10/8/77 A response has been received. It tracks the arguments given in the memo as to why this petn should be denied. Together with the memo writer, I find these reasons to be persuasive. Deny.

PRELIMINARY MEMORANDUM

Oct. 14 Conf. List 2

Summer List 3, Sheet 2

No. 76-1660 CFX

HUTTO [Dept. of Corr.]

v.

FINNEY

Cert to CA 8 (Heaney, Ross, Van Pelt)

Federal/Civil (E.D. Ark., Henley, J. [by desig.])

Timely

1. SUMMARY: The DC held that certain uses of indefinite punitive segregation as punishment in the Arkansas penal system violated the Cruel and Unusual Punishment Clause and that the State of Arkansas should pay $20,000 to counsel for the resps as attorney's fees. The CA 8 upheld the DC and further awarded counsel for resps $2,500 for services on appeal. This petn raises three issues: (1) Was the DC empowered by P.L. 94-599 (Civil Rights Attorney's Fees Awards Act of 1976, Oct. 19, 1976), to make an award of attorneys' fees against a state agency? (2) If

Pub. L. 94-599 was inapplicable, was the award justified because the award was "ancillary" to prospective injunctive relief or because the petrs acted in "bad faith" as defined by Aleyska Pipeline Service Co. v. Wilderness Service, 421 U.S. 240, 258-259 (1959)? (3) Does the use of indefinite punitive segregation as punishment within prison violate the Cruel and Unusual Punishment Clause?

2. FACTS: This petn is another chapter "in the seemingly endless litigation involving the constitutionality of the Arkansas state prisons." The resps, prisoners, brought individual and class actions under 42 U.S.C. §1983 against petrs, who include the Arkansas Commissioner of Correction, members of the Arkansas State Board of Correction, and lesser prison officials. Resps alleged that conditions in, and practices of, certain Arkansas prisons rendered the confinement there a cruel and unusual punishment. In its most recent action (entitled the "Third Supplemental Decree"), among other things, the DC held that the policy of sentencing inmates to indeterminate periods of confinement in punitive isolation was unconstitutional, given the duration (indeterminate, sometimes lasting weeks or months) and the conditions of the confinement (often 3 or 4 persons in a cell with sleeping facilities for two; no exercise; a shower and change of clothes every third day; and the continual threat of violence by cell mates). The DC ordered such confinement limited to two persons per cell with a bunk for each and to a maximum of 30 days. The DC also ordered that $20,000 in attorney's fees be paid to resps' attorneys out of the funds of the Department of Correction. The CA 8 affirmed both of the actions described above, and themselves awarded

$2,500 in attorney's fees to resps' court appointed counsel for their service on appeal.

3. DECISION BY CA 8: The CA 8 held, citing Fitzpatrick v. Bitzer, 427 U.S. 445, 457 (1976), that the award of attorneys' fees was authorized by Act of 1976, Pub. L. No. 94-559, 1/ supra, which was signed into law while the case was pending appeal. The court also held, after examining the legislative history and Bradley v. Richmond School Board, 416 U.S. 696 (1974), that Congress intended the Act to apply to all pending litigation. By way of dictum, the CA 8 also ruled that, although it was not required to pass on the issue, the record fully supported the DC's finding that the conduct of the state officials justified an award of attorney's fees under the "bad faith" exception enumerated in Aleyska Pipeline Service Co. v. Wilderness Society, supra. Finally, the CA 8 upheld, without discussion, the DC's decision that punitive confinement for more than 30 days was cruel and unusual punishment.

4. CONTENTIONS: Petr disputes both holdings.

(a) Attorney's Fees: Petrs recognize that under the enabling clause of the 14th Amendment, Congress can override the 11th Amendment's ban on money judgments against a state, see Fitzpatrick v.

1/ "In any action or proceeding to enforce a provision of Section 1977, 1978, 1979, 1980, and 1981 of the Revised Statutes. Title IX of Public Law 92-318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or Title VI of the Civil Rights Act of 1964, the Court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the cost." Public Law No. 94-559 (Oct. 19, 1976).

Bitzer, supra, but they argue that Congress has not done so in regard to actions brought under 42 U.S.C. §1983. Public L. No. 94-559 does not do the job, they claim, because it authorizes an award only against a party and Congress failed to amend to permit the inclusion of a state as a party def. And, they contend, even if Pub. L. No. 94-559 does override the 11th Amendment in §1983 actions, it should not be applied in the case at bar because it was not signed into law until the case was pending on appeal.

Petrs further argue that under the 11th Amendment as interpreted in Edelman v. Jordan, supra, neither of the other rationales offered by the DC and CA are sufficient to support the award: the award is not justified under the "bad faith" exception enumerated in Aleyska Pipeline Service Co. v. Wilderness Society, nor under a theory that the award is only "ancillary" to the prospective equitable relief.

(b) Indefinite Punitive Segregation: Petrs argue that other Circuits have held that indefinite punitive isolation does not constitute cruel and unusual punishment. See Sostre v. McGinnis, 442 F.2d 178, 193 (2d Cir. En Banc 1971); Novak v. Beto, 453 F.2d 661, 670 (5th Cir. 1971). Thus, the circuits are in conflict and this Court ought to settle the matter. Moreover, petrs contend with the usual array of arguments that the CA 2 and 5 are correct, while the CA 8 is incorrect, particularly on the facts of this case.

5. DISCUSSION: (a) Attorneys' Fees: If Pub. L. No. 94-559 is inapplicable to this case, then this case would raise the question of whether there is any occasion to make an award of

fees against a state agency other than when expressly authorized by Congress. Some courts have held that Edelman v. Jordan, supra, prevents any award of attorneys' fees against a state agency. See, e.g., Hallmark Clinic v. North Carolina Dept. of Human Resources, 519 F.2d 1315, 1317 (4th Cir. 1975); Skehan v. Bd. of Trustees of Bloomsburg State College, 501 F.2d 31, 42 (3d Cir. 1974), vacated on other grounds, 421 U.S. 983 (1975); Jordon v. Gilligan, 500 F. 2d 701, 709-710 (6th Cir. 1974), cert. denied, 421 U.S. 991 (1975). On the other hand, some courts have permitted an award under various theories. For example, some courts have permitted an award under the Aleyska "bad faith" exception. See, e.g., Thonen v. Jenkins, 517 F.2d 3, 6 (4th Cir. 1975); Class v. Norton, 505 F.2d 123, 126-127 (2d Cir. 1974); Milburn v. Huecher, 500 F.2d 1279, 1280 (6th Cir. 1974). Even this Court summarily affirmed a DC case where an award was made against a state because of bad faith, see Sims v. Amos, 340 F. Supp. 691, 694 (N.D. Ala. 1972), aff'd, 409 U.S. 942. But see, Murgia v. Massachusetts Bd. of Retirement, 386 F.Supp. 179, 181 (D. Mass. 1972) (denied attorneys' fees "both as a matter of law, and as a matter of discretion."), summarily aff'd, 421 U.S. 972. Another tack used by some courts to justify an award is that the successful litigants are "private attorneys general" and the award is merely ancillary to prospective equitable relief. See, e.g., Souza v. Travisono, 512 F.2d 1137, 1139-1140 (1st Cir. 1975); Mulburn v. Huecken, 500 F.2d 1279, 1280 (4th Cir. 1974). Cf. Fitzpatrick v. Bitzer, 427 U.S. 445, 457 (1976) ("We need not address this question [whether the award could be permitted as falling outside the 11th Amendment because it would have only an "ancillary effect" on the state treasury] . . . .").

I do not think the petn is certworthy, however, because the CA 8 is correct in its holding that Pub. L. No. 94-559 authorizes the award in this case. The plain language of the statute indicates that all prevailing parties, except the United States, may receive an award of attorneys' fees. Congress could not have been unaware that §1983 actions are brought against state agencies or state officials acting in their official capacity and yet it did nothing to limit the clear implication of the Act that awards can be made against the party defs in their official capacities, which, in this case, are head of, and members of, the Dept. of Correction. Moreover, the CA 8 seems correct in its holding that Congress intended Pub. L. No. 94-559 to apply to pending litigation. But, even if there is some doubt about the correctness of the CA 8's opinion in these two respects, it would be worth waiting at least until some other Circuits have faced these issues. The issues do not seem important enough to require immediate review.

(b) Indefinite Punitive Segregation: This issue is extremely fact-specific. The DC judge did not hold that indefinite punitive segregation was per se unconstitutional. Neither did he totally prohibit punitive segregation. Rather, he held that in light of the conditions of confinement and the manner of administration, petrs' use of indefinite punitive segregation was unconstitutional. He then limited the length of such confinement and slightly modified the conditions. Given the unique circumstances of the case, I do not think the decision is necessarily in conflict with the decisions of the CA 2 and 5. Moreover, I

cannot see anything useful that would be accomplished by review of the DC judge's decision.

No response filed.

Deny as to all issues.

7/20/77 Young
SN

7/21 Deny. DW