the state, there was no state action depriving Fate of his constitutional rights, and no supervisory liability against the police officers.

http://www2.ca3.uscourts.gov/opinarch/132219np.pdf (last accessed Mar. 6, 2014).

RLUIPA: Wyoming Prison's Refusal to Allow Inmate Access to Prison's Sweat Lodge Due to Security Concerns Is Not Viable Under RLUIPA

Yellowbear v. Lampert, No. 12-8048 (10th Cir. Jan. 23, 2014).

The Tenth Circuit recently reversed a lower court decision which had upheld a prison's refusal to accompany an Arapaho inmate across prison quadrants to the institution's sweat lodge, finding that the state failed to show a compelling governmental interest or a least restrictive solution.

Andrew Yellowbear, a member of the Northern Arapaho Tribe, is incarcerated for life in a Wyoming penitentiary for murdering his daughter. He sought access to the prison's existing sweat lodge to facilitate his religious exercises. The prison refused because the sweat lodge is located in the general prison yard and Yellowbear is housed in a special protective unit (because of threats against him). Prison officials insisted that the cost of providing the necessary security to take Yellowbear from the special protective unit to the sweat lodge was "unduly burdensome." Yellowbear sought relief under RLUIPA. The district court entered summary judgment in favor of the state, and Yellowbear appealed, seeking to allow the case to go to trial.

HELD: Reversed and remanded. The state failed to show that the burden it would incur outweighed plaintiff's free exercise rights under the Constitution and RLUIPA.

DISCUSSION: Judge Gorsuch, writing for the Tenth Circuit in an exceptionally readable decision, first laid out RLUIPA's bare essentials. It requires an inmate to show that his (1) religious exercise is (2) substantially burdened by prison policy. At the heart of RLUIPA is the necessity of a "sincerely held religious belief":

Of course, trying to separate the sacred from the secular can be a tricky business — perhaps especially for a civil court whose warrant does not extend to matters divine. But at least one feature of the statute's "religiosity" requirement often proves relatively unintrusive in its application and not infrequently dispositive: the question of sincere belief. RLUIPA does not offer refuge to canny operators who seek through subterfuge to avoid laws they'd prefer to ignore. Like those who set up "churches" as cover for illegal drug distribution operations. Or those who, facing the difficult realities of prison life, are tempted to seek special dispensations through fraudulent assertions of faith. But in suggesting we may ask whether a claimant truly holds a religious belief isn't to suggest we may decide whether the claimant's religious belief is true. After all, "Faith means belief in something concerning which doubt is still theoretically possible." William James, *The Will To Believe* 90 (1897).

Separate and apart from showing a sincerely motivated "religious exercise," a RLUIPA plaintiff must also demonstrate that the government has imposed a "substantial burden" on that exercise. State laws or practices that require action or inaction in violation of a sincerely held religious belief amount to "substantial" burdens on the exercise of religion; the term "substantial," doesn't mean complete or total, so a "substantial burden" need not be a complete or total one.

Here, the Tenth Circuit found that Yellowbear satisfied his obligations under both the sincere religious exercise and the substantial burden tests. In terms of sincerity, there was no suggestion that Yellowbear's Northern Arapaho faith did not constitute a religion, and no dispute that access to a sweat lodge was a form of religious exercise those who share that faith. As Yellowbear had explained, it is his religious belief that a sweat lodge "is used to cleanse and purify our mind, our spirit, and our bodies . . . upon leaving it is said that you are born again physically and spiritually." It was also clear that, by prohibiting Yellowbear from making any use of the sweat lodge, the prison had "substantially burdened" his religious exercise.

The issue was therefore whether the state could show a "compelling governmental interest" -- and that it was pursuing the "least restrictive means" of furthering that interest.

The more abstract the level of inquiry, often the better the governmental interest will look. At some great height, after all, almost any state action might be said to touch on "one or another of the fundamental concerns of government: public health and safety, public peace and order, defense, revenue," and measuring a highly particularized and individual interest "directly against one of these rarified values inevitably makes the individual interest appear the less significant. (citations omitted). The text of RLUIPA and Supreme Court guidance, however, do not support such a lopsided inquiry.

The prison had advanced three compelling justifications for its actions:

First, a sweat lodge is inherently dangerous in a prison setting, because it uses live coals, and many other prisons have refused to allow them. This argument made little sense, because the Wyoming prison had already allowed a sweat lodge, and only raised the safety issue once Yellowbear sought access

A more credible argument was that ferrying Mr. Yellowbear back and forth in protective custody would require too much manpower and expense. The Circuit Court found this rationale to fall far short.

In the first place, the prison does not even attempt to quantify the costs it faces, let alone try to explain how these costs impinge on prison budgets or administration. . . . RLUIPA's compelling interest test is a strict one: Congress borrowed its language from First Amendment cases applying perhaps the strictest form of judicial scrutiny known to American law. That test isn't traditionally the sort of thing that can be satisfied by the government's bare say-so. (citation omitted).

The appropriate process for moving Yellowbear safely across sections of the prison would be to institute a lock down. While the prison characterized this step as costly and troublesome, Yellowbear introduced evidence that the prison already instituted prison-wide lock-downs numerous times each day, sometimes on an hourly basis, to transport "specially housed" inmates — inmates in the geriatric unit, the women's unit, and (like himself) the protective

custody unit — to other parts of the prison, including the medical wing. If lock downs could be accomplished to facilitate the inmates' *medical* needs, what compelling interest was served by refusing any lock downs *ever* to facilitate an inmate's *religious* needs?

The prison's last argument was that, if Yellowbear's request was accommodated, a flood of other inmate requests would ensue—the "slippery slope." Again, however, the state failed to present any evidence of what such a flood of unreasonable requirements might entail, and conclusory statements alone did not suffice.

The Court has recognized the possibility that there may be cases where that approach is inappropriate and the "need for uniformity precludes the recognition" of *any* exceptions to *anyone,* or where a well-documented slippery slope argument could support such a uniform rule. But one thing is certain. To warrant any of that, the law requires considerably more than milquetoast musing that granting one request might lead to others.

The prison also failed in its obligation to show that the process adopted was the least restrictive of various alternatives. Yellowbear proposed at least two solutions-first, transport him to the sweat lodge in the early morning, before the general population had been allowed into common areas; and second, build another sweat lodge, in his quadrant. The prison did not explain how difficult or expensive these potential solutions might be.

The court imagined a far different discussion if the prison allowed Yellowbear to visit the sweat lodge intermittently; then the question would be one of degree. But here, where he was completely foreclosed, there was no doubt that RLUIPA was violated.

http://www.ca10.uscourts.gov/opinions/12/12-8048.pdf (last accessed Mar. 6, 2014).

Search and Seizure: Questions Remain About Reasonableness of Police Killing Occupant's Dogs During "High Risk Search" of Home

Thurston v. City of North Las Vegas Police Department, No. 12-15729 (9th Cir. Jan. 9, 2014).

The Ninth Circuit has reversed and remanded a lower court grant of summary judgment where police shot and killed two dogs more than 20 minutes after they entered a home to conduct a search, finding that questions remained as to the reasonableness of the officers' actions.

The North Las Vegas Police Department executed a search warrant at the home of Louise Thurston. It was a "high risk search warrant" and the officers, while carrying out the search, shot and killed Thurston's pit bull and mastiff. Thurston filed suit under Section 1983, alleging illegal seizure of her dogs in violation of the Fourth and Fourteenth Amendments. The district court granted a motion for summary judgment brought by the police department and various individual officers, holding that they acted reasonably in shooting the dogs. Thurston appealed.