

No. 06-1750

In the
United States Court of Appeals
for the Seventh Circuit

David Paul Hammer,
Plaintiff-Appellant,

v.

John D. Ashcroft, Attorney General of the United States; Harley G. Lappin, Warden;
Kathleen Hawk-Sawyer, Director - Federal Bureau of Prisons; and Keith Olson, Warden,
Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of Indiana,
No. IP 01-558-C-T/G,
The Honorable John Daniel Tinder, Judge Presiding.

BRIEF OF PLAINTIFF-APPELLANT
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CIRCUIT RULE 26.1

DISCLOSURE STATEMENT

Appellate Court No: 06-1750

Short Caption: Hammer v. Ashcroft, et. al

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

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None

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Date: 8/1/2007

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None

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JURISDICTIONAL STATEMENT

The United States District Court for the Southern District of Indiana, Indianapolis Division, had jurisdiction over this case under 28 U.S.C. § 1331. A final judgment was entered on February 23, 2006, in favor of Defendants-Appellees. (A. 236-37.) On March 13, 2006, Mr. Hammer filed a timely notice of appeal to this Court, which has jurisdiction under 28 U.S.C. § 1291. (A. 238-39.)

ISSUES PRESENTED

1. Whether summary judgment was erroneously granted against David Paul Hammer on Mr. Hammer's claim that his First and Fifth Amendment rights were violated by Institution Supplement THA-1480.05A, which prohibited federal death row inmates (and only federal death row inmates) from having face-to-face access to the press, or from sharing with the press, in any form, "any information regarding other federal or state inmates," on the ground that Mr. Hammer had failed to demonstrate a genuine issue of material fact?

2. Whether the district court abused its discretion by granting summary judgment against Mr. Hammer, a *pro se* plaintiff, without allowing him a continuance under Fed. R. Civ. P. 56(f) for the purpose of compelling Defendants-Appellees to provide discovery, which they had categorically refused to do?

3. Whether the district court abused its discretion in denying Mr. Hammer's three separate motions for the appointment of counsel, where Mr. Hammer had demonstrated that he was indigent, his claims involved difficult constitutional issues, and his incarceration made meaningful discovery impossible?

STATEMENT OF THE CASE

Plaintiff-Appellant David Paul Hammer (“Mr. Hammer”) commenced this action on April 24, 2001, by filing a Complaint in the United States District Court for the Southern District of Indiana, Indianapolis Division, against Defendants-Appellees John D. Ashcroft (“Attorney General Ashcroft”), Harley G. Lappin (“Warden Lappin”), Kathleen Hawk-Sawyer (“Director Hawk-Sawyer”), and Keith E. Olson (“Warden Olson”). (A. 1-16.) An Amended Complaint was filed on January 2, 2003. (A. 26-40.) The Amended Complaint sought injunctive and declaratory relief, as well as compensatory and punitive damages from Defendants-Appellees in their official and personal capacities for violating Mr. Hammer’s rights under the First and Fifth Amendments. (*Id.*) Specifically, Mr. Hammer alleged that Bureau of Prisons’ (“BOP”) Institution Supplement THA-1480.05A – which prohibits all federal death row inmates (1) from conducting face-to-face or video conference interviews with the press and (2) from discussing with the press in any way information regarding other federal or state inmates (including inmates who witnessed the murder for which Mr. Hammer was sentenced to death) – violated his constitutional rights to freedom of speech, equal protection, and due process of law. (*Id.*)

Between October 10, 2002, and May 12, 2005, Mr. Hammer filed three separate Motions for the Appointment of Counsel. (A. 16-23, 41-50, 66-75.) In each Motion, Mr. Hammer cited his indigence; the complex nature of the constitutional issues involved in the case; and the impossibility of conducting meaningful discovery given his confinement. (*Id.*) The district court denied all three Motions. (A. 24-25, 51-55, 227-28.)

Mr. Hammer served three separate *pro se* discovery requests, but Defendants-Appellees declined to produce any documents in response to any of them. (A. 56-62, 76-86.) Nonetheless, on May 10, 2005, Defendants-Appellees filed a Motion for Summary Judgment, claiming that Mr. Hammer had failed to raise a genuine issue of material fact regarding the constitutionality of the BOP restrictions. (A. 63-65.) In response, Mr. Hammer filed a Motion for a Continuance under Fed. R. Civ. P. 56(f). (A. 87-90.) Pending a decision on that motion, Mr. Hammer also filed a Memorandum of Law in Opposition to Defendants-Appellees' Motion for Summary Judgment on June 9, 2005, to which he attached 50 exhibits. (A. 91-118, 119-123.)

On August 23, 2005, the district court entered an order "granting" Plaintiff's Motion for a Continuance, but only "to the extent that his filings in this action . . . shall be deemed to have been timely made." (A. 225-26.) The district court denied Mr. Hammer any extension of time to engage in further discovery, or to challenge Defendants-Appellees' refusal to provide discovery. (*Id.*) Six months later, on February 23, 2007, the district court granted Defendants-Appellees' Motion for Summary Judgment, holding that "[Mr.] Hammer has not identified a genuine issue of material fact as to his claims." (A. 229-37.) On March 14, 2006, Mr. Hammer filed a timely Notice of Appeal from (1) the district court's entry of summary judgment, (2) the district court's denial of his motion for a continuance under Fed. R. Civ. P. 56(f), and (3) the district court's denial of his three motions for appointment of counsel. (A. 238-39.) On April 17, 2007, this Court appointed counsel for Mr. Hammer.

STATEMENT OF FACTS

I. Facts Underlying Mr. Hammer's Constitutional Claims

A. Mr. Hammer's Face-to-Face Access to the Press, July 1999 – March 2000

Mr. Hammer, who was sentenced to death for the killing of another prisoner, has been incarcerated in the Special Confinement Unit ("SCU") of the United States Penitentiary - Terre Haute ("USP-TH") since July 13, 1999. (A. 28.) The SCU was conceived as "a humane, safe, and secure environment for individuals who have received a [federal] sentence of death," but from its inception the SCU has also housed "inmates who are not under . . . sentence of death, but are . . . considered in administrative detention status." (A. 200.) As one of the SCU's 20 original death row inmates (which also included Timothy McVeigh), Mr. Hammer has received numerous press requests for face-to-face interviews to discuss conditions on death row, his personal legal proceedings, and other matters. (A. 176-92.)

On December 27, 2005, the United States District Court for the Middle District of Pennsylvania vacated Mr. Hammer's death sentence due to the government's failure to disclose mitigating statements made by other inmates, which "tainted the jury's determination that Mr. Hammer committed the offense after substantial planning and premeditation." *United States v. Hammer*, 404 F. Supp. 2d 676, 798-99 (M.D. Pa. 2005). Mr. Hammer is currently awaiting re-sentencing or retrial.

Warden Lappin approved Mr. Hammer for three face-to-face interviews in late 1999: two on-camera interviews with television reporters in August and December 1999, and a personal interview with a print reporter in November 1999. (A. 93-94.) All three

interviews occurred in the SCU's non-contact visiting room under the supervision of prison staff. (A. 94.) 28 C.F.R. § 540.63 requires that "as a prerequisite to granting an interview the inmate must authorize the institutional staff to respond to comments made in the interview and to release information to the news media relative to the inmate's comments." Pursuant to 28 C.F.R. § 540.63, Mr. Hammer and the interviewers agreed to allow prison staff to respond to any of Mr. Hammer's statements made during the interview. (A. 94.) No security incidents or violence resulted from any of these interviews. (A. 93-94.)

B. The Aftermath of Timothy McVeigh's "60 Minutes" Interview - Restrictions on Mr. Hammer's Access to the Press from March 2000 until April 2001

On March 12, 2000, the CBS television news program "60 Minutes" aired reporter Ed Bradley's interview of SCU death row inmate Timothy McVeigh. (A. 175.) Public and political outcry over the controversial interview was immediate. Two days after the interview, United States Senator Byron L. Dorgan sent a letter to BOP Director Hawk-Sawyer, in which he stated that allowing Mr. McVeigh to be interviewed "goes well beyond what the Supreme Court has ruled is required to comply with Mr. McVeigh's First Amendment rights as well as the free press rights of a news organization to cover those within the federal prison system." (*Id.*) Senator Dorgan threatened legislative action unless the BOP prohibited interviews of federal death row inmates in the future. (*Id.*)

Thereafter, Warden Lappin rejected all press requests for face-to-face interviews with Mr. Hammer. From March 2000 until April 16, 2001, Warden Lappin denied at

least nine separate press requests to conduct face-to-face or unrestricted telephone interviews with Mr. Hammer. (A. 176-92.) Warden Lappin justified his denial of these interviews “in order to protect the privacy of inmates and staff, and to insure the orderly and safe operation of the institution.” (A. 92-93.)

Mr. Hammer attempted to communicate with the press in late 2000 by having his attorney, Ronald C. Travis, issue a press release summarizing Mr. Hammer’s impressions of the tense mood on death row as the December 12, 2000 execution of inmate Juan Garza approached. (A. 215-19.) Calling “publication of [the press] release irresponsible,” Warden Lappin warned Mr. Travis that it “very well may have jeopardized the security of this institution, and the lives of the inmates and staff members who live and work here.” (A. 168-69.) Warden Lappin also charged Mr. Travis with possibly “committ[ing] a violation of [Pennsylvania’s] state bar’s code of conduct.” (A. 169.)

Mr. Hammer continued to attempt to exercise his right to communicate with the press through restricted phone calls and written correspondence. In response to these efforts, Mr. Hammer received three written orders from Warden Lappin in late December 2000 and early January 2001, which purported to prohibit Mr. Hammer “from disclosing to a media representative *any* information about another inmate through any manner of communication (oral, written, etc.).” (A.170-73.) This restriction prevented Mr. Hammer from discussing his ongoing case with the press, because his challenge to his conviction involved the existence of undisclosed mitigating evidence from fellow inmates. *Hammer*, 404 F. Supp. 2d at 798-99. During this time period,

communications between federal inmates and the press were regulated by 28 C.F.R. § 540.61(d), which states that “[a] representative of the news media may not obtain and use personal information from one inmate about another inmate who refuses to be interviewed.” Warden Lappin’s three letters to Mr. Hammer did not identify what, if any, personal information regarding other inmates Mr. Hammer may have shared with the press; nor did it disclose the identities of the inmates, if any, whom Mr. Hammer may have discussed with the press but who had refused to be interviewed. (A. 170-73.)

C. A Permanent Ban on Face-to-Face Press Interviews for Federal Death Row Inmates - Restrictions on Mr. Hammer’s Access to the News Media from April 2001 until the Present

Warden Lappin continued to limit Mr. Hammer’s ability to communicate with the press in this way until April 2001. On April 12, 2001, Attorney General Ashcroft and Director Hawk-Sawyer held a nationally broadcast press conference to discuss both the press access policy for Mr. McVeigh’s execution (which was scheduled for June 11, 2001), and press access to federal death row inmates in general. (A. 150-55.) During this press conference, Attorney General Ashcroft stated that:

As an American who cares about our culture, I want to restrict a mass murderer’s access to the public podium. On an issue of particular importance to me as attorney general of the United States, I do not want anyone to be able to purchase access to the podium of America with the blood of 168 innocent victims. Media access to special confinement unit inmates will be limited to each inmate’s ordinary allotment of telephone time.

(A. 152.) Under the policy announced by Attorney General Ashcroft and Director Hawk-Sawyer, all federal death row inmates would be prohibited from face-to-face

interviews with the press, and future interviews would be limited to restricted, monitored 15-minute phone calls that the press were prohibited from recording. (A. 152, 154.)

Four days later, on April 16, 2001, Warden Lappin implemented the new policy announced by Attorney General Ashcroft and Director Hawk-Sawyer, by adopting Institution Supplement THA-1480.05A. (A. 193-98.) The Institution Supplement states that “[t]o maintain safety, security and the good order of the SCU, in-person interviews (including video-recorded interviews) will not be permitted,” and press representatives were prohibited from recording or broadcasting phone interviews or “from asking or discussing with [an] SCU inmate any information regarding other federal or state inmates.” (A. 195.) This restriction applied only to federal death row inmates housed on the SCU; federal inmates who had not been sentenced to death, including other inmates housed on the SCU and elsewhere at USP-TH, were allowed continued face-to-face access to the press, subject to individualized review of each interview request for specific security concerns. (A. 194-95; 28 C.F.R. § 540.63.)

From April 16, 2001, until Warden Olsen’s departure on September 30, 2004, Wardens Lappin and Olson enforced Institution Supplement THA-1480.05A’s bans on face-to-face press interviews and the sharing with press representatives of any information regarding other inmates against Mr. Hammer and all federal death row inmates. (A. 35.) Institution Supplement THA-1480.05A has been enforced only against Mr. Hammer and other SCU inmates sentenced to death; all non-death row inmates, including those housed on the SCU, regardless of the nature of their crimes, are

permitted face-to-face access to the press subject to 28 C.F.R. § 540.63. (A. 35.) The restrictions remain in place today.

II. District Court Proceedings

Mr. Hammer commenced this litigation on April 24, 2001, by filing a civil rights complaint against Attorney General Ashcroft, Director Hawk-Sawyer, and Warden Lappin. (A.1-15.) Mr Hammer sought injunctive relief, declaratory relief, and compensatory and punitive damages against all of the defendants in their official and personal capacities under *Bivens v. Six Unknown Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). (A. 1-15.)¹

The district court screened Mr. Hammer's original complaint under the Prison Litigation Reform Act, 28 U.S.C. § 1915(A)(b)(1), and dismissed the complaint for failure to state a claim upon which relief could be granted on May 24, 2001. Mr. Hammer filed a *pro se* appeal. This Court reversed and remanded the case for further proceedings on July 25, 2002. *Hammer v. Ashcroft*, 42 Fed. Appx. 861 (7th Cir. 2002). This Court held that the district court erred in relying exclusively upon administrative documents from Warden Lappin to demonstrate that the restrictions were based on "safety and privacy concerns," and that the district court failed to accept as true Mr. Hammer's allegations

¹ Mr. Hammer's original complaint alleged that: (1) Warden Lappin, acting at the direction of Attorney General Ashcroft and Director Hawk-Sawyer, had denied all press requests for face-to-face interviews with Mr. Hammer in violation of Mr. Hammer's First Amendment rights based solely on his status as a death row inmate; and (2) Warden Lappin, acting at the direction of Attorney General Ashcroft and Director Hawk-Sawyer, had placed restrictions upon Mr. Hammer's right to speak to the press by any means regarding other inmates in violation of Mr. Hammer's First Amendment rights. (A. 1-15.)

that such safety concerns were a pretext or “guise” under which Warden Lappin attempted to justify the allegedly unconstitutional restrictions. *Id.* at 864.

On remand, Mr. Hammer later filed a Motion for the Appointment of Counsel, claiming that counsel was necessary due to Mr. Hammer’s indigence, the complexity of the issues involved, and the difficulties posed in conducting discovery while incarcerated. (A. 16-23.) The District Court denied that motion on October 17, 2002. (A. 24-25.)

On January 2, 2003, Mr. Hammer filed an Amended Complaint, adding Warden Olson as a named defendant and alleging that the restrictions violated his First and Fifth Amendment rights. (A. 26-40.) Mr. Hammer also alleged that he was entitled to injunctive and declaratory relief, as well as compensatory and punitive damages. (*Id.*) More specifically, Mr. Hammer’s Amended Complaint alleged that: (1) from March 2000 through April 2001, Warden Lappin and Director Hawk-Sawyer violated his First and Fifth Amendment rights by adopting practices and procedures that restricted his ability to conduct face-to-face interviews with the press and also prohibited him from discussing other inmate witnesses involved in his criminal case with the press; and (2) on April 16, 2001 Warden Lappin, under the direction of Attorney General Ashcroft and Director Hawk-Sawyer, adopted and began enforcing USP-TH Institution Supplement THA-1480.05A, which denied all death row inmates, including Mr. Hammer, the right

to have face-to-face interviews with the press or to discuss in any form other inmates with the press, in violation of Mr. Hammer's First and Fifth Amendment rights. (*Id.*)²

In February 2004, Warden Olson informed Mr. Hammer that his execution had been set for June 8, 2004, and, thinking that he would soon be dead, Mr. Hammer moved to dismiss his Amended Complaint without prejudice. Defendants-Appellees did not oppose Mr. Hammer's motion, which was granted without prejudice on March 26, 2004. However, after the United States Court of Appeals for the Third Circuit granted Mr. Hammer's Motion for a Stay of Execution, Mr. Hammer moved to vacate the judgment under Rule 60(B)(6) and thus reinstate his civil action. Over the objections of Defendants-Appellees, the district court granted Mr. Hammer's motion and reinstated the case on August 3, 2004.

On September 10, 2004, Mr. Hammer renewed his Motion for Appointment of Counsel, which the district court again denied on March 31, 2005. (A. 41-55.)

Between March 31, 2005 and May 5, 2005, Mr. Hammer served three separate sets of document requests on Defendants-Appellees. (A. 56-62.)³ Among other things, Mr. Hammer requested the following:

- (1) All documents related to requests by the press to interview Mr. Hammer during his confinement on the SCU;
- (2) "[A]ll policies, directives or instructions governing news media interviews with inmates confined within the Federal Bureau of Prisons;"

² Mr. Hammer contends that Warden Olson replaced Warden Lappin on August 26, 2001, and continued enforcement of Institution Supplement THA-1480.05A in violation of Mr. Hammer's First and Fifth Amendment rights. (A.26-40.)

³ For some reason, these documents were not docketed until May 25, 2005.

(3) All documents “between the defendant[s], their agents, employees, representatives or any other person concerning news media interviews and/or requests for interviews with inmates confined on the SCU;”

(4) All documents and correspondence between defendants and United States Senator Byron Dorgan relating to the “60 Minutes” interview of Timothy McVeigh, including any documents related to the policy on news media interviews with all federal death row inmates confined on the SCU;

(5) All documents and information relating to the availability of video conferencing facilities at the SCU;

(6) All information and documents indicating the number of inmates incarcerated within the Federal Bureau of Prisons and specifically within USP-TH serving a sentence other than death for the crime of murder; and

(7) Information and documents related to any uprisings or disturbances within USP-TH or any other BOP facility which was the direct or indirect result of a face-to-face interview between an inmate and a member of the press. (A. 56-62.)

Rather than respond to Mr. Hammer’s three requests for the production of documents, Defendants-Appellees filed a Motion for Summary Judgment on May 10, 2005 (A. 63-65) – a full month before the district court’s announced date for the close of discovery. (A. 54.) In their Motion for Summary Judgment, Defendants-Appellees alleged that “there [were] no genuine issues of fact in dispute in this action” because (1) “plaintiff’s allegations of restricted media access fail[ed] to set forth a violation of any right that is clearly established and/or secured to the plaintiff by the United States Constitution;” (2) that with respect to Attorney General Ashcroft, Director Hawk-Sawyer, and Warden Olson, “plaintiff has failed to demonstrate the direct, personal involvement of these defendants in the alleged unconstitutional conduct;” and (3) that

“the defendants are immune from liability pursuant to the doctrine of qualified immunity.” (A. 63-65.) It was not until two weeks after filing this Motion for Summary Judgment that Defendants-Appellees responded to Mr. Hammer’s three discovery requests by refusing to provide any documents whatsoever. (A. 76-86.)

In response to the Motion for Summary Judgment, Mr. Hammer renewed his request for appointment of counsel. (A. 66-75.) His assertions concerning the difficulty of conducting discovery were underscored, on this occasion, by Defendants-Appellees’ successful, categorical refusal to provide discovery. (A. 76-86.) Mr. Hammer also moved for a continuance under Fed. R. Civ. P. 56(f), seeking additional time challenge Defendants-Appellees’ recalcitrant refusal to provide documents to him. (A. 87-90.)

In an effort to protect his rights, Mr. Hammer also filed a *pro se* opposition to Defendants-Appellees’ Motion for Summary Judgment, attaching 50 exhibits he had gathered despite Defendants-Appellees’ refusal to afford discovery. (A. 91-123.) On August 23, 2005 the District Court “denied for the present” Mr. Hammer’s Third Motion for the Appointment of Counsel, and further “granted” Mr. Hammer’s Motion for a Continuance, but only “to the extent that his filings in this action . . . shall be deemed to have been timely made.” (A. 225-26.) The court denied Mr. Hammer any “additional extension of time to engage in further discovery.” (A. 225.) On January 25, 2006, the district court entered an additional order officially denying Mr. Hammer’s Third Motion for the Appointment of Counsel. (A. 227-28.) Finally, on February 23, 2006 the district court granted summary judgment in favor of Defendants-Appellees,

holding that “[Mr.] Hammer has not identified a genuine issue of material fact as to his claims against the defendants.” (A. 229-37.)

SUMMARY OF ARGUMENT

Mr. Hammer has raised a triable issue of fact regarding the constitutionality of Institution Supplement THA-1480.05A, that is, he has raised a genuine issue of material fact as to whether this discriminatory policy was adopted at the direction of Attorney General Ashcroft and Director Hawk-Sawyer and enforced by Wardens Lappin and Olson for the unconstitutional purpose of “restrict[ing] a . . . murderer’s access to the public podium.” (A. 152.) By entering summary judgment in favor of Defendants-Appellees, without either allowing Mr. Hammer an opportunity to conduct meaningful discovery or appointing counsel to assist him, the district court repeated the error for which its prior judgment in this case was reversed by this Court. The district court’s entry of summary judgment in favor of Defendants-Appellees also should be reversed, and the case remanded for further proceedings, including an opportunity for Mr. Hammer to secure a ruling on Defendants-Appellees’ recalcitrant refusal to provide discovery.

The district court’s entry of summary judgment should be reversed for five reasons. First, Mr. Hammer has raised a genuine question of material fact as to whether the restrictions placed on his First Amendment rights violate his Fifth Amendment right to equal protection. Mr. Hammer has shown that Institution Supplement THA-1480.05A applies only to federal death row inmates, permanently denying those inmates the right to face-to-face access to the press — a right afforded to all other federal inmates. Mr.

Hammer has therefore raised a material question as to whether his First Amendment rights are being denied solely because of his death sentence, thereby treating him and other death row inmates unequally compared to other inmates, including other inmates convicted of murder but not sentenced to death. In addition, Mr. Hammer has raised a question as to whether Institution Supplement THA-1480.05A is a content-based restriction in violation of both the First and Fifth Amendments, because the Supreme Court has held that any restriction based solely on the speaker's group membership is inherently content-based, and therefore unconstitutional.

Second, under the four-factor reasonable basis test announced in *Turner v. Safely*, 482 U.S. 78, 89 (1987), for evaluating regulations restricting prisoners' First Amendment rights, Mr. Hammer has raised a genuine question of material fact as to whether the restrictions placed upon him by Defendants-Appellees are indeed "reasonably related to legitimate penological interests." The record below suggests that the restrictions were not motivated by valid "security concerns," but to silence death row prisoners after Timothy McVeigh was interviewed on "60 Minutes." Mr. Hammer provided the district court with ample evidence to show that his First Amendment rights could be accommodated through less restrictive means than the absolute ban imposed by Institution Supplement THA-1480.05A, and with negligible impact on prison guards or other inmates. He therefore satisfied his burden of raising a triable question of fact regarding the restriction's constitutionality under *Turner*.

Third, Mr. Hammer's allegations are sufficient to show that Defendants-Appellees, through Institution Supplement THA-1480.05A, deprived him of his First Amendment

liberty interest in meeting with the press face-to-face, in violation of the Due Process Clause of the Fifth Amendment. Institution Supplement THA-1480.05A countermands and eliminates the procedural requirements established by 28 C.F.R. § 540.63 to review media requests for face-to-face interviews with federal prisoners for security concerns, and replaces it with a complete and total ban on all such interviews for federal death row inmates. Mr. Hammer has raised a question as to whether Institution Supplement THA-1480.05A was adopted by Defendants-Appellees without the notice-and-comment procedures required by the Administrative Procedure Act. Mr. Hammer has also raised a question as to whether his rights have been improperly abridged without any adjudication of the specific security concerns that would be posed by Mr. Hammer's being interviewed face-to-face. Mr. Hammer has therefore raised a triable question of fact as to whether the Institution Supplement permanently deprives him of liberty without due process of law.

Fourth, the district court abused its discretion by denying Mr. Hammer a continuance under Fed. R. Civ. P. 56(f). Defendants-Appellees took advantage of Mr. Hammer's *pro se* status by moving for summary judgment a month before the close of discovery and refusing to provide him with any of the document discovery he requested. The district court's denial of Mr. Hammer's Rule 56(f) motion facilitated Defendants-Appellees' successful motion for summary judgment. By denying Mr. Hammer a clearly needed continuance to seek discovery from Defendants-Appellees, the district court prevented him from gathering the evidence necessary to raise a genuine question of fact regarding his claims.

Finally, the district court abused its discretion in denying Mr. Hammer's request for the appointment of counsel, which it did three times. Mr. Hammer's incarceration precluded him from conducting adequate discovery. This case required expert discovery and concerned legal issues of first impression in this (or perhaps any) Circuit. The district court abused its discretion by denying him appointed counsel.

For all of these reasons, the district court's entry of summary judgment was erroneous, and should therefore be reversed, and the case remanded to the district court for further proceedings.

STANDARD OF REVIEW

This Court reviews a district court's grant of summary judgment *de novo*. *Thornton v. Snyder*, 428 F.3d 690, 693 (7th Cir. 2005); *McCoy v. Gilbert*, 270 F.3d 503, 508 (7th Cir. 2001). "We review [appellant's] claims that the district court erroneously granted summary judgment with a fresh set of eyes – *de novo* – to ensure that, after viewing the facts in the light most favorable to [appellant], there remains no genuine issue of material fact and that [appellee] is entitled to judgment as a matter of law." *CERAbio LLC v. Wright Med. Tech., Inc.*, 410 F.3d 981, 987 (7th Cir. 2005). A district court's determination of the constitutionality of a federal statute or regulation is also reviewed *de novo*. *United States v. Wilson*, 154 F.3d 658, 662 (7th Cir. 1998); *Smith v. Shalala*, 5 F.3d 235, 238 (7th Cir. 1993); *Sequoia Books, Inc. v. Ingemunson*, 901 F.2d 630, 633 (7th Cir. 1990).

The standard of review of a district court's denial of a Rule 56(f) motion is for "abuse of discretion." *Farmer v. Brennan*, 81 F.3d 1444, 1449 (7th Cir. 1996); *Pfeil v. Rogers*, 757

F.2d 850, 856 (7th Cir. 1985). A district court's denial of a party's request for appointment of counsel is also reviewed for abuse of discretion. *Greeno v. Daley*, 414 F.3d 645, 658 (7th Cir. 2005); *Farmer v. Haas*, 990 F.2d 319, 322 (7th Cir. 1993).

ARGUMENT

INTRODUCTION

Mr. Hammer has presented evidence sufficient to raise a genuine issue of material fact as to whether the press restrictions placed upon him and other federal death row inmates, based solely on the fact of their death sentences, served (or, indeed, ever could serve) any "legitimate penological objective" of USP-TH, and thus pass muster under the First and Fifth Amendments. For this reason, the summary judgment entered by the district court should be reversed.

Summary judgment is appropriate only where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The entry of summary judgment is warranted "if, on the record as a whole, a rational trier of fact could not find for the non-moving party," *Rogers v. City of Chicago*, 320 F.3d 748, 752 (7th Cir. 2003) (internal quotation omitted), and the court must "construe all facts in a light most favorable to...the party opposing summary judgment, and . . . draw all reasonable inferences in his favor." *McGreal v. Ostrov*, 368 F.3d 657, 672 (7th Cir. 2004) (citation omitted).

While lawful "incarceration brings about the necessary withdrawal or limitation of many privileges and rights . . . justified by the considerations underlying our penal

system,” *O’Lone v. Estate of Shabazz*, 482 U.S. 342, 348 (1987) (citing *Price v. Johnson*, 334 U.S. 266, 285 (1948)), incarcerated individuals “do not forfeit all constitutional protections by reason of their conviction and confinement in prison.” *Bell v. Wolfish*, 441 U.S. 520, 545 (1979). The constitutional rights which federal prisoners retain in some form include freedom of speech under the First Amendment, and the rights to due process and equal protection of the law under the Fifth Amendment. *See Pell v. Procunier*, 417 U.S. 817, 822 (1974) (“a prison inmate retains those First Amendment rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system”); *Johnson v. California*, 543 U.S. 499, 505-07 (2005) (equal protection afforded prisoners protection from racial classifications with regard to the segregation of inmates); *Campbell v. Miller*, 787 F.2d 217, 222 (7th Cir. 1986) (“[t]he constitutional protections encompassed by the Due Process Clause do not abate at the time of imprisonment”) (citing *Hudson v. Palmer*, 468 U.S. 517, 523-24 (1984)).

Mr. Hammer’s complaint alleges that Defendants-Appellees deprived him of these First and Fifth Amendment rights. Based on the record evidence before the district court, Mr. Hammer has demonstrated a “genuine issue” as to whether the restrictions placed on federal death row inmates pass muster under the First and Fifth Amendments, and he has raised a triable question of fact regarding the legitimacy of the purported “security reasons” proffered to justify these restrictions. The district court’s entry of summary judgment should therefore be reversed.

I. The District Court's Grant of Summary Judgment Should Be Reversed Because Mr. Hammer Has Raised a Genuine Question of Material Fact as to Whether the Absolute Ban Placed Upon his First Amendment Rights Solely Because of His Death Sentence Violates His Right to Equal Protection of the Law

The restrictions placed upon Mr. Hammer's First Amendment right to face-to-face access to the press violate his right to the equal protection of the laws. Section 1 of the Fourteenth Amendment to the United States Constitution states that "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. While the Fifth Amendment does not contain an "equal protection" clause in relation to action by the federal government, the Supreme Court "repeatedly has held that the Fifth Amendment imposes on the Federal Government the same standard required of state legislation by the Equal Protection Clause of the Fourteenth Amendment." *Schweiker v. Wilson*, 450 U.S. 221, 226 n.6 (1981). To the extent that the BOP restrictions adopted and enforced by Defendants-Appellees would deny Mr. Hammer equal protection if imposed by a state, the restrictions necessarily violate Mr. Hammer's rights under the Fifth Amendment.

A. The District Court Should Have Assessed Mr. Hammer's Equal Protection Claim as a Unique Case Challenging a BOP Policy on the Grounds That It Denies First Amendment Rights to Death Row Prisoners in a Discriminatory Manner Based Only On Their Death Sentence.

The Supreme Court has held that general restrictions placed upon prisoners' First Amendment rights are to be analyzed under a reasonable basis standard. *Turner v. Safely*, 482 U.S. 78, 89 (1987). In *Turner*, the Supreme Court held that restrictions placed upon the right of inmates to have written correspondence with other inmates was to be analyzed to see if "the regulation is . . . reasonably related to legitimate penological

interests.” *Id.* Similarly, in *Thornburgh v. Abbott*, 490 U.S. 401, 409-10, 414 (1989), the Supreme Court noted that “a standard of ‘strict’ or ‘heightened’ scrutiny . . . was not appropriate for consideration” of a BOP regulation governing the right of all federal inmates to receive subscription publications, and that the regulation would instead be analyzed using “the *Turner* reasonableness standard.” See also *Beard v. Banks*, 126 S. Ct. 2572, 2578-82 (2006) (upholding a prison policy under the *Turner* reasonableness standard that temporarily restricted the access of certain “specially dangerous and recalcitrant” prisoners to periodicals until such time as their behavior and disciplinary record improved); *Overton v. Bazzetta*, 539 U.S. 126, 131-32 (2003) (holding that a prison policy that denied social visitation privileges to prisoners who had committed two substance abuse violations for a minimum of two years had a “rational relation to legitimate penological interests” in discouraging inmate drug use under *Turner*).

Mr. Hammer’s complaint, however, alleges an equal protection violation under the Fifth Amendment that is categorically different from the claims alleged and reviewed under the reasonable basis standard in *Turner*, *Thornburgh*, *Beard*, or *Overton*. Indeed, the claim presented here is different from that raised in any other case involving the intersection of prisoners’ equal protection and First Amendment rights. The cases applying the *Turner* reasonable basis standard of review have all addressed First Amendment restrictions that were either (A) applicable permanently and equally to all inmates within a correctional system (*Turner*, *Thornburgh*), or (B) applicable to all inmates within a correctional system on a temporary basis in the event certain disciplinary rules were violated (*Beard*, *Overton*). Insofar as these restrictions implicated

equal protection under either the Fourteenth Amendment or the Fifth Amendment, the unequal treatment alleged was unequal treatment of incarcerated prisoners compared to free citizens. But comparing prisoners to free citizens for purposes of equal protection in those circumstances was futile and illogical, because lawful “incarceration brings about the necessary withdrawal or limitation of many privileges and rights . . . justified by the considerations underlying our penal system,” *O’Lone v. Estate of Shabazz*, 482 U.S. 342, 348 (1987) (citing *Price v. Johnson*, 334 U.S. 266, 285 (1948)). Instead, a reasonable basis standard of review over prison regulations restricting First Amendment rights in a manner applicable to all prisoners was appropriate because “inflexible strict scrutiny analysis would seriously hamper [the] ability [of prison officials] to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration.” *Turner*, 482 U.S. at 89.

Mr. Hammer’s claims, by contrast, assert that the First Amendment restrictions imposed upon him and other federal death row inmates by Defendants-Appellees constitute unequal treatment of death row inmates in relation to the universe of federal prisoners as a whole, including others convicted of murder but not given death sentences. In other words, Mr. Hammer’s complaint alleges that Institution Supplement THA-1480.05A discriminates against federal death row prisoners by imposing restrictions based not on their crime or conduct, but on their death sentences, and thereby prohibits federal death row inmates from exercising the same First Amendment freedoms afforded all other federal inmates, including other inmates convicted of murder but not sentenced to death.

No reported decision has applied the *Turner* reasonable basis standard of review to First Amendment restrictions that discriminate *among* prisoners based on their sentences. Indeed, as the Supreme Court noted in *Turner*, “it is important” when a reviewing court analyzes a restriction on the First Amendment rights of prisoners “to inquire whether prison regulations restricting inmates’ First Amendment rights operated in a neutral fashion.” 482 U.S. at 90 (citing *Pell v. Procunier*, 417 U.S. 817, 828 (1974); *Bell v. Wolfish*, 441 U.S. 520, 551 (1979)); *see also Hammer v. Ashcroft*, 42 Fed. Appx. 861, 863 (7th Cir. 2002) (citing *Turner* for the proposition that “[r]elevant to [the constitutionality of the BOP restriction] is whether the restriction on speech is applied in a neutral manner without regard to content *and is applied equally among inmates*”) (emphasis added). It is not appropriate, therefore, for Mr. Hammer’s equal protection claim to be analyzed under the *Turner* rational basis standard which the district court used in this case. Rather, Mr. Hammer’s claim should be assessed using strict or heightened scrutiny to determine whether Defendants-Appellees’ differential treatment of death row prisoners under Institution Supplement THA-1480.05A is a narrowly tailored measure that furthers a compelling governmental interest. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995).

B. Mr. Hammer Has Raised a Triable Question Regarding His Equal Protection Claim Because the Supreme Court Has Consistently Held That a Government’s Restriction of First Amendment Rights Based on Group Classification or Identity Violates Equal Protection.

Supreme Court precedent examining the intersection between equal protection and speech rights demonstrates that the BOP’s permanent and categorical restrictions on the

First Amendment rights of federal death row prisoners, based solely on the nature of their sentences, violates equal protection as a matter of law under strict or heightened scrutiny analysis. While the Supreme Court “has firmly established the principle that the Equal Protection Clause does not make every minor difference in the application of laws to different groups a violation of [the] Constitution,” it is also true that “invidious distinctions [in apportionment or restriction of fundamental rights] cannot be enacted without a violation of the Equal Protection Clause.” *Williams v. Rhodes*, 393 U.S. 23, 30 (1968). Defendants-Appellees cannot merely claim that death row inmates like Mr. Hammer are categorically more dangerous, or categorically present more serious security threats, than other federal inmates not sentenced to death. To satisfy equal protection, they must show that this difference is “compelling,” and that the restrictions imposed by Institution Supplement THA-1480.05A are narrowly tailored to address the security concerns that are posed by these “especially dangerous” inmates.

This equal protection principle was articulated in both *Niemotko v. Maryland*, 340 U.S. 268 (1951), and *Fowler v. Rhode Island*, 345 U.S. 67 (1953), where members of the Jehovah’s Witnesses challenged criminal convictions for disturbing the peace on the ground that their equal protection and free speech rights were violated by local licensing and permit procedures that allowed other religious groups to utilize public spaces for speech. In *Niemotko*, the Court held that the challenged permitting process, which had allowed other religious groups to use a public park (while denying the same right to Jehovah’s Witnesses) could not withstand strict or even rational basis scrutiny: “To allow expression of religious views by some and deny the same privileges to others

merely because they . . . are unpopular, even deeply so, is a denial of equal protection of the law as forbidden by the Fourteenth Amendment.” 340 U.S. at 284. Similarly, the Court in *Fowler* held that a local practice denying Jehovah’s Witnesses the right to conduct services in public parks, while permitting other religious groups to do so, “shows that a religious service of Jehovah’s Witnesses is treated differently than a religious service of other sects. That amounts to the state preferring some religious groups over this one.” 345 U.S. at 69.

The Supreme Court’s disapproval of policies that discriminate among groups with respect to First Amendment rights, as evidenced by *Niemotko* and *Fowler*, is not limited to discrimination among religious groups. Indeed, the Supreme Court held that governmental discrimination among non-religious groups with respect to First Amendment rights also is unconstitutional in *Police Department of City of Chicago v. Mosley*, 408 U.S. 92, 94 (1972). In *Mosley*, the Court addressed a local ordinance that distinguished between labor and non-labor groups in allowing picketing near schools. Noting that “the equal protection claim in this case [was] closely intertwined with First Amendment interests,” the Court observed that “the crucial question . . . is whether Chicago’s ordinance [permitting labor members to picket peacefully near schools but prohibiting non-labor members from doing so] advances that objective in a manner consistent with the commands of the Equal Protection Clause.” *Id.* at 95, 99 (internal quotations and citation omitted).

The Supreme Court held:

Although preventing school disruption is a city's legitimate concern, Chicago itself has determined that peaceful *labor* picketing during school hours is not an undue interference with school. Therefore, under the Equal Protection Clause, Chicago may not maintain that *other* picketing disrupts the school unless that picketing is so clearly more disruptive than the picketing Chicago already permits. If peaceful *labor* picketing is permitted, there is no justification for prohibiting all *non-labor* picketing, both peaceful and nonpeaceful. . . . Such unequal treatment is . . . condemned.

Mosley, 408 U.S. at 100 (emphasis added). According to the Court, Chicago could not claim that "as a class, non-labor picketing is more prone to violence than labor picketing," because "predictions about imminent disruption . . . involve judgments appropriately made on an individualized basis, not by means of broad classifications. . . . Freedom of expression, and its intersection with the guarantee of equal protection, would rest on a soft foundation indeed if government could distinguish among picketers on such a wholesale and categorical basis." *Id.* at 100-01.

Applying *Mosley* to the present case, it is obvious that the district court erred in ruling that the First Amendment restrictions contained in Institution Supplement THA-1480.05A were "neutral" because the restrictions' selective application to federal death row inmates was drawn "solely on the basis of their potential implications for prison security." (A. 233-34) (quoting *Thornburgh v. Abbott*, 490 U.S. 401, 415-16 (1989)). The decision as to whether security concerns demand denial of face-to-face press access to a prisoner necessarily "involve[s] judgments appropriately made on an individualized basis, [and] not by means of broad classifications." *Mosley*, 408 U.S. at 100-01. Nor is there any compelling — or even rational — basis for suggesting that death row inmates

are categorically more dangerous, or categorically pose a greater security threat, than other federal inmates not sentenced to death. *Id.* Mr. Hammer has clearly raised a question as to whether Defendants-Appellees' restrictions are unconstitutionally "overbroad" in violation of equal protection, because the restrictions substitute a broad classification for individualized assessment of the security threat posed by a given face-to-face interview request made by a particular press representative or inmate.

Furthermore, to the extent that Institution Supplement THA-1480.05A treats *death row* prisoners convicted of murder differently from other federal prisoners incarcerated for murder but not sentenced to death, it is unclear whether it can satisfy compelling or rational basis review. It therefore violates equal protection as being impermissibly "underbroad" as well as "overbroad." As shown by the allegations and evidence supplied by Mr. Hammer, Institution Supplement THA-1480.05A applies *only* to death row inmates, but not to other convicted murders incarcerated within the BOP. (A. 99, 195.) It is difficult to imagine how Institution Supplement THA-1480.05A could survive equal protection analysis, even under a rational basis standard of review, when the security concerns allegedly supporting the restrictions are based not on Mr. Hammer's crime (because other murderers are clearly free from the restrictions), but on his death sentence. To the extent that Institution Supplement THA-1480.05A denies murderers sentenced to death the First Amendment rights that are granted to other murderers who have not been sentenced to death, Mr. Hammer has raised another triable issue regarding his equal protection claim.

The record below not only raises a genuine issue of material fact as to whether Institution Supplement THA-1480.05A violates these equal protection rights of federal death row inmates, but practically establishes Mr. Hammer's equal protection claims as a matter of law. The following record evidence demonstrates the restriction's unequal treatment of federal death row inmates: (1) a transcript of the April 12, 2001 press conference of Attorney General Ashcroft and Director Hawk-Sawyer announcing that death row inmates would no longer be permitted to conduct face-to-face interviews with the media because, according to Attorney General Ashcroft, "I want to restrict a mass murderer's access to the public podium. . . . I do not want anyone to be able to purchase access to the podium of America with the blood of . . . innocent victims" (A. 152); (2) Mr. Hammer's affidavit testimony that "the restrictions placed upon me [as a death row inmate] are not applied equally and do not apply to any Federal Bureau of Prisons inmate not under a sentence of death," (A. 131); (3) the text of Institution Supplement THA-1480.05A, which prohibits only death row inmates from participating in face-to-face interviews and from sharing with the media "any information regarding other federal or state inmates," (A.195, 198); (4) the text of 28 C.F.R. § 540.63, which permits all non-death row federal inmates to conduct face-to-face interviews with the press subject to an individual determination on a case-by-case basis that the interview does not "endanger the health or safety of the interviewer, [and] would [not] probably cause serious unrest or disturb the good order of the institution;" and (5) the text of Institution Supplement THA-5566.05D, which states that the non-death row inmates housed on the SCU "are considered in administrative detention status" and are not

therefore subject to the same First Amendment restrictions placed upon death row inmates. (A. 200.)

At the very least, this evidence, which supports Mr. Hammer's well-pleaded allegations in this case, "construe[d] . . . in a light most favorable to . . . the party opposing summary judgment, and . . . draw[ing] all reasonable inferences in his favor," raises a triable question of material fact as to whether Institution Supplement THA-1480.05A denies Mr. Hammer equal protection by imposing a First Amendment restriction upon him that other federal inmates are not subject to, due solely to his death sentence. *McGreal v. Ostrov*, 368 F.3d 657, 672 (7th Cir. 2004) (citation omitted). The district court's entry of summary judgment in favor of Defendants-Appellees is therefore erroneous, and should be reversed.

C. Mr. Hammer Has Also Presented Evidence Sufficient to Raise a Triable Question of Fact as to Whether Institution Supplement THA-1480.05A, In Light of Its Unequal Application to Death Row Inmates, Constitutes an Unconstitutional Content-Based Restriction on Speech.

The Supreme Court's decision in *Mosley* (as well as those in *Fowler* and *Niemotko*) also acknowledges that restrictions on First Amendment rights applied unequally based on affiliation with a disfavored group are inherently content-based, and thus also constitutionally prohibited. In *Mosley*, the Court interpreted an ordinance's disparate treatment of labor and non-labor groups with respect to the right to picket near schools as being a restriction based "not in terms of time, place, and manner, but in terms of subject matter. The regulation thus [shifts] from the neutrality of time, place, and

circumstance into a concern about content. This is never permitted.” 408 U.S. at 99 (internal quotations omitted).

Discrimination regarding First Amendment rights based on group status is always a content-based restriction, because an unequally applied law or regulation banning a group from a means of expression necessarily silences the viewpoints and opinions of that group. Restrictions based on the identity of the speaker are as inimical to First Amendment values as purely content-based restrictions, and the Supreme Court has “frequently condemned such discrimination among different users of the same medium for expression.” *Id.* at 96; *Greater New Orleans Broad. Ass’n, Inc. v. United States*, 527 U.S. 173, 190 (1999) (holding that the FCC cannot restrict advertising by privately operated casinos while allowing advertising by Native-American tribal casinos based on the identity of the speaker); *Los Angeles Police Dept. v. United Reporting Publ’g Corp.*, 528 U.S. 32, 47 n.4 (1999) (Stevens, J., dissenting) (“Our cases have repeatedly frowned on regulations that discriminate based on the content of the speech or the identity of the speaker”).

In this case, Mr. Hammer provided the court with a transcript of the April 12, 2001 press conference of Attorney General Ashcroft and Director Hawk-Sawyer, wherein Attorney General Ashcroft made clear that restrictions were not being imposed for security purposes, but because “I want to restrict a mass murderer’s access to the public podium. . . . I do not want anyone to be able to purchase access to the podium of America with the blood of . . . innocent victims.” (A. 152.) By Attorney General Ashcroft’s own admission, the press restrictions contained in Institution Supplement

THA-1480.05A were not designed to protect security, but to further the Attorney General's desire that well-known federal death row inmates not be given an opportunity to express their views to the American people.

Those views and those inmates may be repugnant to the Attorney General and the BOP. Indeed, they may be repugnant to many. But that has never been considered an appropriate justification for silencing speech under our system of government. As Justice Jackson noted long ago: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion." *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 642 (1943). It is not for the Attorney General to decide who gets to speak or what they get to say.

Because these restrictions were applied unequally to death row inmates based solely on their sentence of death, Mr. Hammer has raised a material question of fact as to whether Defendants-Appellees have burdened his First Amendment rights in a way that is different and unequal to those placed upon other federal inmates, including those convicted of the same crime but not sentenced to death.

II. The District Court's Entry of Summary Judgment Should Be Reversed Because Mr. Hammer Has Raised a Genuine Question of Material Fact as to Whether the BOP Restrictions as Adopted and Enforced by Defendants-Appellees Violate his First Amendment Rights Under *Turner v. Safely*.

The district court's entry of summary judgment in favor of Defendants-Appellees was erroneous for the additional reason that Mr. Hammer raised a genuine question as to whether the restrictions are "reasonably related to legitimate penological interests"

under *Turner v. Safely*, 482 U.S. 78, 89 (1987). The district court purported to apply *Turner*, but did not actually do so. If it had, it would have determined that Mr. Hammer has raised a material question as to whether the restrictions were “reasonably related to legitimate penological interests.” For this further reason, the district court’s summary judgment should be reversed.

In *Turner*, the Supreme Court held that a reviewing court should apply a four-factor test to determine whether a governmental regulation restricting the First Amendment rights of prisoners is “reasonably related to legitimate penological interests.” *Id.* First, “there must be a ‘valid, rational connection’ between the prison regulation and the legitimate governmental interest put forward to justify it.” *Id.* (quoting *Block v. Rutherford*, 468 U.S. 576, 586 (1984)). Second, to determine whether a prison speech restriction is reasonable, a court must inquire as to “whether there are alternative means of exercising the right that remain open to prison inmates.” *Turner*, 482 U.S. at 90. Third, a court must assess “the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally.” *Id.* Finally, “the absence of ready alternatives [to address the legitimate governmental interest] is evidence of the reasonableness of a prison regulation” that limits a prisoner’s constitutional rights. *Id.*

A. Mr. Hammer Provided the District Court with Evidence Raising a Genuine Question of Material Fact As to Whether Institution Supplement THA-1480.05A Was Adopted For the Impermissible Purpose of Silencing the Voice of Death Row Inmates By Preventing Them Access to the Press.

Under the first *Turner* factor, a reviewing court must find that a “valid, rational connection” exists between a prison regulation affecting First Amendment rights and the professed governmental interest served by the regulation. 482 U.S. at 89. While the burden “is not on the State to prove the validity of prison regulations but on the prisoner to disprove it,” *Overton v. Bazzetta*, 532 U.S. 126, 132 (2003), the record below raises a “genuine issue of material fact” as to the validity of Defendants-Appellees’ professed security concerns sufficient to warrant reversal of the district court’s entry of summary judgment.

Mr. Hammer has alleged, and the evidence demonstrates, that Defendants-Appellees adopted Institution Supplement THA-1480.05A because of public reaction to the “60 Minutes” interview of Timothy McVeigh. (A. 126, 175.) Institution Supplement THA-1480.05A’s First Amendment restrictions were designed to silence death row inmates and prevent them from participating in highly visible television interviews with the press. There was no “valid, rational connection” between the restrictions and the “security concerns” proffered as a basis for the restrictions. The record evidence, which includes the following, supports this conclusion: (1) the transcript of the April 12, 2001 press conference of Attorney General Ashcroft and Director Hawk-Sawyer announcing the media restrictions on death row inmates, in which Attorney General Ashcroft admitted that the new policy was adopted because “I want to restrict a mass

murderer's access to the public podium" (A. 151-55, 152); (2) a news report from the Terre-Haute Tribune-Star dated December 15, 2000, noting a BOP response to a letter from Senator Byron Dorgan regarding public outrage over a "60 Minutes" interview of Timothy McVeigh which stated "that [the BOP] would provide restrictions on future [face-to-face media] interviews, citing security concerns as the reason," and stating that this BOP policy would apply only to death-row inmates (A. 175); (3) Mr. Hammer's affidavit regarding the lack of security problems in connection with face-to-face interviews prior to the promulgation of the ban (A. 126-29); and (4) affidavits from fellow death-row inmates stating that there has "never been any sort of violence" in relation to a press interview, and that they have been restrained and monitored by prison staff during all face-to-face visits of any kind (A. 157-58, 160-62, 164-65, 221-24).

This evidence raises a question (and the Attorney General's admission, in particular, strongly suggests an answer) as to whether the regulation is indeed "reasonably related to legitimate penological interests," *Turner*, 482 U.S. at 89, or is instead using the mantle of "security concerns" to shield an impermissible restriction based on the government's (and Attorney General Ashcroft's) professed desire to "restrict a . . . murderer's access to the public podium." (A. 152.) By granting Defendants-Appellees summary judgment on the ground that "Institution Supplement THA 1480.05A sets forth restrictions on inmate contact with the media only in areas reasonably deemed proper for the purpose of [safely] operating the prison" (A. 233), the district court erroneously resolved factual issues regarding the legitimacy of these "security concerns" in favor of Defendants-

Appellees, rather than limiting its inquiry to whether Mr. Hammer had raised a sufficient factual question to defeat summary judgment.

When ruling upon a motion for summary judgment, construing the facts in the record “[i]n the light most favorable’ [to the non-moving party] simply means that summary judgment is not appropriate if the court must make ‘a choice of inferences.’” *Draghi v. County of Cook*, 184 F.3d 689, 691 (7th Cir. 1999) (quoting *Smith v. Severn*, 129 F.3d 419, 425 (7th Cir. 1997)). It is precisely this “choice of inferences” in which the court below engaged, crediting a factual inference that the restriction was based on security concerns, rather than Mr. Hammer’s contrary and well-supported inference that the “security concerns” were a pretext to disguise Defendants-Appellees’ unconstitutional purposes. Indeed, the transcript of Attorney General Ashcroft’s and Director Hawk-Sawyer’s April 12, 2001 press conference alone raises a question as to the legitimacy of the government’s reliance on security concerns as a basis for these restrictions. (A. 151-55.) Mr. Hammer has therefore provided evidence sufficient to defeat summary judgment. In granting summary judgment, the district court did not find the absence of a genuine issue of material fact; it purported to resolve those issues, which was improper on a motion for summary judgment.

This is the second time that the district court has chosen to decide this case by accepting Defendants-Appellees’ “safety concerns” explanation for their actions, notwithstanding compelling evidence to the contrary. Earlier in this action, the district court dismissed Mr. Hammer’s complaint for failure to state a claim based on Defendants-Appellees’ assertion that the restrictions served legitimate penological

interests. On that occasion, this Court reversed the judgment and remanded Mr. Hammer's civil action for further proceedings, noting that "[i]nstead of accepting Mr. Hammer's allegations that these [security and privacy concern] explanations were a 'guise' and not the reason his speech is being restricted, the district court [erroneously] accepted" Defendants-Appellees' explanation as true. *Hammer v. Ashcroft*, 42 Fed. Appx. 861, 864 (7th Cir. 2002).

The district court has now reached the same conclusion for a second time. Although Defendants-Appellees refused to provide any discovery to Mr. Hammer, the district court ignored Mr. Hammer's evidence and granted summary judgment for Defendants-Appellees, essentially holding that the evidence Mr. Hammer did provide, including Attorney General Ashcroft's admissions, should be ignored. Apparently, Defendants-Appellees' self-serving assertions were deemed sufficient to carry the day, notwithstanding the evidence. That Mr. Hammer was able to raise a triable question of fact on this issue despite being afforded no discovery only underscores the district court's error in entering summary judgment in favor of Defendants-Appellees in this case.

B. Mr. Hammer Has Raised A Triable Question as to Whether Institution Supplement THA-1480.05A Allows Him Alternative Means to Speak with the Press.

Mr. Hammer has also raised a material question of fact as to whether Institution Supplement THA-1480.05A satisfies *Turner's* second prong, which requires a reviewing court to decide "whether there are alternative means of exercising the right that remain open to prison inmates." *Turner*, 482 U.S. at 90. According to the district court, the

second *Turner* factor was satisfied because Institution Supplement THA-1480.05A still allowed Mr. Hammer to “contact media representatives through general and special mail, as well as through monitored and unmonitored telephone calls, giving [Mr. Hammer] an alternative means of exercising the right.” (A. 233.)

The district court’s contention that telephone calls or correspondence constitute an adequate substitute for face-to-face access to the press is dubious.⁴ Moreover, the district court failed to consider Mr. Hammer’s challenge to another aspect of the restrictions enacted and enforced by Defendants-Appellees – namely, the prohibition on sharing with the press “any information regarding other federal or state inmates.” Mr. Hammer was sentenced to death for the murder of another federal prisoner, and central to Mr. Hammer’s defense in that ongoing case is the government’s failure to disclose mitigating statements made by other inmates regarding Mr. Hammer’s conduct prior to the murder, thereby “taint[ing] the jury’s determination that Mr. Hammer committed the offense after substantial planning and premeditation.” *United States v. Hammer*, 404 F. Supp. 2d 676, 798-99 (M.D. Pa. 2005).

Mr. Hammer pointed the district court both to the language of the restriction in Institution Supplement THA-1480.05A and to three written orders from Warden Lappin

⁴ See *Saxbe v. Washington Post Co.*, 417 U.S. 843, 854 (1974) (Powell, J., dissenting) (“Without a personal interview a reporter is often at a loss to determine the honesty of his informant or the accuracy of the information received. This is particularly true in the prison environment, where the sources of information are unlikely to be well known to newsmen or to have established any independent basis for assessing credibility. Consequently, ethical newsmen are reluctant to publish a story without an opportunity through face-to-face discussion to evaluate the veracity and reliability of its source.”)

in late December 2000 and early January 2001 which specifically prohibited Mr. Hammer “from disclosing to a media representative *any* information about another inmate through any manner of communication (oral, written, etc.)” (A. 171-73.) Thus, it is clear that Mr. Hammer has no alternative means of discussing with the press any information concerning inmate witnesses related to his ongoing criminal case, and the district court therefore erred in holding otherwise.

C. Mr. Hammer Demonstrated That His First Amendment Right to Face-to-Face Access to the Press Could Be Accommodated With Negligible Impact Upon Prison Personnel and Other Inmates and at a *De Minimis* Cost to Penological Interests.

Mr. Hammer has also raised a triable question as to the third and fourth *Turner* factors. First, the third *Turner* factor requires a court to inquire into “the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally.” 482 U.S. at 89-90. First Amendment rights “may be curtailed whenever the institution’s officials, in the exercise of their informed discretion, reasonably conclude that [accommodation of the right]...possess[es] the likelihood of disruption to prison order or stability, or otherwise interfere[s] with the legitimate penological objectives of the prison environment.” *Jones v. North Carolina Prisoners’ Union*, 433 U.S. 119, 132 (1977). Thus, if accommodating Mr. Hammer’s right to face-to-face access to the press would have a negligible impact on guards, fellow inmates, and the operations of the prison, the BOP restriction violates the First Amendment under *Turner*’s third factor.

The record demonstrates that Mr. Hammer has raised a triable question of fact on this issue. First, the record shows that Mr. Hammer participated in three face-to-face press interviews without incident in late 1999, thereby demonstrating that his First Amendment rights were accommodated in the past with no obvious impact upon prison personnel, fellow inmates, or normal prison operations. (A. 126-28.) Second, the affidavits of Mr. Hammer and other prisoners (A. 126-28, 157-58, 160-62, 164-65, 221-24), in conjunction with the language in Institution Supplement THA-5566.05B allowing non-contact social visitors (A. 208), suggest that face-to-face access to the press could easily be accommodated because other face-to-face visits are allowed and regularly occur without incident. Moreover, members of the press have a constitutional right of access to prisoners that is coextensive with that of the general public. *Pell v. Procunier*, 417 U.S. 817, 834 (1974). Since federal death row inmates are already entitled to social visits, there is at least a triable question of fact as to whether allowing such access to the press would have a significant impact on prison personnel and other inmates.

Second, the fourth *Turner* factor requires a reviewing court to consider “the absence of ready alternatives [as definitive] evidence of the reasonableness of a prison regulation.” 482 U.S. at 90. “*Turner* does not impose a least-restrictive-alternative test, but asks instead whether the prisoner has pointed to some obvious regulatory alternative that fully accommodates the asserted right while not imposing more than a *de minimis* cost to the valid penological goal.” *Overton v. Bazzetta*, 539 U.S. 126, 136 (2003) (citing *Turner*, 482 U.S. at 90-91).

In this case, Mr. Hammer has provided affidavits to show that USP-TH is equipped with video-conferencing technology that would allow inmates to participate in face-to-face press interviews without any risk of violence by an inmate, or any need for security precautions beyond those employed on a normal basis for federal death row inmates. (A. 130, 164, 214.) Furthermore, with respect to both the third and fourth *Turner* factors, it is important to note both the injury asserted and the form of relief sought by Mr. Hammer. Mr. Hammer is seeking to have the BOP's complete ban on face-to-face press access by death row inmates replaced by the procedures properly established after notice-and-comment rulemaking: individualized review of the security concerns surrounding a given personal interview request on a case-by-case basis under 28 C.F.R. § 540.63. The BOP's use of § 540.63's case-by-case security-related review of interview requests by the press for all other federal prisoners (including those convicted of murder but not sentenced to death) demonstrates that conducting such a review not only has a minimal impact on prison resources, but is also an obvious alternative to the BOP's complete ban. Having raised a genuine question of material fact as to all four of the *Turner* reasonable basis standards, Mr. Hammer is entitled to have the district court's entry of summary judgment in favor of Defendants-Appellees reversed.

III. The District Court's Entry of Summary Judgment Should Be Reversed Because Mr. Hammer Has Raised a Triable Question as to Whether Institution Supplement THA-1480.05A Deprives Him of First Amendment Rights Without Due Process of Law.

The district court erred in granting summary judgment for the additional reason that Mr. Hammer has raised a triable question as to whether Institution Supplement

THA-1480.05A's permanent ban on face-to-face access to the press deprives him, without due process of law, of his First Amendment right to speak with the press. While lawful "incarceration brings about the necessary withdrawal or limitation of many privileges and rights...justified by the considerations underlying our penal system," *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 348 (1987) (citing *Price v. Johnson*, 334 U.S. 266, 285 (1948)), prisoners "do not forfeit all constitutional protections by reason of their conviction and confinement in prison." *Bell v. Wolfish*, 441 U.S. 520, 545 (1979). Prisoners retain free speech and due process rights despite their incarceration, to the extent that these rights may be exercised consistent with their status as prisoners. See *Pell v. Procunier*, 417 U.S. 817, 822 (1974) (holding First Amendment rights consistent with confinement are retained by prisoners); *Hudson v. Palmer*, 468 U.S. 517, 523 (1984) (holding that prisoners "enjoy the protection of due process").

In the prison context, the due process clause protects the liberty of a federal prisoner from restraints that exceed the sentence of the individual prisoner in an unexpected manner. See *Vitek v. Jones*, 445 U.S. 480, 493-94 (1980) (holding that a prisoner could not be involuntarily transferred to a mental hospital without due process because the transfer was "qualitatively different" from the sentence for his crime); *Washington v. Harper*, 494 U.S. 210, 221-22 (1990) (holding that a prisoner had an inherent liberty interest entitled to due process protection from the involuntary administration of psychotropic drugs). The curtailment of Mr. Hammer's First Amendment rights brought about by Institution Supplement THA-1480.05A affect a liberty interest in a way that requires due process protection.

Mr. Hammer has demonstrated a due process violation because his First Amendment right to face-to-face access to the press was eliminated without any agency adjudication as to his particular circumstances (as required by 28 C.F.R. § 540.63), and without any opportunity to comment on the proposed change through ordinary notice-and-comment rulemaking processes. Because Institution Supplement THA-1480.05A was adopted without affording Mr. Hammer notice or an opportunity for comment, and eliminated the adjudicatory provisions of 28 C.F.R. § 540.63, Institution Supplement THA-1480.05A deprived Mr. Hammer of liberty without due process of law.

Like other federal agencies, the BOP is subject to the Administrative Procedure Act, 5 U.S.C. § 553(c), which states that “an agency shall give interested persons an opportunity to participate in the rulemaking through submission of written data, views, or arguments.” While “procedural rules” are exempted from the notice and public comment requirements of the Administrative Procedure Act, 5 U.S.C. § 553(b) (“rules of agency organization, procedure or practice” are exempted from notice and comment requirements), this exemption applies only to “agency actions that do not themselves alter the rights or interests of parties, although it may alter the manner in which parties present themselves or their viewpoints to the agency.” *Am. Hosp. Ass’n v. Bowen*, 834 F.2d 1037, 1047 (D.C. Cir. 1987); *JEM Broad. v. FCC*, 22 F.3d 320 (D.C. Cir. 1994). When an agency rule has a “substantial impact” upon an individual’s liberty interests and “puts a stamp of [agency approval] or disapproval upon a given type of behavior,” that individual is entitled to participate in the formation of the rule through notice and public comment, *Chamber of Commerce v. Department of Labor*, 174 F.3d 206, 211 (D.C. Cir.

1999), or is entitled to an adjudication before being deprived of his liberty, *Londoner v. Denver*, 210 U.S. 373 (1908), under the Fifth Amendment due process clause.

The BOP promulgated 28 C.F.R. § 540.63 to ensure that prisoners and the press are afforded due process before being denied face-to-face press access. §540.63 outlines a procedure under which an inmate is notified of each interview request; the Warden is charged with the duty to “approve or disapprove an interview request within 24 or 48 hours;” approval or disapproval is based on criteria including whether “the interview, in the opinion of the Warden, would endanger the health or safety of the interviewer, or would probably cause serious unrest or disturb the good order of the institution;” and all disapprovals are documented.

What § 540.63 does not permit, however, is for a Warden (or anyone else) to replace this adjudicatory process with a permanent ban on all face-to-face press access for a particular class of federal prisoners. Institution Supplement THA-1480.05A is precisely such a ban, and it nullifies the adjudicatory procedures established by 28 C.F.R. § 540.63 for all death row prisoners such as Mr. Hammer. While the district court stated in its entry of summary judgment that an “institution supplement is a statement of procedure which is required in order to give direction to operations of a BOP facility because of local conditions,” (A. 232), it is clear from the language of Institution Supplement THA-1480.05A that it is a repeal, and not a “supplement” of § 540.63, and it does not dictate procedure. Instead, it permanently alters the First Amendment rights of federal death row prisoners, depriving Mr. Hammer and other federal death row inmates of their

First Amendment liberty without due process. It has the same effect, of course, on the press.

Furthermore, Warden Lappin promulgated the restrictions at the apparent direction of Attorney General Ashcroft and Director Hawk-Sawyer. The permanent restrictions on Mr. Hammer's First Amendment rights were thus adopted without affording Mr. Hammer, the press, or the public at large any notice or opportunity to comment with regard to the changed policy. Whereas other prisoners have the possibility of face-to-face access to the press under the procedure set forth in 28 C.F.R. § 540.63, the rights of Mr. Hammer and other death row inmates to communicate face-to-face with the press have been permanently deprived without either the individualized determination contemplated by law (28 C.F.R. § 540.63), or an appropriate administrative proceeding providing for notice and comment. The deprivation of liberty by such means violates the Constitution. Thus, notwithstanding exemplary behavior, a death row inmate will be permanently deprived of First Amendment freedom, solely because of his sentence, pursuant to a policy adopted without compliance with law.

The Supreme Court's jurisprudence regarding restrictions on prisoners' First Amendment rights holds that a critical factor in assessing the constitutionality of such restrictions is their permanence. In most circumstances a restriction is permissible only if it is temporary in nature and based on an adjudication subject to due process protection. *See Beard v. Banks*, 126 S. Ct. 2572, 2578-82 (2006) (holding that a temporary restriction on the access of "specially dangerous and recalcitrant" prisoners to periodicals until such time as their behavior improved was constitutional); *Overton v.*

Bazzetta, 539 U.S. 126, 131-32 (2003) (holding that a two-year restriction on social visits for prisoners who receive two substance abuse violations had a “rational relation to legitimate penological interests” in preventing and discouraging inmate drug use under *Turner*, in part because the restriction itself was temporary and only imposed as part of a disciplinary process that afforded a prisoner due process protection); *but see Turner v. Safely*, 482 U.S. 78, 91-93 (1987) (upholding a permanent restriction on inmate-to-inmate correspondence because it was necessary to prevent inmates from coordinated escape attempts or violence on prison guards).

As the Supreme Court noted in *Beard*, “we agree that ‘the restriction here is severe,’ and ‘if faced with evidence that [it were] a *de facto* permanent ban . . . we might well reach a different conclusion to a particular application of the regulation.’” *Beard*, 126 S. Ct. at 2582 (quoting *Overton*, 539 U.S. at 134). Mr. Hammer’s evidence raises the precise issues that the Supreme Court had no need to reach in *Beard* or *Overton*: the restrictions placed on Mr. Hammer’s First Amendment rights by Institution Supplement THA-1480.05A are both severe and permanent, and they were imposed without either an adjudication as to specific facts warranting the restriction or appropriate rulemaking procedures. A rational trier of fact would be required to conclude that Institution Supplement THA-1480.05A’s permanent restriction on Mr. Hammer’s First Amendment rights denies him a liberty interest without affording him due process of law.

IV. The District Court Abused its Discretion by Denying Mr. Hammer's Request for a Continuance Under Fed. R. Civ. P. 56(f) for the Purpose of Compelling Defendants-Appellees to Provide Mr. Hammer with Discovery.

The district court abused its discretion by denying Mr. Hammer's Rule 56(f) motion for a continuance so that Defendants-Appellees could be required to produce the documents they had wrongfully withheld. Because the district court abused its discretion in denying Mr. Hammer relief under Rule 56(f), the court's subsequent entry of summary judgment should be reversed, and the case remanded for further proceedings.

This Court reviews a district court's denial of a Rule 56(f) motion for an "abuse of discretion." *Farmer v. Brennan*, 81 F.3d 1444, 1449 (7th Cir. 1996); *Pfeil v. Rogers*, 757 F.2d 850, 856 (7th Cir. 1985). Rule 56(f)'s right to a continuance for discovery purposes is essential to summary judgment, because "the existence of factual disputes depends on the ability of the non-moving party to come forward with concrete materials that demonstrate such a dispute." *Farmer*, 81 F.3d at 1449 (citations omitted). For this reason, a court may, and in many cases should, order a continuance under Rule 56(f) if the party seeking the continuance has given the court an adequate explanation as to why the extension is necessary. *Korf v. Ball State Univ.*, 726 F.2d 1222, 1230 (7th Cir. 1984).

As this Court has previously noted, incarcerated prisoners litigating claims on a *pro se* basis should be given special latitude with respect to requests for continuances to conduct discovery and in summary judgment motions, due to the special difficulties they face in seeking and obtaining evidence and affidavits while incarcerated. *LaBatt v.*

Twomney, 513 F.2d 641, 650 (7th Cir. 1975) (“Incarcerated prisoners, proceeding *pro se*, are bound and limited by often rigorous prison security regulations. . . . Under such circumstances, the court should be especially cautious in granting summary judgment”); *see also Harris v. Pate*, 440 F.2d 315, 318 (7th Cir. 1971).

A review of the district court’s docket clearly shows why the denial of Mr. Hammer’s Rule 56(f) request for a continuance amounted to an abuse of discretion. On March 31, 2005, the district court docketed an Entry Concerning Selected Matters, which provided in part that “[t]he parties shall have *through June 10, 2005*, in which to complete written discovery.” (A. 54) (emphasis in original). Pursuant to this order, Mr. Hammer served three separate requests for documents on Defendants-Appellees in April and May 2005. (A. 56-62.)

Ignoring both the district court’s discovery cut-off and Mr. Hammer’s three document requests, Defendants-Appellees chose to file a Motion for Summary Judgment on May 10, 2005, a full month in advance of the close of discovery. (A. 63-65.) Only on May 24, 2005 – two weeks after moving for summary judgment – did Defendants-Appellees deign to “answer” Mr. Hammer’s document requests by refusing to produce anything. (A. 76-86.) Scrambling to respond to Defendants-Appellees’ summary judgment motion in a timely manner (and without the documents he had requested), Mr. Hammer moved on May 31, 2005, for a continuance under Fed. R. Civ. P. 56(f), while also reminding the district court of its earlier stated discovery cut-off, and informing the court of Defendants-Appellees’ refusal to provide discovery. (A. 87-90.)

The district court clearly abused its discretion when it denied Mr. Hammer an extension under Rule 56(f) to secure the discovery from Defendants-Appellees. Taking advantage of Mr. Hammer's *pro se* status, Defendants-Appellees accelerated the filing of their Motion for Summary Judgment and decelerated their compliance with his discovery requests – declining to produce any documents at all. The district court simply turned a blind-eye to those tactics and faulted Mr. Hammer for not having sufficient evidence to withstand Defendants-Appellees' motion. Of course, the district court was wrong on both counts: even without the discovery, Mr. Hammer was able to demonstrate that Defendants-Appellees's motion was unfounded. But if that were not the case, Mr. Hammer would be entitled to a remand for further discovery. Defendants-Appellees cannot have it both ways. They cannot refuse to provide discovery and then get summary judgment based on their failure to comply with discovery. In denying Mr. Hammer a Rule 56(f) continuance, the district court abused its discretion.

V. The District Court Abused its Discretion in Denying Mr. Hammer's Three Requests for the Appointment of Counsel.

This Court reviews a district court's denial of a party's request to appoint counsel for abuse of discretion. *Greeno v. Daley*, 414 F.3d 645, 658 (7th Cir. 2005); *Farmer v. Haas*, 990 F.2d 319, 322 (7th Cir. 1993). Here, the district court abused its discretion when it denied Mr. Hammer's three separate Motions for the Appointment of Counsel.

Civil litigants do not have a right to appointed counsel, but a district court is allowed to "request an attorney to represent any person unable to afford counsel"

pursuant to 28 U.S.C. § 1915(e)(1). *Johnson v. Doughty*, 433 F.3d 1001, 1006 (7th Cir. 2006); *Luttrell v. Nickel*, 129 F.3d 933, 936 (7th Cir. 1997). A threshold requirement for the appointment of counsel for an indigent civil plaintiff is that the plaintiff has made a reasonable effort to secure representation on his own prior to petitioning the court for the appointment of counsel. *Barnhill v. Doiron*, 958 F.2d 200 (7th Cir. 1992); *Jackson v. County of McLean*, 953 F.2d 1070, 1073 (7th Cir. 1992). The district court found that Mr. Hammer was indigent and that he had made a reasonable effort to secure representation.

But the district court abused its discretion when it held that Mr. Hammer was competent to proceed with discovery in this action with sufficient legal acumen that appointment of counsel was not required. In reviewing a district court's refusal to appoint counsel, this Court's inquiry is focused on the question of whether "given the difficulty of the case, did the plaintiff appear to be competent to try it himself and, if not, would the presence of counsel have made a difference in the outcome?" *Farmer v. Haas*, 990 F.2d 319, 322 (7th Cir. 1993).

While Mr. Hammer may have possessed the legal ability to file a complaint in this case, and to respond to motions and pleadings generally, he lacked the capability to investigate his claims and conduct discovery that was essential to prosecuting *this* case. This Court has held that the appointment of counsel to assist an indigent prisoner was necessary in the past in cases involving important constitutional issues, *Bagola v. Kint*, 39 F.3d 779, 781 (7th Cir. 1994), and in cases where the ability to investigate crucial facts in support of a claim was made impossible by a *pro se* prisoner's confinement, *Swofford*

v. Mandrell, 969 F.2d 547, 552 (7th Cir. 1992). Indeed, courts have the discretion to appoint counsel in a case for a limited purpose such as aiding a prisoner with discovery. See *Donald v. Cook County Sheriff's Dept.*, 95 F.3d 548, 556 (7th Cir. 1996) (holding that the court had the authority to appoint counsel to provide limited aid to a *pro se* litigant in discovery and the amending of a complaint so as to correctly identify the defendants).

This case involves important, difficult constitutional issues related to press access to federal death row inmates. To prove the allegations in his complaint, Mr. Hammer needed to be able to conduct numerous interviews and depositions, with the named defendants, other inmates, and journalists. Otherwise, he could not hope to establish the pretextual nature of the supposed “security” rationales behind the restrictions and the role each Defendant-Appellee played in adopting and enforcing Institution Supplement THA-1480.05A. This discovery was impossible due to his incarceration.

Furthermore, appointing counsel to aid Mr. Hammer with discovery would have had a clear impact on the case, and it certainly would have prevented Defendants-Appellees from obtaining summary judgment without providing any discovery. Appointing counsel to depose or interview several witnesses, including Defendants-Appellees, also would have allowed Mr. Hammer to raise a genuine question of material fact as to the role each Defendant-Appellee played in adopting and enforcing THA-1480.05A, as well as the true motivations behind the restrictions. Had the district court not abused its discretion by denying Mr. Hammer appointed counsel to aid him in discovery, the district court would not have erroneously entered summary judgment

in favor of Defendants-Appellees. For this reason, this Court should reverse the district court's summary judgment, and remand the case with instructions to appoint counsel.

CONCLUSION

For all of the foregoing reasons, Plaintiff-Appellant David Paul Hammer respectfully requests that the Court reverse the judgment below and remand the case for further proceedings.

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION,
TYPEFACE REQUIREMENTS AND TYPE-STYLE REQUIREMENTS**

1. This brief complies with the type-volume requirements of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,466 words excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)iii.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2003 in Book Antigua 12 font.

/s Barry Sullivan
Barry Sullivan

Dated: August 1, 2007

CIRCUIT RULE 30(d) CERTIFICATION

I, Barry Sullivan, hereby certify pursuant to Circuit Rule 30(d) that all of the materials required by Circuit Rule 30(a) and 30(b) are included in the Appendix.

/s Barry Sullivan
Barry Sullivan

Dated: August 1, 2007

CERTIFICATE OF COMPLIANCE WITH CIRCUIT RULE 31(e)

The undersigned, one of the attorneys for Plaintiff-Appellant, hereby certifies that, pursuant to Circuit Rule 31(e), I have filed electronically versions of the brief and all of the appendix items that are available in non-scanned PDF format, and I hereby verify that the same is virus free.

/s Barry Sullivan
Barry Sullivan

Dated: August 1, 2007

CERTIFICATE OF SERVICE

I, Barry Sullivan, an attorney, hereby certify that I served: (1) two copies of the foregoing Brief of Plaintiff-Appellant David Paul Hammer; (2) two copies of the Appendix of Plaintiff-Appellant David Paul Hammer; and (3) a CD containing the Brief of Plaintiff-Appellant David Paul Hammer in a searchable PDF format upon:

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by depositing a copy of same in the United States Mail, postage prepaid, on this 1st day of August 2007.

/s/ Barry Sullivan
Barry Sullivan