In a somewhat similar procedural situation, the Wisconsin Supreme Court noted that a post-conviction motion filed in the trial court is a "prerequisite to appellate review when a defendant challenges a sentence as an erroneous exercise of discretion, unless compelling circumstances justify overriding this requirement." *State v. Walker*, 2006 WI 82 at ¶31. The Supreme Court went on to spell out the exceptional circumstances where such post-conviction motion need not have been filed in order to allow appellate review. *Id* at ¶33.

Another body of law developed with the case of *Burnett v. Alt*, 224 Wis.2d 72 (1999) and *Glenn v. Plante*, 2004 WI 24. In these cases, the Wisconsin Supreme Court discusses the rights that a physician has to assert his or her privilege not to testify, and that they cannot be required to give expert testimony unless, "there are compelling circumstances present". *Glenn v. Plante, supra* at ¶2. If compelling circumstances are present, and there is a plan for reasonable compensation of the expert, and the expert is not required to do additional preparation, their testimony can be compelled. Trial judges are vested with discretion in determining whether such compelling circumstances exist. The Supreme Court further noted that, "the compelling circumstances should focus on whether there is unique or irreplaceable opinion testimony sought from an expert, not on procedural aspects of the case." *Id* at ¶2.

There is another very well developed body of Wisconsin law which gave rise to this Court first considering the use of "compelling circumstances" in the instant case. That body of law developed out of *Barstad v. Frazier*, 118 Wis.2d 549 (1984). There the Wisconsin Supreme Court acknowledged the constitutional rights parents have to a relationship and to maintain custody of their own children. Certainly, when a third party (non-parent) would seek to obtain custody or placement of a minor child, the general

rule should be that the parent(s) would win. That is a very appropriate general rule, and the Supreme Court indicated that that rule could only be overcome by "compelling reasons" or "compelling circumstances". The Supreme Court stated its holding as follows:

> "We hold that unless the court finds that the parent is unfit or unable to care for the child, or that there are compelling reasons for denying custody to the parent, the court must grant custody to the child's parent." *Id* at Pg. 551.

If parents are drug dealers and are supplying their children with drugs, or if say the child's mother is dead, and the child lives with a father who is sexually assaulting her, application of the general rule that minor children should live with their parents would create great harm and injustice. Trial courts have to be able to avoid such situations by exercising appropriate discretion when compelling reasons require it.

This Court is not asking for the basic principles of the *Saenz* case to be changed or the process to be modified. What the Court is asking is that this principle of "compelling circumstances" be engrafted onto *Saenz* such that a trial court may refuse to grant an order, or may terminate an order, when compelling circumstances require. The Court believes that this is precisely such a case.

In the developed body of law in Wisconsin, determination of "compelling circumstances" is a mixed question of fact and law. Appellate courts defer to the trial court on findings of fact, but make their own decisions as to the legal implications of such facts and whether they constitute "compelling circumstances".

The Legal and Ethical Issues Which Are Involved

Before moving to the Court's necessary fact finding, the Court wants to conduct a brief review of the case law and commentaries regarding the forced feeding of hunger striking inmates. A fair amount of the commentary involves the use of the restraint

chair, the same chair that has been used by the Department of Corrections with Mr. Lilly. Some commentators equate any use of the restraint chair in and of itself to a form of torture. This Court doesn't necessarily agree with that broad of a statement in every circumstance, but certainly Mr. Lilly's complaints about the particular duration and method of using the restraint chair, and its affects on him physically in his case, contributes to the Court's finding of compelling circumstances warranting the termination of the forced feeding order.

The Stanford Law Review Note cited above is a persuasive piece of writing which argues that force feeding a competent inmate necessarily violates the inmate's fundamental privacy rights as established by the U.S. Supreme Court in *Cruzan* and reiterated in *Glucksberg*. Again, this Stanford Law Review Note was marked and received for reference purposes as Exhibit 17. At sec. IIIA of the Note, the author reviews the establishment of the "right to die" in the U. S. Supreme Court's jurisprudence dating back to some 18 or 19 years ago. The author notes that that jurisprudence was in no way dependent upon, "the status of the individual, the seriousness of his or her medical condition, the reason for the refusal, or the asserted interests of other parties." *Testing Cruzan: Prisoners and the Constitutional Question of Self Starvation*, 58 Stan. L. Rev. 631 at 640 (Nov. 2005).

In an earlier section of the Note, the author describes and discusses the intrusiveness of force feeding. The description is force feeding with an NG tube, which is how Mr. Lilly has been fed for the last five years. The process is described as both, "painful and dangerous". *Id* at 637. The author also highlights some case law establishing that, "The more invasive a procedure or practice, the more critical an individual's liberty interest becomes." Even the U. S. Supreme Court has noted, "That a

liberty interest in the correctional context becomes greater as conditions or hardships become more significant." *Id* at 636-37, citing *Wilkinson v. Austin*, 125 S. Ct. 2384 at 2394-95 (2005). It is due to the ultimate intrusiveness of force feeding competent adults over their objection that physicians around the world have condemned the procedure.

For example, the World Medical Association issued its so-called "Declaration of Malta" back in 1991. See Exhibit 8 marked and received at this Court's hearing on April 24, 2009. In that document, the World Medical Association discusses physicians' duty to act ethically and to recognize their primary obligation to individual patients. The paper discusses the problems involved with dual loyalties, such as where a physician is employed by the Wisconsin Department of Corrections to provide unwanted medical care to a competent inmate, who is the individual patient to be served by that same physician.

The Declaration on Malta included a section for "Guidelines for the Management of Hunger Strikers". It requires physicians first to assess individuals' mental capacity. Obviously a person doesn't have a right to refuse medical treatment if they are not competent at the time. It goes on to direct physicians to have discussions with their patients about how damaging a prolonged hunger strike can be and what the medical risks are. If physicians determine, however, that the refusal of food or medical treatment is a result of the individual's voluntary choice, then, "hunger strikers should be protected from coercion." See Exhibit 8, Declaration of Malta at .14. Ultimately, the World Medical Association came to the final conclusion in its declarations regarding hunger strikes:

> "Forcible feeding is never ethically acceptable. Even if intended to benefit, feeding accompanied by threats, coercion, force or use of physical restraints is a form of inhuman and degrading treatment." Exhibit 8, Declaration of Malta at .21.

Many of the ethical commentaries and discussions by physicians regarding hunger strikes make reference to the Declaration of Malta and the principles which it established The American Medical Association (AMA) is a major participant and sponsor of the World Medical Association. It and its subsidiaries have acted many times in support of the principles established in the Declaration of Malta. For example, in the case of *Thor v. Superior Court of Solano County*, 855 P. 2d 375 (CA 1993) the Supreme Court of California made reference to an *amicus curiae* brief filed by the California Medical Association. In *Thor*, the California Supreme Court upheld an inmate's right to maintain a hunger strike despite being incarcerated. The Supreme Court noted that the California Medical Association represented over 30,000 physicians statewide, and that it, "fully supports the 'primacy of patient autonomy' and urges this court to 'affirm that a mentally competent [person] has a virtually unqualified right to refuse unwanted medical treatment'." *Id* at 386.

Right off the bat in *Thor* the California Supreme Court established a firm footing on long held principles in precedent in U.S. Supreme Court jurisprudence:

> More than a century ago, the United States Supreme Court declared, "No right is held more sacred, or is more carefully guarded, by the common law than the right of every individual to possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law . . . this right to one's person may be said to be a right of complete immunity: to be let alone (*Union Pacific Railway Company vs. Botsford*, 141 U.S. 250 at 251 (1891)). Speaking for the New York Court of Appeals, Justice Benjamin Cardozo echoes this precept of personal autonomy in observing, "Every human being of adult years and sound mind has a right to determine what shall be done with his own body . . . " (*Schloendorff v. Society of New York Hospital*, 105 N.E. 92 at pg. 93 (N.Y. 1914)). *Thor v. Superior Court, supra* at 378.

The Court cannot leave the *Thor* case without citing the following grain of wisdom contained therein:

"**Since death is the natural conclusion of all life, the precise moment may be less critical than the quality of time preceding it**." *Id* at 384.

Other courts deciding these issues in favor of the hunger striking inmate and his constitutional right to refuse medical care include the Supreme Court of Georgia in *Zant v. Prevatte*, 286 S.E. 2d 715 (G.A. 1982), and the Court of Appeals of Florida in the case of *Singletary v. Costello*, 665 So. 2d 1099 (FLA 1996). Like Mr. Lilly in the instant case, inmate Costello testified that he did not want to die and was not on a suicide mission. Thus the State's interest in the prevention of suicide was not truly implicated in that case, nor is it really implicated in the instant case either.

Much of the recent discussion of dealing with hunger striking inmates and the appropriateness, or inappropriateness, of extended use of the so-called restraint chair deals with hunger striking inmates at Guantanamo. See for example the article entitled Hunger Strikes at Guantanamo—Medical Ethics and Human Rights in a "Legal Black Hole" by George Annas, published it the New England Journal of Medicine, 355:1377-1382 (Sept. 2006). In this medical journal article, the author describes how back in September of 2005 there were over 130 prisoners at Guantanamo (GITMO). By the end of 2005, that number was 84. In January of 2006, the military introduced a new technique designed to break the hunger strike, the use of an "emergency restraint chair". That chair was described by its inventor as a "padded cell on wheels". Twenty-five such chairs were shipped to Guantanamo, and inmates began to be strapped into those chairs and force fed while in that position. As early as February 22, 2006, only three detainees were still being force fed in the restraint chairs, and the author reports that in June of 2006 the number was the same.

This Court suggests that the three inmates out of the 131 who continued to maintain the hunger strike, even despite the use of the restraint chair, must have been

inmates like Mr. Lilly, people who were very dedicated to their cause, and who, for one reason or another, were able to tolerate the feeding process despite its difficulty and obvious discomfort.

In this New England Journal of Medicine article, Mr. Annas comments that he had written on this same subject back in 1982 and had concluded that, "We restrict the rights of prisoners in many ways. Force feeding them rather than permitting them to starve themselves to death is probably one of the most benign." In this new, 2006 article, Mr. Annas indicates that in his earlier writings he had, "grossly underestimated the pain and medical complications force feeding can impose on a competent prisoner." He then goes on to discuss the medical ethics, citing both the Declaration of Tokyo and the Declaration of Malta, both issued by the World Medical Association, condemning physicians involvement in the force feeding of competent hunger strikers.

Interestingly, towards the end of his article, Mr. Annas notes that the U.S. Supreme Court in *Hamdan v. Rumsfeld*, 126 S.Ct. 2749 (2006) that the Geneva Conventions have full force and effect in the Guantanamo detention camp. The Supreme Court also noted that Geneva's Common Article 3 applies to all prisoners in custody, and requires that, "all prisoners be treated humanely and explicitly prohibits cruel treatment and torture, as well as outrages upon personal dignity, in particular, humiliating and degrading treatment" The author ends up concluding that the use of restraint chairs to break the hunger strike of a competent prisoner would not only be a violation of clear medical ethics, but would also violate the Geneva Convention.

Additional commentary on the use of restraint chairs on hunger strikers at Guantanamo, as well as the feedback and commentary regarding medical ethics is set forth in Exhibits 9, 10 and 11, as received on April 24, 2009. Exhibit 9 is an article

documenting the tough steps taken by the U.S. Military at the detention center in Guantanamo. It includes extensive discussion of the use of the restraint chair. In fact, it includes a descriptive paragraph that is eerily similar to the circumstances Mr. Lilly has related to this court, as follows:

> "The lawyers said other measures used to dissuade the hunger strikers include placing them in uncomfortably cold air conditioned isolation cells, depriving them of "comfort items" like blankets and books, and sometimes using riot-control soldiers to compel the prisoners to sit still while long plastic tubes were threaded down their nasal passages and into their stomachs." *Tough U.S. Steps in Hunger Strike at Camp in Cuba* by Tim Golden, New York Times issued February 9, 2006.

Exhibit 10 is an article from the Miami Herald dated February 11, 2009, documenting a federal judge's order refusing to stop Guantanamo guards from using the restraint chair in dealing with hunger strikers. *"Judge Okays Use of Forced Feeding Chair* by Carol Rosenberg, The Miami Herald, issued February 11, 2009. Exhibit 11 is a press release by Physicians for Human Rights (PHR) condemning the use of the restraint chair by U.S. Military at Guantanamo. *Forced Feeding of Gitmo Detainees Violates International Medical Codes of Ethics*, press release by PHR dated September 16, 2005.

Despite the cases cited above, this Court understands that at least 18 state or federal courts have ruled in favor of various departments of corrections in cases involving inmate hunger strikers. They do so primarily on the rationale of *Turner v. Safley*, 482 U.S. 78 (1987). There, too, Missouri prison regulations were challenged by inmates, specifically one prohibiting correspondence between inmates at different institutions, and an almost complete ban upon inmate marriages. Because the inmates viewed that they had vested constitutional rights and liberty interests at stake, they asked for review on a "strict scrutiny standard of review". However, the U.S. Supreme

Court indicated that when a prison regulation impinges upon prison inmates' constitutional rights, you don't use strict scrutiny, but rather inquire as to whether the regulation is "reasonably related to legitimate penological interests." *Id* at 87.

As analyzed by Silver in her Stanford Law Review Note:

> The court articulated a four-part test to determine the reasonableness of such prison directives. First, any regulation must have a "valid rationale connection" to a legitimate government interest. Second, the alternative means must be open to inmates wishing to exercise the right. Third, the impact of the right on guards, inmates and prison resources must be considered. Last, the question whether "ready alternative" to the regulation exist must be answered. *Testing Cruzan: Prisoners and the Constitutional Question of Self Starvation*, *supra* at 641.

Silver goes on to suggest that the force feeding of a prison inmate cannot even pass muster under the more relaxed *Turner* standard. She argues that, "Prison officials in the case of hunger striking inmates have failed utterly to explain how allowing a fully competent inmate to refuse invasive medical procedures is 'inconsistent with proper incarceration'." *Id* at 641.

From Sec. IV of her Note, Silver then sets forth all of the frequently argued interests of state departments of corrections in force feeding inmates, and then, like straw men, she knocks them down until none are left standing. For example, one of the arguments that is made is that the State needs to discourage copycat prisoners from striking, and that if the courts do not allow or require force feeding, that many other inmates will join in and many of them may die. In a pointed commentary, Silver then quotes the trial court judge from the *Costello* case in California where he is quoted as having said, "It is hard to imagine that if [Costello] dies as a result of his actions that inmates will be rushing to imitate him." *Id* at 651. How do you argue with that?

The main point that Silver makes in her persuasive Note is that, although the U.S. Supreme Court established the *Turner v. Safley* (penological interest) rationale, it

did so in 1987. It also created the right to die body of jurisprudence during the 1990's. In no case, notes Silver, has the U.S. Supreme Court connected the dots between the two and indicate that force feeding of a competent inmate is permissible under the *Safley* rationale. In fact, we have seen more recently from the United States Supreme Court that the *Safley* relaxed review standard doesn't even apply to all prison regulation impinging upon constitutional rights.

In *Johnson v. California*, 543 U.S. 499 (2005) the United States Supreme Court again employed a strict scrutiny standard of review of State Department of Corrections actions essentially racially discriminating and segregating African American inmates. The U. S. Court of Appeals for the Ninth Circuit had dismissed the case based on the *Turner v. Safley* rationale that there was some penological interest that was being served by the State's conduct. On certiorari, the Supreme Court reversed and remanded holding that strict scrutiny was the proper standard of review for this particular challenge, under the equal protection clause, to the State's race based policy. Justice O'Connor indicated that the *Turner v. Safely* standard had never been applied to any type of racial classifications of inmates. *Johnson v. California*, *Id* at 510. In fact, she indicated that, "We have applied *Turner's* reasonable relationship test *only* to rights that are 'inconsistent with proper incarceration'." *Id* at 510. Justice O'Connor then comments on the limitations of the constitutional rights that must necessarily be suffered by inmates under certain circumstances, and the resulting application of *Turner v. Safley* in specific instances which they have approved, including restrictions on freedom of association, *Overton v. Bazzetta*, 539 U.S. 126 (2003), limits on inmate correspondence, *Shaw v. Murphy*, 532 U.S. 223 (2001), restrictions on inmates access to the courts, *Lewis v. Casey*, 518 U.S. 343 (1996), restrictions on receipt of

subscription publications, *Thornburgh v. Abbott*, 490 U.S. 401 (1989), work rules limiting prisoners attendance at religious services, *O'lone v. Estate of Shabazz*, 482 U.S. 342 (1987). She concludes her recitation of examples of the proper application of the *Turner* rationale as follows:

> We have also applied *Turner* to some due process claims, such as involuntary medication of **mentally ill** prisoners, *Washington v. Harper*, 494 U.S. 210 (1990). *Johnson v. California, supra* at 510.

This is what Silver is talking about in her Stanford Law Review Note. Even upon exhaustive review by Justice O'Connor of cases that have applied to *Turner v. Safley* relaxed review rationale, none of them involved the forced provision of medical care upon a competent, mentally sane inmate. Again, the U.S. Supreme Court itself has not connected the dots between *Turner v. Safley* and *Cruzan v. Missouri* and *Washington v. Glucksberg*.

This cursory review of the cases and commentaries regarding the force feeding of inmates and proper administration of prison interests is not designed to convince the reviewing court here to change any of the procedures already established in *Saenz.*[2]

What the citation of the cases and commentaries is intended to accomplish by this Court is to portray the underlying legal and ethical foundation of the *Saenz* case as something less than solid bedrock. Reviewing courts should maintain some healthy dose of skepticism in reviewing a state's claims that require such invasive responses to impinge upon clearly recognized constitutional rights of any of our citizens, including inmates. Given a full and proper perspective of all of the legal and ethical interests that are in play here, this Court suggests that **the engrafting of a compelling circumstances exception to *Saenz* is not merely desirable . . . it is necessary**.

[2] Although if the reviewing court does undertake to review the *Saenz* case in light of all of the developed case law and commentaries, I would understand.

What, then, are the compelling circumstances that the Court has found in this case? This requires findings of fact.

Findings of Fact

As alluded to above, the Court heard over 11 hours of testimony most recently, and watched 4½ hours of two forced feeding sessions with Mr. Lilly. This Judge also actually had myself handcuffed and strapped into the restraint chair at the beginning of our last hearing, on the morning of May 4, 2009. Some comments and photographs will be referenced below relative to that experience by the Court. The Court also has a file which is perhaps six or seven inches thick at this point (not including whatever earlier portions of the file are already down in Madison on the first appeal by Mr. Lilly last year). The Court has heard testimony many times in this case, and not only during the past month on the most recent motions. The Court will try to limit itself to findings of fact based on the most recent series of hearings, although it is possible that one or more findings of fact may ultimately be rooted in prior evidentiary hearings in this case.

The Court finds that Mr. Lilly is 58 years old. He was born and raised in Birmingham, Alabama. His house shook one morning when a local church got bombed. He marched with Dr. Martin Luther King to protest that heinous act, and as he commented during one of the forced feeding videos that we have in evidence, he has been protesting ever since.

The Court finds that Mr. Lilly has a Bachelor of Science Degree with a double major in physics and computer science from Lawrence University in Appleton, Wisconsin. The Court finds that Mr. Lilly has sufficient credits for a Masters degree from UW-Madison and UW-Milwaukee, but lacks a Masters degree because he did not complete a thesis. The Court finds that he was self-employed for about 20 years before

coming to prison, running a consulting business where he would provide computer installation and system management services to small businesses in Wisconsin.

As far as the Court knows, he is in prison based upon his only criminal conviction, which was for a significant assault by him on his estranged wife. He entered the prison system in 2003, and does not have a release date until 2018. The Court finds that he has two daughters who are now ages 15 and 16. They live with their mother, who is self-employed running a business. Mr. Lilly earns no wages in the prison, and therefore his daughters are not relying upon him for their support. They will be 24 and 25 years old respectively by the time he gets out of prison.

The Court finds that Mr. Lilly has never been diagnosed with any form of mental illness. He did testify that during one particularly bad week of harassment by DOC staff he suffered from some hallucinations. He indicates that during that week the lights were left on in his cell 24 hours a day for about a week. He was also in a very cold cell and he does not wear any clothing. He suffered the consequences of these practices.

Perhaps in response to that situation, the DOC had Mr. Lilly undergo a psychiatric review. There is a stack of documents in the file underneath the document prepared by this Court entitled “Description of Recent Correspondence”. One of the pieces of correspondence, Item No. 12, was the DOC’s response to the Court’s letter of January 23, 2009, in which the Court expressed some hope that the administration of the Department of Corrections would help to act and insure that some consistent plan of care was developed for Mr. Lilly which could go along with him from institution to institution so there could be some proper continuum of care. Again, this was Attorney Thomas’ letter of February 18, 2009 in which the Department of Corrections declined the Court’s invitation. One of the attachments was a psychiatric report written by Dr.

Ralph Froelich, M.D. on February 4, 2009. It was based upon a clinical examination of Mr. Lilly on January 22, 2009. The psychiatrist's report did not discover any mental illness or recognizable diagnoses. In part, Dr. Froelich wrote as follows:

> NARRATIVE SECTION
>
> Dr. Sumnicht's concern has been that Mr. Lilly has anorexia nervosa which might result in his irrationally choosing to not eat. Mr. Lilly is a 58 year old man originally from Alabama, and from Wisconsin since the age of 18. He reports that he has been on a hunger strike for five years, protesting the Wisconsin treatment of African Americans and also people who are non-violent, have mental illness or mental retardation. He states that he is determined to continue this protest, and he feels that there are a number of people on the outside of prison who support his actions. He gave his reasons under the principles of non-violent protest such as Gandhi and others, and gave me a very clear reason why he feels that there are racist policies, giving statistics about the number of African Americans living in the state, and the number of African Americans that are incarcerated. . . . He is not reporting thoughts of wanting to harm himself or to harm others. . . . He states he does not want to die, if he did die because the State did not provide him with proper nutrition, it would be an embarrassment to the State.
>
> Mental Status Examination
>
> Mr. Lilly was alert, oriented, and cooperative to the exam. His speech was coherent and goal directed without evidence of an associative thought disorder, hallucinations, or delusions. . . He was totally intact intellectually, naming presidents rapidly back to Carter, did serial 7s rapidly and actively, did the A1, B2 sequence correctly, did abstract and complex proverb, did digit span 7 forward and 5 backward. He denies feeling suicidal and he denies having thoughts of harming himself. . . . He had no requests for any psychiatric treatment. No requests for medication. . . . He reports that he has nine years remaining on his sentence and expects to continue the protest the rest of his time in prison. (Emphasis added.)

As alluded to above by Dr. Froelich, the Court finds that Mr. Lilly is one of the most intelligent and most competent inmates this Court has ever seen in 20 years doing work in Dodge County, in which four prisons are located.

The Court finds from documents that were submitted at the first evidentiary hearing early in 2008 (but which are no longer available for the Court's perusal because

I believe they are down there on Mr. Lilly's first appeal) that he is protesting the disproportionate representation of minorities within the prison system. It also appeared that he was protesting the disproportionate representation of non-violent offenders in prison. It also appeared that he was protesting the disproportionate representation of mentally ill persons in prison and, in particular, the lack of mental health services for mentally ill inmates. The Court finds that it is certainly difficult to argue with these issues that Mr. Lilly has raised. In fact, there is a current state commission working diligently to try to figure out how to incarcerate fewer non-violent offenders and how to be more effective with them, including drug offenders.

More recently, Mr. Lilly has revised or added to his list of causes for which he is protesting. When he gave his testimony on Monday, May 4, 2009, he began by reading into the record a 10 or 12 page statement. After the hearing had been concluded, both the Court and Attorney Thomas obtained copies of his prepared remarks, which were subsequently marked Exhibit 22 and received on May 15th, 2009. Obviously, what he said in the courtroom will be part of the transcript in this case. Although his prepared remarks will certainly be part of that transcript, it may facilitate this Court's preparation of this decision and the appellate court's review of this case by making reference to the typed remarks. At the bottom of page and 1 and top of page 2 of Exhibit 22, he sets forth his revised goals for the hunger strike. Frankly, these goals are much more esoteric and easily rebutted than the goals set forth above.

Under his new goals, he is calling for the release of all Americans held for "non-violent social conflict and the prohibition of the imprisonment of non-violent offenders." He wants a constitutional limit set on the number of Americans that can be held behind bars to no more than one person out of every 1,250 as reported by U.S. Census. He

wants all state laws blended into one set of national laws. He wants to end the practices of parole and probation, even as he limits and restricts the number of people who are put behind bars. He asks for the prohibition of disenfranchisement, and finally asks for "a sea change in the philosophy" of government shifting from politically centered principles to principles of "fiscally responsible humanism".

At the end of the second page (of Exhibit 22) he says that he is secondarily seeking, through his hunger strike, to "disrupt things as they are in the DOJ/ DOC and to create expenses for it which exacerbate its present precarious financial condition." The Court finds that he is certainly accomplishing his secondary goal, which is to create vast amounts of expense for the State. The appellate court will see, if it views Exhibits 1 or 2, or reads this Court's Summaries 1A and 2A, that the two plus hours of force feeding now involve at least six DOC staff members. They include a so-called "white shirt", typically a correctional lieutenant, along with a four-man SWAT team of correctional officers, and also an RN. There are times when there are actually two nurses involved, but let's leave it at a half dozen. The Court finds that a conservative estimate of the wages of the six people so involved would be $15 per hour, but more likely we're talking much closer to $20 an hour plus benefits. Let's stick to $15 an hour because the Court wants to be conservative here. The two forced feedings that I saw included dedication of staff time for an average of 2 hours and 12 minutes each meal. That's 2.2 hours. 2.2 hours times six people, times $15 an hour, comes to $198 per meal to force feed Mr. Lilly. Three such meals a day can be purchased for the sum of $594 a day. Although the Court's order was for feeding six days a week, the DOC now insists that it needs to feed him seven days a week. Seven days a week, 52 weeks a year, and we can force feed Mr. Lilly for the sum of $216,810 a year.

Now realize that the $15 an hour is way conservative, especially including the officer and the RN in the calculation. Also consider that we are not including the benefits, which would probably run another 30%, which would get us up to $281,853 a year. Also, let's not consider that in all likelihood the five-man SWAT team that's involved three times a day involves officers who Mr. Lilly claims have told him that they are there on overtime. In other words, not very many institutions can take five people off of a particular shift to spend two hours, three times a day, solely with Mr. Lilly. Instead, it is more likely that these folks are being brought in on overtime, as he suggests. If that is true, then certainly just the staffing cost of these wonderful meals that we are providing Mr. Lilly would be upwards of $400,000 a year. That doesn't even include the cost of the nutritional supplement, Ensure Plus, nor the cost of the other supplies, NG tubes, etc., that the DOC goes through each year with Mr. Lilly.

Remember that in the Supreme Court's analysis in *Turner v. Safley*, *supra*, one of the factors in determining whether the prison regulation was reasonably regulated to penological interests would be the impact of trying to accommodate the asserted constitutional right of the inmate on the guards and other inmates and on the resources of the prison. In other words, if the exercise of the constitutional right by the inmate ended up costing a lot of money to the State, that would be an additional reason to allow the State to regulate and to suppress that constitutional right. Should the flip side of that analysis apply? Should the Court take into account the fact that it is costing taxpayers over $200,000, probably closer to $300,000, a year to infringe upon Mr. Lilly's constitutional right to refuse medical care? Should that be a factor of whether the courts should continue to allow the State to engage in this practice? Frankly, it is one of the

facts and circumstances which contribute to the Court's overwhelming finding of compelling circumstances supporting Mr. Lilly's motion to terminate the force feeding.

The Court further finds as a fact that the five-year hunger strike that Mr. Lilly has been on has pitted a very determined and highly intelligent inmate against all of the various levels of DOC staff, including not only medical staff and correctional officers, but also their superiors and administration. Great frustrations have been built up on both sides, both in Mr. Lilly as well as in DOC staff. The result is that there is a very significant level of animosity between Mr. Lilly and DOC staff. The result may have been that DOC staff have intentionally tried to ratchet up the intrusiveness and the difficulty and discomfort experienced by Mr. Lilly in carrying out his self-imposed hunger strike.

For example, the Court finds that over a number of years the DOC was willing and able to feed Mr. Lilly fairly simply. He could sit on the edge of his bed, or he sat in a wheelchair, and the nutrition was gravity fed, and the feeding was completed in a matter of 8 to 10 or 15 minutes. Over the past two years, however, the DOC has employed to a greater and greater extent the so-called restraint chair, and has further determined that Mr. Lilly's health will be best promoted by having him sit restrained in the restraint chair for at least two hours, at each feeding, three times a day, seven days a week. There have been some institutions where Mr. Lilly's hands were handcuffed in front of him, and the lap belt part of the restraint went over his forearms, and his hands were thus restrained. However, it was much more comfortable for Mr. Lilly than having his hands handcuffed and placed behind him before he is strapped into the restraint chair. However, having his hands handcuffed behind him before he is strapped into the restraint chair became the DOC's method of choice.

This Court had some brief experience with the actual restraint chair that has been used on Mr. Lilly. On the morning of May 4, 2009, as previously directed by the Court, the DOC staff brought not only Mr. Lilly to court, but also the restraint chair with the same types of shackles, handcuffs, etc. that are applied to Mr. Lilly during his forced feedings. The Court willingly underwent the handcuffing, ankle shackling, and strapping into the restraint chair, in order to try to resolve an issue of fact that came up during the first session of our hearing back on April 13, 2009.

There was some indication at that point by Mr. Lilly that he was sitting on his hands and on the handcuffs which had been applied to those hands. DOC staff disagreed vigorously and indicated that there was an indentation in the back of the restraint chair specifically designed to accommodate somebody's forearms and wrist and hands. Mr. Lilly corrected the Court's interpretation of his testimony that his buttocks were actually above his hands and handcuffs, but nevertheless asserted that his rear end was somehow putting pressure on his hands and handcuffs. Obviously the videos, Exhibit 1 and Exhibit 2, don't really help the viewer see what is going on behind Mr. Lilly's back, between him and the restraint chair. So this was a disputed fact that the Court wanted to get to the bottom of.

A transcript of the proceeding of May 4, 2009 will reveal not only what happened with the Court getting restrained, but also my comments of what it was like to be in the chair and what the effect was on my wrists. Also twelve photos of the restraint chair, me in the restraint chair, the handcuffs etc, were marked and received as Exhibit 23 on May 15th, 2009.

As I commented on the record that morning, the angle formed between the seat of the restraint chair and the back of the restraint chair is approximately 90 degrees.

However, the back is not perpendicular to the floor. It is tilted back at a significant angle, and so the person seated in the restraint chair is cocked back into that position by the angle of the chair. See photo Exhibit 23-E. With the handcuffs on, I did find that there was space, initially, for me to situate my lower arms, hands and handcuffs into the indentation of the chair so that I could sit with my back up against the chair. If the back of the chair were perpendicular to the floor, the indentation in the back of the chair may well have been able to accommodate my hands and handcuffs for some extended period of time without a problem. See Exhibit 23-C.

The Court finds, however, that with the lip of the seat of the chair being elevated above the back of the seat of the chair, the user's body slopes down into the indentation behind the user. In other words, gravity doesn't work primarily to hold the user down onto the flat surface of the seat, but gravity propels the user's body down into the angle formed by the seat and the back. The result is that the top of the user's buttocks and lower back are pressed into the indentation and up against the handcuffs and user's wrists. This judge was in that position, strapped in, for about 10 minutes. The judge allowed both Attorney Thomas and Mr. Lilly to make observations or to ask any questions. The Court made a record.

At the end of the 10 minutes, I was unstrapped from the chair, and I tried to get out and could not. Lieutenant Rasmussen, who was in charge of the security detail from the prison that morning, indicated that the chair was designed specifically for that purpose. In other words, the cocking back, or tilting back of the chair with the user's arms handcuffed behind him allow one no ability to get out of the chair without the aid of some other person. Lieutenant Rasmussen and one of the officers then helped pull me out of the chair. I stood up, and the handcuffs were removed. They were removed for

the purpose of then applying some nylon straps to my wrist, which themselves were then handcuffed together. See exhibits 23-I and 23-K. This was a recent development by the Department of Corrections in response to persistent complaints by Mr. Lilly of bruising and soreness in his wrists and numbness and tingling of his fingers as the result of having handcuffs applied behind his back and having to sit in the restraint chair with his body weight pressing up against those handcuffs.

The Court finds that after just ten minutes with handcuffs in the restraint chair, when the handcuffs were removed, there were visible and palpable red indentations (welts?) in my wrists, both on the top of my wrists and on the bottom or inside of my wrists. Photographs were taken by my judicial assistant at that point. See exhibits 23-F and 23-H. Additional photographs were taken two or three times later than morning, and the indentations actually persisted until late that afternoon.[3] See Exhibits 23-J, taken at 10 Am, and 23-L another hour or so later. The Court is unable to determine exactly how many months or years Mr. Lilly has had his hands placed behind him with handcuffs on, without the protection of the vinyl strap and was seated in the restraint chair. In any event, it was a very considerable length of time. The transition from straight handcuffs to vinyl straps on Mr. Lilly's wrists was not made until the final week of the forced feeding at WCI in February of 2009. Therefore, the Court agrees with Mr. Lilly that at least 99% of the time he has been handcuffed with regular steel handcuffs and not with the vinyl strap.

[3] On the early evening of May 4, 2009, the undersigned judge went to a fitness center in Mayville, Wisconsin and worked out as I usually do. As I was reaching up for a bar of soap in the shower at 10 minutes till 6:00 that evening, the red mark on the outside of my right wrist caught my eye yet again, although it was greatly faded from what it had looked like that morning. The red marks and indentations on my left wrist had already disappeared by 3 or 4 o'clock that same afternoon, but again I could still see the red mark on my right wrist even at 5:50 p.m. after having been released from the restraint chair at 9:15 a.m. that morning, following 10 minutes with handcuffs on.

Although the Court commented on the morning of May 4, 2009 that how the handcuffs and the chair fit the judge would not mirror image how these things fit the body of Mr. Lilly, Mr. Lilly did verify that he had the exact same type of problems with his wrists when he was seated in the restraint chair with handcuffs on behind his back. The problem as he described it is that when he would be required to sit in the restraint chair for two hours or more, those problems with the handcuffs would be even more aggravated. The Court finds (based upon Lilly's testimony) that once each month during this entire hunger strike he has submitted a statement of his health condition to the responsible medical staff at whatever prison he has been at, and the Court finds that when the restraint chair was used with handcuffs applied behind his back, those reports consistently included complaints of exactly this problem. For whatever medical or non-medical reason, his complaints were not heeded.

The Court finds that for whatever reason the DOC has determined that the use of the restraint chair is its best hope in managing Mr. Lilly's hunger strike. Whether this best hope was developed as the result of publicity from Guantanamo and how the restraint chair had affected the inmates down there is unknown to the Court. Clearly, this Court would find that the restraint chair was used, at least on occasion, with Mr. Lilly even prior to the publicity coming out of Guantanamo. However, the extended use of the restraint chair for up to two hours or longer did not start with the DOC until after the Guantanamo publicity, positive and negative, about the extended use of the restraint chair with alleged terrorists at Guantanamo.

Among the witnesses the Court heard during this last round of motion hearings was Dr. David Burnett. He is employed by the DOC's Bureau of Health Services (BHS) as the Medical Director for the DOC. Admittedly, Mr. Lilly's weight has suffered a

significant decline in recent months, and the DOC was trying to figure out a way to halt that decline. During some of that decline, however, the restraint chair was used for extended feedings, two hours or more, and yet those feedings had very little effect on Mr. Lilly's weight.

The Court finds, in fact, that in response to the extended use of the restraint chair and the extended feedings, contrary to this Court's previous order, Mr. Lilly devised additional methods of protest. He has taught himself how to regurgitate (vomit) even without sticking his finger in his mouth. In fact, he is unable to so use his finger because his hands are handcuffed behind him in the restraint chair. Nevertheless, he can voluntarily produce vomit, which is a highly developed and relatively unique skill according to DOC staff testimony (I believe it was Dr. Barbara Bell, a physician from Dodge Correctional Institution). So if the Court of Appeals views Exhibits 1 or 2, or reads through my summaries, Exhibit 1A and/or 2A, the Court will see a number of times where I reference Mr. Lilly turning to his left and spitting up some of the formula onto the floor next to him.

The DOC is trying to get the maximum amount of nutrition into Mr. Lilly, but in using the extended use of the restraint chair and extended feedings, it has been counterproductive for a number of reasons. First of all, Mr. Lilly was very resistant to it and responded by voluntarily regurgitating and vomiting a fair portion of the nutrition of the nutritional supplement. In addition, in keeping him naked in a restraint chair for two hours or more, in a cold environment, a fair portion of the nutrition would be dissipated just in trying to shiver and stay warm.

The DOC's theory was that, if they could keep Lilly in the restraint chair for two hours or more, and extend the feeding out that long, that the much more gradual

feeding (as compared to say an 8 or 10 minute bolus feeding) that there would be a better chance of the nutrition staying in his stomach, and less of it would be spit up by Mr. Lilly. In fact, it was Dr. Burnett's impression that on the two hour extended feedings the drip rate was slowed down enough that the feeding was taking place during the whole two hours. Mr. Lilly rebutted that, and the Court finds as a fact, that although he would be restrained for two hours or more in the restraint chair, the feeding consisted of a number of smaller bolus feedings. A bolus feeding is where the nutrition is introduced rather quickly into Mr. Lilly's body, such as entire feeding of three cans of nutrition over a period of six or eight minutes. Instead what happened most recently, at WCI, is that during the two hour restraint chair ordeal, Mr. Lilly would receive smaller bolus feedings, perhaps five or six, of just a minute or two each.

In the final analysis, the Court asked Dr. Burnett a question along the following lines[4], to which he answered in the affirmative. "Doctor, would it be a fair statement to say that despite extended use of the restraint chair, say for two hours or more, over an extended period of time, such as a month or more, that you really did not see any clear correlation between the extended use of the chair and Mr. Lilly's weight gain. However, that you still believe that the theory of the more gradual and extended feedings resulting in greater retention of the nutrition and logically leading to a greater weight gain, is still an accurate theory?" Again, he answered that, "yes". In other words, <u>there is no evidence to show that the extended use of the chair has resulted in anything positive for Mr. Lilly's health, but the DOC's medical staff is still committed to that and hopes that some day it will produce results</u>. Whether the real desired result is the cessation of the hunger strike or weight gain for Mr. Lilly is known only to the DOC.

[4] I don't have a transcript of this testimony, so the question is from my memory of what I had asked.

The Court also finds that at times non-medical staff has been involved in preparing or mixing the formula for the feedings. In particular, see Mr. Lilly's testimony regarding the occasional practice of security staff of mixing the formula with water and performing other chores for the assigned nurse.

The Court finds that Mr. Lilly has been on a strike from wearing inmate clothing for some number of years as well. They do provide him with blankets, and he covers up with blankets, especially in the winter. This is important for somebody who you want to maintain some weight and not to dissipate all of his weight in simply trying to keep warm. Therefore, especially in the winter, one would expect the DOC to provide him with sufficient blankets to maintain desirable body temperature and to help him maintain his weight. Nevertheless, the Court finds that there have been incidents where DOC staff has declined his request for an extra blanket. When he was at WCI here in Dodge County in late 2008, he requested an extra blanket, and one of the DOC staff who testified confirmed that it took some three or four weeks to get approval for that from BHS down in Madison. One has to wonder why prison staff in Waupun would need to get approval from somebody in Madison in order to provide an extra blanket to an inmate who they are trying to keep warm and healthy.

The Court finds that at times, especially when it was in cold weather and he was being held in a cold room, that DOC staff was adding cold water to the Ensure Plus before feeding it to Mr. Lilly. Neither Mr. Lilly nor the Court are complaining that water was added because they are not only providing nutrition but also hydration. The point was, however, that Mr. Lilly, being seated naked during the extended forced feedings, was complaining that the room was already cold, and that the DOC staff was not using hot, or at least warm, water when that was readily available. He testified that under

such conditions he felt like his stomach was being packed with ice cream during those forced feeding sessions. The Court inquired whether this was so of witness Belinda Schrubbe, the HSU Manager at WCI. Her response to the Court on April 13, 2009 was that this was not a big concern of theirs, that "water is water". Again, it shows a lack of concern with the ultimate issue here, which is Mr. Lilly's health and maintenance of a desirable weight. As Mr. Lilly testified, if he was already cold in his naked state and in a chilly room, to pack his stomach with cold nutrition would further reduce his core temperature and lessen the effect of the feeding (and this, despite the fact that the State is paying some $200,000 to $300,000 just to have him fed!).

The Court finds that the circumstances involved with the extended feedings at Waupun Correctional (WCI) during January and February of 2009 was resulting in some serious setbacks to Mr. Lilly's health. On February 17, 2009, the Court received a packet from Mr. Lilly upon which both the envelope and the letter bore notations, "Emergency", "Immediate and imminent danger claim!" Essentially the letters received earlier this year from Mr. Lilly indicated that the DOC was trying to kill him and that he could not take it any longer. The Court had to stop the extended use of the restraint chair, which was not accomplishing anything other than destroying his health.

The Court also finds that there have been other assaults by DOC staff upon Mr. Lilly's physical and mental health. I am not talking about batteries here, but I am talking about psychological ploys that might result in him giving up his hunger strike. There was the incident in April and May of 2008 at Jackson Correctional Institution where he was being subjected to "24/7 floodlighting". He would not know whether it was night or day, and he had great difficulty sleeping. Much more recently, at WCI, an inmate in an adjoining cell told Mr. Lilly that he had been approached by a sergeant on the unit and

had been asked to beat on their common wall in order to try to keep Lilly awake at night and to drive him crazy. The Court doesn't mention this because in and of itself this would be a compelling reason to terminate the forced feedings. Rather, as the result of one and a half years on this case, and many extended hours of testimony, and review of documents, letters, complaints, incident reports, etc., this Court has determined that there is a pattern of conduct by DOC staff, whether it is sanctioned or unsanctioned doesn't matter, which seems to reflect a goal of something more like punishment or retaliation than the maintenance of Mr. Lilly's good health. Again, this goes back to the Court's previous finding that by reason of such an extended hunger strike, the longest in DOC history, according to Dr. Burnett, a very adversary relationship has developed in which Mr. Lilly argues it is impossible for the DOC to competently and humanely carry out its expressed goal of providing him with adequate nutrition and hydration.

The Court finds that the extended use of the restraint chair (feedings taking two hours or so) with Mr. Lilly has resulted in bruising to his buttocks. If the reader would go to Exhibit 2A, that is this Court's informal summary of the contents of video Exhibit 2. At page 9 of Exhibit 2A, at clock reading 00:58, there is a discussion by this Court of what I see on the screen at that point of Breakfast 4 video of 2/28/09. Although I don't mention it in that discussion, I recall that during part of the time that Mr. Lilly's buttocks would otherwise be visible to the videographer, the videographer's view is blocked by a nurse, or other officer, who steps in front of the camera and is standing at the foot of Mr. Lilly's bed, apparently looking at the same condition that the Court was trying to look at before they stepped in front of the camera. They eventually move out of the way, however, and I think 00:58 was a point where you can stop the video and visualize the area the Court is talking about.

Dr. Burnett saw that part of the video at the end of our hearing on April 24, 2009 and gave his opinion that it was just an area that was temporarily discolored because of the length of time that Mr. Lilly had been seated in the restraint chair. The Court would certainly note that the restraint chair has no cushion or padding to the seat, and that can be visualized in the courtroom photographs from May 4, 2009. Sometimes a towel would be put on the seat between Mr. Lilly and the restraint chair, and other times not. The seat of the restraint chair is a hard surface. There is no doubt about that. In watching Mr. Lilly getting strapped in at the beginning of one or the other (and perhaps both) of the videos, it is clear that the lap belt strap is grabbed with two hands by one of the correctional officers and is yanked as tight as he can get it. This provides Mr. Lilly with almost no ability to adjust his position on the seat during the two hour feeding.

Mr. Lilly observed the same video at the end of the afternoon on April 24, 2009 and gave testimony on May 4, 2009 that in fact he believes that it was bruising resulting from six or more hours in the restraint chair every day for seven days a week for an extended period of time. He testified that that these extended feedings were resulting in bedsores on his buttocks.

Ultimately, the Court finds that even if there was some temporary discoloration in the buttocks as described by Dr. Burnett, the Court does not believe that would be a fair or sufficient explanation of what the Court has visualized on the tape. At least some of the discoloration certainly resulted from bruising. As I mention in Exhibit 2A, it certainly appears to all be bruising, but the Court is backing off on that slightly to say that there may have been some temporary discoloration which over 2 or 3 hours might have faded. Of course, by then, he would be back in the restraint chair for the next meal. When you repeat this scenario for weeks on end, the Court would be surprised if there

wasn't bruising on inmate Lilly's buttocks. I hereby invite the Court of Appeals to visualize this same section of video and then decide for itself about the bruising.

The Court further finds that in fact this five year hunger strike was temporarily suspended, and has been on hold, since very early March, 2009. Either on March 1st or 2nd , I believe, Mr. Lilly reached an agreement with a nurse at DCI, and then with the nurse's supervisor, Dr. Barbara Bell. The agreement was that he would not be force fed but that he would voluntarily consume sufficient quantities of graham crackers, cheese, honey, peanut butter, and water to increase his weight back to an acceptable level. Having consumed those substances for about two months, Mr. Lilly's weight was back up to 162 pounds (from a low of about 127 pounds), both at the hearing of April 24, 2009, and he confirmed that he was still at approximately that same weight on May 4, 2009.[5] So, at the time the Court last saw him, Mr. Lilly was actually in very good shape, and clearly doesn't meet the standards for a forced feeding order by this Court either under the initial *Saenz* standard, or even under the standard this Court employed in January of 2008 (that he would quickly become a candidate for forced feeding, if forced feeding were withdrawn at this time).

The Court finds that this temporary suspension of the hunger strike by Mr. Lilly was due to the somewhat extreme conditions that he was facing with the extended use of the restraint chair and, in particular, where it was located within the seg unit at WCI in January and February, 2009.

There is a disputed issue of fact between Mr. Lilly and the DOC as to how cold or how warm his room was at the time of these force feedings. The Court finds as a fact that his room was in the basement of the seg unit/ HSU at WCI. The Court finds that

[5] During the brief hearing of May 15th, 2009, Mr. Lilly testified that he is still eating and now weighs 163 pounds.

there is an exit along his hallway for inmates to go into the recreation cells. The Court finds that the recreation cells have window-sized openings in the exterior wall, but there is no window in those openings. Essentially, if you are in a recreation cell, you are in the ambient outside air. On Exhibit 1, and as referenced in the Court's summary Exhibit 1A, Mr. Lilly made repeated references to being able to feel the cold air, "just rolling in" on him as he sat naked in the restraint chair. He was visibly shaking and shivering throughout the two hour process. In letters and complaints that he sent to this Court, I think he claimed that the room was down to something like 45 or 50 degrees. The Court doubts whether the room temperature was anywhere near that low. However, the Court does not believe that his particular cell at that location and at that time was anywhere near as warm as what the State wants to portray in Exhibit 19. The Court believes that David Roberts is in fact an HVAC specialist at the Waupun Correctional Institution, and that he knows how the system works. There are some sensors in the building where Mr. Lilly was housed that were operational during the month of February, 2009. The Court doesn't doubt that wherever the sensors were located they gave the readings indicated on the exhibit attached to Mr. Roberts' affidavit in Exhibit 19. Those readings would show temperatures up in the low 80's, which seems would be an excessively warm atmosphere for a prison building. In fact, if one looks at the videos and sees how heavily clothed and clad the SWAT team officers were, I would wonder why they weren't constantly wiping sweat off if they were standing there for two hours in 80 degree temperatures. In any event, Mr. Lilly is correct that the readings are from somewhere in an area of his building known as BC-71, but even after getting the affidavit, we still don't know exactly where within that area of the building. More importantly, these readings were taken every four hours, such as at 4 p.m., 8 p.m., and

midnight. As Mr. Lilly pointed out in his testimony on May 4, 2009, the feeding on the evening of February 27th started at approximately 5:30 p.m.[6] Between 5:30 and 7:30 is when there is some inmate movement in that part of Lilly's building, and you could actually hear the inmates coming and going in the background of the Exhibit 1 video. Finally I should add that the DOC previously provided an earlier exhibit with lower temperature readings for this same area, inconsistent with Exhibit 19. See Exhibit 12.

The Court is finding that with Mr. Lilly's door open to the hall, which no one disputes, and with the ambient outside air coming in through the door to the rec area, which nobody disputes, that the temperature within his cell did drop significantly during the two hour feedings. Given his state of nakedness, the Court would find that there would be reason for him to complain of the cold and to shiver despite the contents of Exhibit 19.

The Court should also point out to the Court of Appeals that the morning feeding on video Exhibit 2 is actually at a different institution. He was transferred, I believe, the night of February 27, 2009, and everyone agrees that the next morning feeding was at DCI. Mr. Lilly indicated that he did not have any significant problems with the room temperature at DCI like he had had consistently at WCI.

The Court kind of got sidetracked on the reason why Mr. Lilly temporarily suspended his hunger strike. He could not take the conditions anymore of the extended two hour feedings, three times a day, seven days a week. As he testified, it seemed that the drawing out of the forced feeding period out to two hours, and with him fully restrained in the restraint chair for that length of time, was not designed to achieve any type of weight gain or increase, but was more likely designed to punish him and/or to

[6] It actually started at 5:32 p.m. according to Exhibit 1A, and of course I based that on statements of the officer as he introduces the SWAT team and indicates what time it is.

discourage him from continuing his hunger strike. To put it in another way, although a forced feeding is a medical procedure, it was being conducted in a different way, arguably for non-medical purposes. Again, this points out the problem of having physicians and nurses with dual loyalties. I think any of them would acknowledge that their primary obligation was to the patient, Warren Lilly, and yet things were being done to serve their primary loyalty to their employer, the DOC.

Getting back to why the force feeding order at this point would be totally inappropriate, the Court points out Exhibit 21. Exhibit 21 is a full metabolic panel run on Mr. Lilly on April 27, 2009. The entire three pages of readings are all within normal ranges, with the exception that his white blood count was at 3.9, while the normal range is between 4.0 and 10.0. In other words, he was within a tenth of a point of being within the normal range. Similarly, there is a lymphocyte count of 46%, with normal being in the range of 20 to 45%. Again, he was one point high compared to the normal range. The other approximately 40 readings on Exhibit 21 are all within normal ranges. That includes his sodium count, which the DOC was particularly concerned about back in February of this year. His sodium count is 142, and the normal range is 135 to 145. The upshot here is that this is not an inmate who is in a state of severe malnourishment or dehydration, despite the fact that he has not been force fed since approximately February 28, 2009.

The Court finds from his testimony as well as his writings that Mr. Lilly has no intention to commit suicide. He realizes that there would be no gain either to himself or his family, or more importantly to his causes, should he die of starvation while in the custody of the DOC. The Court acknowledges that he may continue his hunger strike and lose additional weight, and get down to a range where he could become severely

malnourished and at medical risk. He could try to maintain a particular weight, assuming that it would keep him in sufficient health, and he may guess wrong. Either on his way to that weight or while maintaining that weight, he could go into cardiac arrest and die just like that. While that is a possibility, it is outside the scope of Mr. Lilly's intent as expressed continuously throughout his writings and testimony in this entire case.

The Court finds that Mr. Lilly was transferred to Waupun Correctional Institution at the end of October of 2008, and remained there until the end of February, 2009. The Court finds from the testimony of the DOC witnesses, particularly including Belinda Schrubbe, the HSU Manager, that there was no particular protocol or care plan that was sent along with Mr. Lilly from the previous institution. Such a care plan still did not exist, although she indicates that the prior institution did send her a list of questions that should be asked before Mr. Lilly was force fed. Things like, "will you take a meal tray?", etc. By the time that he left WCI, however, Ms. Schrubbe indicated that the nurses had come up with some type of a care plan just for reference by nurses. It was not prepared by the doctors, nor would she believe it would ever be used by the doctors. Instead of having a comprehensive care plan, Nurse Schrubbe indicated that the nurse's care is controlled by professional standards of care. She indicated they really had no need for a care plan.

However, it is clear from DOC testimony at the most recent set of hearings that not every HSU manager or medical staff person was aware that BHS had approved some two years ago a standard practice of feeding Mr. Lilly Ensure Plus as opposed to Ensure HP. There was a letter from Christine Althouse of BHS approving continued use of Ensure Plus. The Ensure Plus provides more calories for the same number of cc's

and had always been more effective in maintaining Mr. Lilly's weight. Nevertheless, the Court heard testimony that some new institutions would go back to Ensure HP, not even aware of the BHS memo from years earlier. The reason would be that his medical file was too thick, and they didn't have time to go through it all. The Court finds that he would therefore have to complain repeatedly in order to try to get somebody's attention that they should be using the correct nutritional product. Ms. Schrubbe ended up being convinced that they should be using Ensure Plus, even though to the day of our hearing she had still not been able to find that letter in Mr. Lilly's medical file. She acknowledges that somehow it was "just missed" in his chart.

Ms. Schrubbe testified, on a matter discussed above, that she had tried to monitor the temperature in Mr. Lilly's cell every few hours, and that it was never below 68 degrees, nor above 77 degrees. The Court would note that if in fact during some times of the day Mr. Lilly's cell was in the upper 70's, and he was on his bed covered by a blanket, that the comparative drop in temperature into the 60's when he would be placed into the restraint chair naked, with inmates going in and out of the unit either to meals or to rec, that type of drop in comparative temperature would feel quite cold to Mr. Lilly. This is the same witness who confirmed that there were extended discussions about whether or not to get Mr. Lilly another blanket, and that she did have to get specific approval from BHS in Madison, and the whole process did take some extended period of time. Mr. Lilly pointed out that he had requested the extra blanket in October of 2008, and did not receive it until January, 2009. Again this was a health issue which the DOC seemed unprepared to deal with.

HSU Manager Schrubbe also acknowledged that in November of 2008, Mr. Lilly attempted to provide such a care plan to her and her staff, so that there could be some

consistency in his continuum of care, not only within her institution, but also as he moved from institution to institution. His care plan was kept by her, or by someone in her office, for an extended period of time before it was given back upon Mr. Lilly's request. In the meantime, she testified she "never had an opportunity to even read it."[7] Finally, Ms. Schrubbe was also the witness who, when confronted with the issue of mixing the nutritional supplement with hot water versus cold water commented that it really isn't an issue. As far as she is concerned, "water is water".

The Court then heard the testimony of Dr. Paul Sumnicht. Dr. Sumnicht is a physician who has been employed by the Department of Corrections since January of 2006, and was the responsible physician at Waupun Correctional Institutional with Mr. Lilly from the end of October, 2008 to the end of February, 2009.

Dr. Sumnicht indicated that he first medically examined Mr. Lilly through a cell door in November of 2008 to try to establish a baseline. He then conducted an actual medical exam on November 14, 2008. He was concerned about Mr. Lilly's evident muscle loss and weight of only 137 pounds. He talked to Dr. Burnett over the phone down in Madison, and they decided to increase the morning feeding from two cans to three cans. He also acknowledges that there was a discussion between him and Mr. Lilly about providing him an extra blanket as he believed that his weight loss was due to his shivering in the cold. Dr. Sumnicht indicated that Mr. Lilly already had two blankets and was eventually given a third.

Dr. Sumnicht also verifies that Mr. Lilly complained about getting the wrong form of the Ensure supplement, and that that was also eventually corrected.

[7] Other than for the testimony of Mr. Lilly at the most recent hearing, if I am quoting a witness, I am quoting the witness according to the notes that I took during their testimony. At the time that I am writing this decision, I do not have the benefit of a transcript other than of May 4th, 2009.

There continued to be a weight loss, and so he was concerned about Mr. Lilly purging himself like in anorexia or in bulimia. He therefore made the referral to Dr. Froelich for a psychiatric evaluation, which came back normal.

The Court finds that Mr. Lilly was viewed as having some particular cardiac condition which could be made critical by a significant drop in his sodium level. On January 23, 2009, his sodium level was down to 125. Dr. Sumnicht believes that this patient suffered from pulmonary hypertension and/or congestive heart failure, and that his life could be easily compromised as the result of an extended, unabated hunger strike.

With the extended use of the restraint chair, Mr. Lilly began throwing up more frequently and more successfully, and so the DOC kept trying slower and slower feeding sessions as a response.

Dr. Sumnicht indicated that the restraint chair has worked on other hunger striking inmates. Most of them he felt suffered from some type of psychiatric illnesses and were quickly persuaded by use of the restraint chair to give up on their hunger strikes. In response, I believe, to a question by Mr. Lilly, Dr. Sumnicht agreed that the restraint chair was used specifically to try to discourage inmates from maintaining hunger strikes.

Dr. Sumnicht agreed with Nurse Schrubbe that the temperature of the water mixed with the formula was essentially a “non issue”. He referenced it as being “just a distraction”.

Dr. Sumnicht testified that the restraint chair is a valid tool that they want to use with Mr. Lilly. It is safe for him because it keeps him in a stable position. His hands are

restrained so he can't grab anybody or hurt anyone, or pull the tube out of his nose. Dr. Sumnicht believes this restraint chair is the safest option.

In the end, Dr. Sumnicht was concerned that they were not able to successfully treat Mr. Lilly, that is, guide him to any significant weight gain at WCI, despite their extended use of the restraint chair. Therefore they transferred him to Dodge Correctional Institution because their infirmary is perhaps the best of all the state institutions.

The Court finds that neither Dr. Sumnicht, nor really the DOC, has had any other prior experience in how to treat long term hunger strikers, that is people who have been on a hunger strike for two or three years, other than Mr. Lilly. Dr. Sumnicht acknowledged that the restraint chair did not prevent Mr. Lilly from losing weight, but he gave his opinion that the restraint chair was "still our best tool" and that he could not envision any alternative. Actually, he did mention one alternative, which would be to put Mr. Lilly under with general anesthetic and then to feed him in that condition, which the doctor said would be a very dangerous situation.

Dr. Sumnicht did not see the need for an ongoing overall written care plan for Mr. Lilly because each physician and nurse at each of the various institutions would be guided by their own professional judgment and standards and would, in essence, "know what to do."

The Court heard the testimony of Dr. Barbara Bell. She is board certified in osteopathic family practice. She is one of the physicians in the infirmary at Dodge Correctional Institution. Mr. Lilly has been one of her patients since the night of February 27, 2009. She indicated that she has not reviewed his medical records to any great depth because they are very extensive, and she would never have time to do that.

She verified that Mr. Lilly is now voluntarily taking nutrition in the form of graham crackers, cheese, honey and peanut butter. It is unclear from my notes whether she said that he might voluntarily be taking some Ensure as well. Eventually, they decreased his cheese and increased his peanut butter because his sodium was getting too high. She indicated that he was up over 150 pounds already within a few weeks, and was up to 165 pounds about a week before she testified. Exhibit 4 is a total metabolic panel lab report, and she says that his blood was collected on April 6, 2009. She says this shows a fairly normal lab result. In fact, she says that these numbers are a great improvement from earlier lab reports at WCI and DCI.

Dr. Bell indicated that she is concerned about the balance in Mr. Lilly's diet because she does not believe he can remain healthy on graham crackers, peanut butter and honey. She testified that he advised her that he fully intends to continue the hunger strike if and when he gets transferred to another institution.

She heard that he was coming to her institution on the night of February 27, 2009 because WCI was having problems maintaining a safe weight and appropriate metabolic health. Their plan, if they had to continue force feeding him, was to slow the feedings, either to some type of drip feeding or a series of small bolus feedings.

Dr. Bell described Mr. Lilly's ability to purge on demand without sticking his finger in his mouth as a "highly developed and relatively rare skill." That is certainly one of the facts that the Court is finding in this case contributing to the compelling circumstances we are confronting here. Dr. Bell admitted that Jackson Correctional Institution had tried the slow drip, two hour extended feedings for a period of six weeks, and at the end of that time he had still lost weight. Dr. Bell confirmed that they had the same problem at DCI that they had had at WCI. In other words, they were feeding him Ensure HP,

which most hunger strikers would get within the DOC. She wasn't aware of the decision years ago that Mr. Lilly should be given Ensure Plus. She did not catch that until late in March.

The Court finds, from having viewed the various written complaints that Mr. Lilly has sent to DOC staff, as well as by watching him and listening to him on the two videotape exhibits, that he fairly frequently belittles, berates, and insults the DOC staff. They are variously called morons, idiots, or less complimentary names. Again, this is evidence of the rather antagonistic relationship that has developed between him and DOC staff, and it may help to explain some of their particular responses to him.

The Court finds that Mr. Lilly testified that over the years he has been beat, hit, kicked, and slammed into the walls or floor as part of the force feeding process. He says there are videos to back that up, although this Court was not able to see any of those videos. In addition, it didn't sound like there had been any recent instances of this while this Court was supervising the case, other than the June, 2008, Tasing and mace application at Jackson Correctional Institution.

In his testimony, Mr. Lilly indicates that DOC personnel understand that they are practically immune to prosecution for abuse of prisoners. He believes that this encourages them to be more disrespectful or violent with inmates that they don't like. In conjunction with that, he complained that this Court's response time to critical situations has taken more along the line of weeks or months than hours. The Court can't really dispute that, but this combination of facts helps lead this Court to conclusion that the ongoing involvement of the Court in the approval and operation of a force feeding operation over many years is something less than desirable.

In one of the cases cited above that barred a correctional agency from force feeding an inmate, the inmate had given or signed a release of that agency. After reading that, this Court prepared a proposed release and sent it to Mr. Lilly and to Attorney Thomas for comment and possible use at our hearing. However, at the hearing of May 4, 2009, Mr. Lilly refused to sign it. Nevertheless, he did not have any explanation of a legal theory that would allow him or his estate to successfully obtain damages from the Wisconsin Department of Corrections if in fact they complied with this Court's order to refrain from force feeding Mr. Lilly. If the DOC bears upon the Court of Appeals to reverse based on this particular aspect of the matter, the Court of Appeals should first require the DOC to lay out the legal theory that the DOC thinks would likely lead to a successful verdict on behalf of Mr. Lilly's estate.[8] I sure can't think of any, and the prospect of such recovery is so small as to be considered de minimis.

Mr. Lilly described the intubation process where the NG tube is inserted through his nostril and down into his stomach. He indicates that this is not a natural process, and the body wants to resist it. It is something quite uncomfortable and can be painful as well. All of this depends to some extent upon the skill of the nurse, whether the inmate is resisting, the size of the tube, the condition of the tube, and the extent to which it has been properly lubricated. Certainly no anesthetic is provided or offered.

There is significant discussion within this Dodge County court file in the past about Mr. Lilly's concerns with his nares (his nostrils) and whether permanent damage was being done to them, which might ultimately make it impossible for further NG tube feeding. If that would become impossible, his assumption is that there would be some type of an external port affixed to his stomach, and the DOC would attempt feeding

[8] Or alternatively give Mr. Lilly the option of signing such a release if necessary.

through that. However, he previously indicated that if that were the case, he would be continually ripping that port out of his stomach, further aggravating his medical condition.

As I already mentioned above, the State's doctor feels that the alternative to what they are doing now might best be done alternatively by putting him under a general anesthetic and feeding him, although the doctor indicated that would be a very dangerous procedure which could prove tragic. The bottom line here is that Mr. Lilly is intent on resuming his hunger strike, and the DOC is equally as intent to resume the extended two hour feedings in the restraint chair, and that there aren't a lot of good medical alternatives to choose from.

When I started dictating this decision, I didn't realize that my citation to *State v. Ciarpaglini* at page 13 of this brief might come into play further in my decision. However, the Court is thinking about the fact that Mr. Lilly technically hasn't been on a hunger strike for better than two months, and that he is currently in excellent health. That alone should support an order terminating the State's forced feeding order. However, if the Court were only to do that, and if Mr. Lilly resumed his hunger strike as he has stated his intention to do, and if the State resumes, with another court order, the forced feeding as it has in the past, we will be back exactly where we are now, but with the need to go through all these hearings again in order to sort out these four complexes of issues. The State might argue that with Mr. Lilly no longer on a hunger strike for better than two months, the issues that I have discussed above and will deal with below are for the most part moot. However, referencing the quote at page 13 of this brief, the issues which have crept up repeatedly between Mr. Lilly and the DOC for the past five years are likely to be repeated, and the reprocessing of these motions and

the hearing of the evidence would consume valuable judicial resources, and further appellate processing and review could not be completed or undertaken quickly enough to have a practicable effect upon these parties. These are all issues which need to be dealt with now for once and for all.

The Court therefore urges its brethren and sistern on the Court of Appeals not to take the easy way out by finding that the essential rulings of this Court have become moot. I urge the Court to grapple with these important issues as I have had to, and to further develop the law as suggested above. The Court will now simply and quickly reiterate/ highlight those facts and circumstances which the Court believes add up to "compelling circumstances" sufficient to not only terminate any current force feeding orders, but also to enjoin the DOC from simply taking Mr. Lilly to a new county and a new institution and obtaining a fresh order for forced feeding from another judge. This Court believes that the Court of Appeals should engraft a "compelling circumstance' exception to the *Saenz* protocol, and furthermore approve its application in the instant case. The undersigned judge isn't sure which of the following facts will add up to compelling circumstances for the Court of Appeals, but the Court is going to lay out all of the circumstances which might possibly be considered by the Court of Appeals so that I don't miss anything.

The facts and circumstances are:

1) That Mr. Lilly has been on the longest known hunger strike in Wisconsin for a period approximating five years;
2) That during most of that five year hunger strike, the DOC was able to rather safely and quickly feed Mr. Lilly without undue delay, difficulty or discomfort;

3) That Mr. Lilly is highly intelligent and is very competent, and the recent psychiatric report establishes that his conduct is very purposeful….he is a college graduate in physics and computer science with masters degree credits from UW Madison;

4) That the DOC has demonstrated that it is either unable or unwilling to develop any type of continuum of care in terms of an established protocol or care plan that would assist each institution in carrying on the appropriate feeding schedule and procedures that have been utilized at the previous institution;

5) That Mr. Lilly's health records are too thick and the DOC's staff time is too limited for the staff to have any meaningful review of Mr. Lilly's medical records….it is par for the course for important records to be overlooked or "missed" ;

6) The previous paragraph results, for example, in DOC medical staff not even being aware of BHS determinations from earlier years that Mr. Lilly should be on Ensure Plus versus Ensure HP;

7) That the situation two sections above also exemplified itself in staff not being aware that Mr. Lilly should have been given only two cans of nutrition in the morning, and three cans at lunch and supper;

8) That the extended feeding of a five year hunger strike inmate by DOC medical staff involves them in direct conflict of interest in terms of their professional ethics;

9) That the World Medical Association, among others, has condemned the forced feeding of competent adult hunger strikers;

10) That the DOC has decided for some reason, perhaps other than medical, that Mr. Lilly needs to be restrained in a restraint chair for more than two hours at each feeding, three times a day, and seven days a week;

11) That past use of the chair has resulted in extensive bruising of Mr. Lilly's buttocks;

12) That past usage of the restraint chair has involved extensive bruising and discomfort to Mr. Lilly's wrists to the point that he was experiencing numbness and tingling in three fingers, and medical staff finally had to recommend use of vinyl wrist straps instead of the metal handcuffs which had been used 99% of the time;

13) That Mr. Lilly has become adept at voluntarily purging, that is vomiting, the nutritional supplement, even as it is being administered in the restraint chair;

14) That extended use of the restraint chair in recent months did not result in any appreciable weight gain by Mr. Lilly, but only contributed to his steady decline to the point where he believed that the DOC was trying to kill him;

15) That extended term use of the restraint chair on hunger strikers has been condemned by a number of authors and medical ethicists;

16) That Mr. Lilly, as part of the adverse relationship which has developed with the DOC, has belittled staff and given them more motivation to try to make him pay;

17) That due to a lack of developed protocol and continuum of care plan, Mr. Lilly has been Tased and maced and been subject to other rough treatment when staff had not been properly trained on how his case should be handled;

18) That there is evidence of harassment by DOC staff in the record, including the attempt by a correctional officer to have the inmate next to Mr. Lilly's cell bang on Mr. Lilly's wall all night to keep him awake;

19) That part of the adverse relationship between Mr. Lilly and the DOC was evidenced by having Mr. Lilly experience seven days of 24 hour lighting and resulting sleep deprivation;

20) That the purpose of Mr. Lilly's hunger strike is to protest such things as disproportionate representation of minorities in prison, disproportionate representation of non-violent offenders in prison, disproportionate representation of mentally ill inmates in prison, and significant lack of mental health services for inmates;

21) That Mr. Lilly has cited the non-violent principles of Mahatma Ghandi and as a youth actually marched with Dr. King following the church bombings in Birmingham. I am not equating him to either Ghandi or King, but his efforts seem firmly rooted in their non-violent principles;

22) That the DOC staff has turned an indifferent eye from Mr. Lilly's reasonable requests, such as that the nutrition be mixed with hot or warm water, when available, especially during winter feedings in a cold room;

23) That DOC staff attitude is indicated by comments such as, "water is water" under those same circumstances;

24) That Mr. Lilly has stated repeatedly that he has no intention of committing suicide, that he is not suicidal, he has no intention of dying;

25) That although Mr. Lilly refused to sign a release drafted by the Court, there is no known theory under which he or his estate could recover from the DOC if

his death is due to their complying with this Court's order, requested by Mr. Lilly, not to forcibly feed him;

26) That although Mr. Lilly has two minor daughters, they are currently ages 15 and 16, and are being supported by their mother. They do not rely at all on Mr. Lilly for support, and they would be in their mid twenties by the time Mr. Lilly is released from prison;

27) That the DOC has acknowledged dual loyalties in that their loyalty to the DOC seems to exceed their loyalty to individual patients where their primary ethical responsibility lies;

28) That the DOC most recently was engaging in a practice of employing four SWAT team members, and an officer, and an RN in extended feedings, taking more than two hours, of Mr. Lilly, three times a day, and seven days a week. Therefore, that the taxpayer's cost of violating his constitutional right to be free of unwanted medical care is somewhere in the vicinity of $200,000 to $300,000 per year;

29) Considering one of the factors in the Supreme Court's analysis in *Turner v. Safley*, *supra*, granting Mr. Lilly's constitutional right to refuse unwanted medical care would not only not cost the State any money, but it would probably save the same $200,000 to $300,000 a year to an extremely financially strapped state government;

30) That this Court wrote to all levels of the DOC administration recently and urged them to work with Mr. Lilly to develop a continuum of care document that would travel with Mr. Lilly and that would be followed at all of the various

institutions, without reinventing the wheel each time, and that invitation was spurned by the DOC;

31) That the United States Supreme Court has established a constitutional "right to die". In this case, however, Mr. Lilly is only asking for recognition of his constitutional right to refuse unwanted medical care. He has no intention of dying;

32) That continued involvement of the court in long term hunger strikes inevitably and invariably will draw the court into the third complex of issues identified above, that is to say, how long is the inmate fed, what is he fed, is he in the restraint chair, is there hot water or cold water. The very processes that are used for six hours a day, seven days a week, 52 weeks a year become very important, not only in reference to the status of Mr. Lilly's health, but also in terms of whether the DOC is following the court's admonishment not to torture or mistreat Mr. Lilly in the delivery of health care services;

33) That when there are violations of the court order, ideally the court would be able to respond within hours, but practical experience shows that the court's response is more likely to be gauged in terms of weeks or months;

34) That in light of all the foregoing circumstances, it makes no sense to require or allow the DOC to continue force feeding this particular inmate;

35) That Mr. Lilly indicated that he would be willing to sit down and communicate with DOC medical staff, including physicians, regarding the state of his health as he continues his hunger strike. He would cooperate with periodic sampling of his blood so that metabolic panels can continue to be run;

36) That Mr. Lilly is familiar with the significance of the various readings on a metabolic panel and, although he is not a physician, this would certainly help him to gauge where he is at and to determine the mode and method of his continuing hunger strike.

37) That the Court has provided inmate Lilly with both a living will form and a power of attorney for health care. Mr. Lilly in fact already had both, and he plans on using them to express his wishes.

The Court therefore is finding <u>compelling circumstances</u> which warrant the following orders:

IT IS THEREFORE ORDERED that all previous orders allowing forced feeding or the forced provision of hydration to inmate Warren G. Lilly, Jr. are hereby terminated.

IT IS FURTHER ORDERED that in order to give the foregoing order any meaning at all, and to prevent the DOC from doing an end run around such order, it is further ordered that the Wisconsin Department of Corrections is hereby enjoined from further forced provision of nutrition or hydration to inmate Lilly unless and until he asks for it. Among other things, this means that the DOC may not go to a different trial court in the state and ask for another forced feeding order to replace the one that the Court is hereby terminating.

IT IS FURTHER ORDERED that in light of the Court's order prohibiting future forced feeding, the Court does not see a need to make financial awards requested by Mr. Lilly for past violations of this Court's order. The purpose of such financial awards would be to deter DOC staff from further violations of court specified methodologies in force feeding Mr. Lilly. Since the Court is absolutely prohibiting any such force feeding, that is no longer a problem. If this Court would be reversed, however, on the compelling

circumstances finding and order above, then this Court would have to revisit the subject's motion to award financial penalties for established violations of the Court's prior orders, and

IT IS FURTHER ORDERED that in the event that this Court's order terminating forced feeding and the supporting injunction would be reversed for any reason, this Court would hereby order that the forced feeding of Mr. Lilly involve him seated in the restraint chair for no more than 30 minutes at any feeding, and that a bolus feeding, or series of feedings, be provided Mr. Lilly taking no longer than 20 minutes of the 30 minutes that he would be in the restraint chair. That upon his request, any water mixed with the nutrition should be hot water, and that vinyl straps be used for the wrist restraints connected by a handcuff as was discussed and demonstrated by the Court on the morning of May 4, 2009.

Neither this Court nor the Court of Appeals should feel any compunction to serve as a mere rubber stamp for the Wisconsin Department of Corrections. Having said that, if the DOC were to come in to the undersigned judge next week with paperwork that satisfies the *Saenz* case on another inmate, I have no doubt that I would sign it and enter a forced feeding order. In all likelihood, that would be the end of the case, and we would not likely ever reach the second, third or fourth complexes of issues identified above. However, if that inmate remained on the hunger strike for several years, and things happened in his case such as have happened with Mr. Lilly's case, it would be only right and just if the law in Wisconsin allowed the trial court to consider whether compelling circumstances have developed which support a termination and prohibition of such further orders.

If Wisconsin Law does not permit a compelling circumstance exception to the *Saenz* force feeding protocol, then the Wisconsin DOC will realize that it is free to do whatever it wants, including making many non-medical decisions on how medical care is provided to hunger striking inmates.

For the last several months (and perhaps years) there has been an ongoing debate in Washington along the lines of "Is water boarding torture?" and "What if torture works . . . shouldn't it be used?" That debate has been swirling about with regard to terrorists, and potential terrorists, who have as their goal in life the destruction of the United States of America. They are people who, we presume, would be willing to fly additional airplanes into additional buildings to kill thousands of Americans. Even in the face of such a threat, our new President has come down against torture as being un-American and contrary to the founding principles that our nation was built on.

Certainly, this Court, nor the Wisconsin Court of Appeals, nor the Wisconsin Department of Corrections, should in any way condone any type of mistreatment or torture of an inmate in a Wisconsin correctional facility. This debate should form no part of a discussion about how medical care is to be delivered to a U.S. citizen over his constitutional objection.

Whether what has happened to Mr. Lilly in the course of the DOC's force feeding processes over the last five years resulted from some form of bureaucratic oversight, benign neglect, purposeful conduct, carelessness, or something else, the consequences to Mr. Lilly have been exactly the same…and they are not good. This Court is not going to try to classify what has happened into any of those categories in particular, and it is more likely to be the result of a haphazard combination of all of those circumstances. The DOC acts through countless employees

of vastly different levels of training, ability, dedication and motivation. There are some very dedicated individuals of great integrity within the DOC. Nevertheless, this Court is absolutely convinced that the facts in this case establish circumstances justifying this Court entering the orders above.

I respectfully ask my colleagues on the Court of Appeals to affirm on the existence of a "compelling circumstance" exception to the *Saenz* rationale. I also ask that the Court of Appeals affirm on the application of that exception under the facts of this particular case. For the benefit of the trial courts with prisons in their jurisdictions, it would be helpful if the Court would also set forth what standards the DOC is expected to meet in seeking an extension of a forced feeding order (under *Lilly I/ Saenz II*). And finally, I am asking the Court of Appeals to affirm on the issuance of an injunction necessary to give meaningful life to my order to terminate the force feeding of Mr. Lilly.

Dated this 19th day of May, 2009.

BY ORDER OF THE COURT

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ANDREW P. BISSONNETTE
CIRCUIT JUDGE, BRANCH 3
DODGE COUNTY, WISCONSIN

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