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VI. Prisoner's Rights

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tries has important implications for future actions against former operators of inactive dump sites.⁹² Although Superfund provides money for the emergency cleanup of abandoned hazardous waste disposal sites, considerable doubt exists as to the adequacy of the money allocated to Superfund to complete the cleanup.⁹³ With the adequacy of the amount of money in Superfund in question, the EPA's inability to use section 7003 to require immediate cleanup of inactive dump sites might result in the persistence of the threatening conditions at abandoned disposal sites over several years, while the parties adjudicate the ultimate liability for elimination of the hazard.⁹⁴ In preserving the applicability of section 7003 to inactive hazardous waste disposal sites, the Fourth Circuit's decision in *Waste Industries* provides important protection for public health and the environment.⁹⁵

BARBARA J. TAYLOR

VI. PRISONERS' RIGHTS

Appointment of Counsel: A Fair Trial for Prisoner Civil Suits

The sixth amendment to the United States Constitution guarantees the right of assistance of counsel to indigent criminal defendants.¹ The indigent

92. See *infra* notes 93-94 and accompanying text (implication of Fourth Circuit's decision in *Waste Industries*).

93. See 9 ENV'T. REP. (BNA) 2085 (1979) (study estimated total cleanup costs for roughly 1,200 improperly managed sites would exceed money allocated to Superfund by at least \$10.5 billion). EPA Assistant Administrator Lee Thomas recently estimated the number of hazardous waste disposal sites eligible for cleanup with Superfund money at 2,200. See 15 ENV'T. REP. (BNA) 757 (1984). An additional 20,000 sites require investigation. *Id.* Thomas estimated that by the end of 1984, the EPA will have obligated one billion dollars of the \$1.6 billion available through Superfund. *Id.* at 756. By the end of the 1984 congressional session, Congress had not authorized additional money for Superfund. *Id.* at 957. Superfund's current authorization expires at the end of the 1985 fiscal year. *Id.* at 35.

94. See Wolf, *Hazardous Waste Trials & Tribulations*, 13 ENVTL. L. 367, 382-83 (1983) (detailing reductions in recent years in EPA's budget for hazardous waste programs).

95. See *RCRA's Imminent Hazard Provision*, *supra* note 72, (§ 7003 remains important weapon for combatting dangers of abandoned hazardous waste disposal sites because cost of eliminating hazards such sites pose will exceed money allocated to Superfund).

1. U.S. CONST. amend. VI. Under the sixth amendment, federal courts must appoint counsel to represent each indigent criminal defendant regardless of the circumstances. See *von Moltke v. Gillies*, 332 U.S. 708, 720 (1948) (sixth amendment requires in all criminal proceedings that federal courts provide counsel to accused who is too poor to secure lawyer); *Walker v. Johnston*, 312 U.S. 275, 286 (1941) (court must appoint counsel unless defendant waived right

civil litigant, however, does not enjoy a similar constitutional right.² Nonetheless, indigent civil litigants may obtain the assistance of counsel under the federal in forma pauperis statute, section 1915 of Title 26 of the United States Code.³ Section 1915(d) grants the federal courts discretion to request

to counsel); *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) (determination of whether defendant intelligently waived right to counsel must depend upon facts and circumstances of case, including conduct, background, and experience of accused).

The United States Supreme Court extended the right to counsel to state criminal defendants accused of serious crimes in *Gideon v. Wainwright*. 372 U.S. 335, 342-44 (1963). In *Gideon*, the Supreme Court reviewed cases addressing the sixth amendment right to counsel and the due process clause of the fourteenth amendment, and noted that a person who is too poor to hire a lawyer is not assured of a fair trial unless the court appoints counsel to represent the defendant. *Id.* at 344. The *Gideon* Court, therefore, sought to equalize the relative positions of the government-funded prosecution and the indigent defendant, who is too poor to finance a vigorous defense. *Id.* The Supreme Court later held that, absent a defendant's knowing and intelligent waiver of the right to counsel, no state may imprison that individual for any offense, whether petty or felonious, unless the individual was represented by counsel. *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1971). The *Argersinger* Court observed that although *Gideon* involved a defendant charged with a felony, courts should apply the rationale in *Gideon* to any criminal proceeding in which an individual's liberty is involved. 407 U.S. at 32. Both *Gideon* and *Argersinger* relied heavily upon the Court's decision in *Powell v. Alabama*, which held that the fourteenth amendment's due process clause embodies a right to counsel concept similar to that found in the sixth amendment. *Argersinger*, 407 U.S. at 31; *Gideon*, 372 U.S. at 344-45; *Powell v. Alabama*, 287 U.S. 45, 70-71 (1932); U.S. CONST. amend. VI. The *Powell* Court held that due process requires the appointment of counsel to ignorant or illiterate defendants in federal felony cases. *Powell*, 287 U.S. at 71. The *Powell* Court reasoned that most people require the aid of a trained lawyer to understand the consequences of criminal proceedings, to make prudent choices in pleading, and to maintain a viable defense. *Id.* at 69.

2. *See, e.g., Lopez v. Reyes*, 692 F.2d 15, 17 (5th Cir. 1982) (appointment of counsel in civil case is privilege and not constitutional right). *Peterson v. Nadler*, 452 F.2d 754, 757 (8th Cir. 1971) (there exists no statutory or constitutional right for indigents to have counsel appointed in civil case). *But see Swygert, Should Indigent Civil Litigants in the Federal Courts Have a Right to Appointed Counsel?*, 39 WASH. & LEE L. REV. 1267, 1270 (1982) (fundamental principles of due process and equal protection give indigent plaintiffs right to appointed counsel in some actions). Judge Swygert contends that the government's failure to provide counsel to represent indigents constitutes a suspect classification subject to strict scrutiny under the equal protection clause of the fourteenth amendment. Swygert, *supra*, at 1276. Swygert also believes the due process clause guarantees appointed counsel to indigent civil plaintiffs seeking to protect a constitutional or fundamental right, because without the aid of counsel the individual often will lose important rights. *Id.* at 1282-83. Swygert, therefore, believes that when indigent civil plaintiffs bring cases involving constitutional or fundamental rights, they should have a right to court appointed counsel. *Id.* at 1301.

3. 27 Stat. 252 (1892) (*codified as amended* at 28 U.S.C. § 1915 (1982)). The pertinent parts of 28 U.S.C. § 1915 state:

Proceedings in forma pauperis

a) Any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees and costs or security therefor, by a person who makes affidavit that he is unable to pay such costs or give security therefor . . .

d) The court may request an attorney to represent any such person unable to employ counsel and may dismiss the case if the allegation of poverty is untrue, or if satisfied that the action is frivolous or malicious.

that counsel represent any person financially unable to secure an attorney.⁴ Courts construing section 1915(d), however, generally have refused to appoint counsel to indigent civil litigants absent exceptional circumstances.⁵ In *Whisenant v. Yuam*,⁶ the United States Court of Appeals for the Fourth Circuit considered whether the circumstances surrounding an allegation of a deliberate indifference to a prisoner's serious medical needs constituted exceptional circumstances justifying the appointment of counsel to represent an indigent prisoner in a civil action.⁷

In *Whisenant*, North Carolina police officers arrested Bobby Whisenant at a hospital emergency room while the defendant Dr. Yuam, was treating Whisenant for injuries sustained from a motorcycle accident.⁸ The officers took Whisenant into custody on murder charges even though Whisenant allegedly complained of vomiting blood and rectal bleeding.⁹ Whisenant did not receive further medical attention until his condition became so serious that a prison official recommended hospitalization.¹⁰ Following Whisenant's

28 U.S.C. § 1915 (1982).

4. *Id.* Although § 1915(d) states that a court may "request" an attorney to represent indigents, courts have interpreted the statute as granting the power to appoint counsel. *See* *McKeever v. Israel*, 689 F.2d 1315, 1319 (7th Cir. 1982) (no question that court has discretion to appoint counsel); *Peterson v. Nadler*, 452 F.2d 754, 757 (8th Cir. 1971) (§ 1915 is express authority for courts to appoint counsel in civil cases); *United States v. Madden*, 352 F.2d 792, 793 (9th Cir. 1965) (§ 1915 specifically authorizes appointment of counsel). *But see* *Reid v. Charney*, 235 F.2d 47, 47 (6th Cir. 1956) (district court only has power to request that attorney represent indigent plaintiff); *see also* Bagwell, *Procedural Aspects of Prisoner § 1983 and § 2254 Cases in the Fifth and Eleventh Circuits*, 95 F.R.D. 435, 443 (1983) (operative word in § 1915 is "request," not "appoint").

5. *See* *Lopez v. Reyes*, 692 F.2d 15, 17 (5th Cir. 1982) (exceptional circumstances exist when counsel is necessary to present meritorious issues to court); *White v. Walsh*, 649 F.2d 560, 563 (8th Cir. 1981) (exceptional circumstances found where appointment of counsel is in interest of administration of justice); *Cook v. Bounds*, 518 F.2d 779, 780 (4th Cir. 1975) (prisoner must present meritorious claim before court begins inquiry into existence of exceptional circumstances); *United States v. Madden*, 352 F.2d 792, 794 (9th Cir. 1965) (finding of exceptional circumstances requires exercise of court's discretion); *see also* *Branch v. Cole*, 686 F.2d 264, 266 (5th Cir. 1982) (although no precise definition of exceptional circumstances exists, type and complexity of case and relative ability of litigant are controlling considerations).

6. 739 F.2d 160 (4th Cir. 1984).

7. *Id.* at 162.

8. *Id.* In *Whisenant v. Yuam*, although Whisenant received treatment for a broken ankle, broken ribs, and broken toes immediately after a motorcycle accident, the injuries continued to bother him. *Id.* On July 7, 1981, while Whisenant was seeking medical care from Dr. Yuam, North Carolina police officers arrested Whisenant for murder. *Id.* The motorcycle accident was unrelated to the murders. Brief for Appellant at 2, *Whisenant v. Yuam*, 739 F.2d 160 (4th Cir. 1984).

9. 739 F.2d at 162. In *Whisenant*, Whisenant testified that he went to the emergency room because he had vomited blood and suffered from rectal bleeding. *Id.* The hospital records, however, did not mention these complaints. *Id.* The parties also disputed the circumstances of the arrest. *Id.* Whisenant alleged that Dr. Yuam only grunted when the officers asked the doctor if Whisenant could be taken into custody. *Id.* Dr. Yuam stated, however, that he specifically permitted the officers to remove Whisenant from the hospital. *Id.*

10. *Id.* In *Whisenant*, Whisenant testified that he complained of internal bleeding to the officers from the time of arrest until his incarceration in the Burke County Jail. *Id.* The jailer

convictions on first and second degree murder,¹¹ Whisenant commenced a civil suit in the District Court for the Western District of North Carolina under section 1983 of title 42 of the United States Code.¹² Whisenant alleged that nine state officials and two hospital administrators violated his constitutional rights by providing him with inadequate medical care.¹³ Whisenant subsequently requested that the district court appoint counsel to represent him.¹⁴ The district court refused to appoint counsel because of a lack of federal funding for attorney's fees.¹⁵ Whisenant thereafter continued the suit pro se from his jail cell.¹⁶ After the jury returned a verdict for the defendants, Whisenant appealed the district court's denial of appointment of counsel and the correctness of certain jury instructions.¹⁷ The defendants also appealed, contending that the district court incorrectly denied their motion for a directed verdict.¹⁸

The Fourth Circuit in *Whisenant* reversed the district court's decision and remanded the case for a new trial, concluding that the trial court abused its discretion by refusing to appoint counsel to represent Whisenant.¹⁹ The *Whisenant* court noted that although the appointment of counsel in civil cases is discretionary, a court should appoint counsel when an indigent plaintiff demonstrates the existence of exceptional circumstances.²⁰ The Fourth

did not record such a complaint until 4:25 a.m., on July 8th, some eleven hours after the arrest. *Id.* That afternoon, the prison doctor informed the chief jailer that Whisenant should be hospitalized. *Id.* Ostensibly for security reasons, the chief jailer and sheriff transferred Whisenant to the Salisbury prison unit, some seventy miles away. *Id.* At 2:00 a.m. on July 9th, the sheriff's department transferred Whisenant by ambulance to the North Carolina Central Prison Hospital at Raleigh. *Id.* Whisenant remained in intensive care for eight days after receiving eleven units of blood. *Id.*

11. See *State v. Whisenant*, 308 N.C. 791, 303 S.E.2d 784 (1983). In *State v. Whisenant*, a Burke County Superior Court jury convicted Whisenant of first and second degree murder in the slaying of a man and his housekeeper. *Id.* at 792, 303 S.E.2d at 784. Whisenant appealed his convictions on the grounds that the prosecutor asked improper questions during cross-examination and that the trial court erred in allowing the prosecutor to comment on evidence outside the record. *Id.* at 795, 303 S.E.2d at 785. The North Carolina Supreme Court found no error in the trial and affirmed the convictions. *Id.* at 798, 303 S.E.2d at 788.

12. 42 U.S.C. § 1983 (1982). Section 1983 provides that any person, acting under the authority of state law, who deprives another of any rights secured by the Constitution is liable to that person for money damages. *Id.*

13. 739 F.2d at 161-62. In *Whisenant*, the plaintiff alleged that the defendants' delay in providing him with medical attention constituted a deliberate indifference to his serious medical needs and thus violated his rights guaranteed by the fourteenth amendment. *Id.* at 162; see U.S. CONST. amend. XIV (states shall not deprive any person of life, liberty, or property without due process of law).

14. 739 F.2d at 162.

15. *Id.* at 162-63.

16. *Id.* at 161-62.

17. *Id.*; see *infra* note 44 and accompanying text (district court incorrectly instructed jury that Whisenant must prove defendants intended to punish him by delaying medical care).

18. *Id.* at 162.

19. *Id.* at 163-64; see *infra* text accompanying notes 22-24 (Fourth Circuit's explanation of existence of exceptional circumstances in *Whisenant*).

20. 739 F.2d at 163; see *Cook v. Bounds*, 518 F.2d 779, 780 (4th Cir. 1975) (court should

Circuit further noted that the existence of exceptional circumstances is dependent upon the type and complexity of the case and the relative abilities of the individual requesting the appointment of counsel.²¹ In concluding that Whisenant presented exceptional circumstances justifying the appointment of counsel, the *Whisenant* court stated that Whisenant's allegation of a deliberate indifference to his serious medical needs presented a meritorious claim.²² The Fourth Circuit stated that evidence existed indicating that Whisenant suffered from oral and rectal bleeding and that Whisenant did not receive timely medical attention.²³ Additionally, the Fourth Circuit determined that Whisenant did not possess the ability to litigate the complex civil rights case because Whisenant was uneducated and could not effectively cross-examine the defendants to challenge their credibility.²⁴ Furthermore, the Fourth Circuit acknowledged that Whisenant could not leave prison to question witnesses and obtain information favorable to his claim.²⁵ The *Whisenant* court consequently determined that the district court's refusal to appoint counsel because of an unavailability of federal funding for attorney's fees denied Whisenant a fair trial.²⁶ The Fourth Circuit thus held that the facts surrounding Whisenant's case constituted exceptional circumstances which required the appointment of counsel.²⁷

The Fourth Circuit's reasoning in *Whisenant* is consistent with decisions of several other circuits.²⁸ Courts have considered many factors in determining whether exceptional circumstances exist to justify the appointment of counsel to represent an indigent prisoner in civil litigation.²⁹ The threshold question is whether the plaintiff's allegations establish a meritorious claim.³⁰

appoint counsel to represent indigent plaintiff presenting exceptional circumstances).

21. 739 F.2d at 163.

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.* The Fourth Circuit in *Whisenant* stated that the availability of funding for attorney compensation is wholly unrelated to the issue of whether a litigant will receive a fair trial without the appointment of counsel. *Id.* at 163-64. The *Whisenant* court noted that the bar has a duty to accept court appointments on behalf of indigents and emphasized the possibility of attorney's fees in civil rights actions pursuant to 42 U.S.C. § 1988. *Id.* at 164; see 42 U.S.C. § 1988 (1982) (§ 1988 grants court discretion to award prevailing party reasonable attorney's fees).

27. 739 F.2d at 164.

28. See *infra* notes 29-33 and accompanying text (discussion of factors courts consider in determining whether to appoint counsel).

29. See, e.g., *Ulmer v. Chancellor*, 691 F.2d 209, 213 (5th Cir. 1982) (appointment of counsel to represent indigent prisoners justified only under exceptional circumstances); *White v. Walsh*, 649 F.2d 560, 563 (8th Cir. 1981) (28 U.S.C. § 1915(d) requires appointment of counsel to represent indigent prisoners only when circumstances justify appointment). No satisfactory definition of what constitutes exceptional circumstances exists. See *supra* note 5 (courts have not explicitly defined "exceptional circumstances"). Nonetheless, courts consider several factors in determining the existence of exceptional circumstances. See *infra* notes 30-33 and accompanying text (courts consider nature of claim and plaintiff's ability to litigate suit in determining existence of exceptional circumstances).

30. *Maclin v. Freake*, 650 F.2d 885, 887 (7th Cir. 1981). The *Maclin* court stated that an

If a court finds that a plaintiff has presented a meritorious claim, the courts then consider the type and complexity of the case,³¹ the plaintiff's ability to investigate the facts of his case,³² the necessity of cross-examination,³³ and the plaintiff's ability to litigate the case.³⁴

The United States Supreme Court, in *Estelle v. Gamble*,³⁵ established the criteria for determining whether a prisoner alleges a meritorious claim against state officials for failure to provide adequate medical care.³⁶ In *Estelle*, the Supreme Court held that prison officials' deliberate indifference to a prisoner's serious medical needs subjected the prisoner to cruel and unusual punishment in violation of the eighth amendment.³⁷ The United States Court of Appeals for the Seventh Circuit applied the deliberate indifference standard in *Maclin v. Freake*³⁸ to determine whether a prisoner's complaint alleging a deliberate indifference to his serious medical needs

indigent prisoner must allege facts constituting a meritorious claim to justify the appointment of counsel. *Id.* Even when the claim is not frivolous, however, a court may decline to appoint counsel if there is little chance for the plaintiff to prevail in the case. *Id.*

An indigent litigant, however, must satisfy the statutory requirements of § 1915(d) before a court will inquire into the existence of exceptional circumstances. *See* 28 U.S.C. 1915(d) (1982) (applicant must prove indigency and present case that is not frivolous or malicious). Section 1915(d) does not define what constitutes a frivolous or malicious claim, so the trial court must assess the complaint in light of the facts presented and applicable law. *Watson v. Ault*, 525 F.2d 886, 892 (5th Cir. 1976). *See generally* Annot., 52 A.L.R. FED. 679 (1981) (discussion of standards for determining frivolity under § 1915(d)).

31. *Branch v. Cole*, 686 F.2d 264, 266 (5th Cir. 1982) (appointment of counsel generally depends upon type and complexity of case and practical abilities of person bringing suit).

32. *See McKeever v. Israel*, 689 F.2d 1315, 1320 (7th Cir. 1982) (court should appoint counsel when plaintiff is unable to investigate crucial facts).

33. *See Manning v. Lockhart*, 623 F.2d 536, 540 (8th Cir. 1980) (appointment of counsel is justified when witness credibility is determinative of outcome of case and when case presents serious questions of fact).

34. *See Childs v. Duckworth*, 705 F.2d 915, 922 (7th Cir. 1983) (court must determine whether litigant is capable of presenting his own case).

35. 429 U.S. 97 (1976).

36. *Id.* at 101-06.

37. *See Gregg v. Georgia*, 428 U.S. 153, 173 (1976) (eighth amendment prohibits punishment grossly disproportionate to the crime committed); U.S. CONST. amend. VIII (federal government shall not inflict cruel and unusual punishment on prisoners). In *Estelle*, Gamble received a back injury when a 600 pound bale of cotton fell on him while he was unloading a truck. 429 U.S. at 99. A prison doctor prescribed muscle relaxants and ordered Gamble to remain in his cell. *Id.* After two months of rest and treatment, the medical staff certified Gamble as being fit for light work, but Gamble continued to complain of pains in his back and arms. *Id.* at 100. The prison disciplinary committee placed Gamble in administrative segregation and solitary confinement when he refused to work. *Id.* at 101. Gamble thereafter brought an action under 42 U.S.C. § 1983 alleging that the prison staff subjected him to cruel and unusual punishment by their improper care of his injuries. *Id.*; *see* 42 U.S.C. § 1983 (1982). The *Estelle* Court held that prison officials violate the eighth amendment's prohibition against cruel and unusual punishment when the officials demonstrate a deliberate indifference to a prisoner's serious medical needs. 429 U.S. at 104. Improper medical treatment, delay in care, or the intentional interference with prescribed treatment may constitute such indifference. *Id.* at 104-05. The Fourth Circuit extended the *Estelle* holding to pretrial detainees. *See Loe v. Armistead*, 582 F.2d 1291, 1296 (4th Cir. 1978), *cert. denied*, 446 U.S. 928 (1979).

38. 650 F.2d 885 (7th Cir. 1981).

justified the appointment of counsel under section 1915(d).³⁹ In *Maclin*, a prisoner alleged that the prison doctor denied the prisoner proper medical attention in violation of the eighth amendment prohibition against cruel and unusual punishment.⁴⁰ Maclin, a paraplegic, stated that the doctor refused to provide him with necessary physical therapy and would not provide him with medication to alleviate the pain attributable to Maclin's paralysis.⁴¹ The Seventh Circuit, noting that Maclin had not received physical therapy since his incarceration, concluded that the allegations formed the basis for a claim that the doctor had exhibited a deliberate indifference to Maclin's serious medical needs.⁴² The *Maclin* court, therefore, determined that the district court should have appointed counsel to represent Maclin because he presented a meritorious claim and, additionally, because Maclin could not investigate the facts of his case and could not litigate the case successfully without the aid of counsel.⁴³ In light of *Estelle* and *Maclin*, therefore, the *Whisenant* court properly concluded that Whisenant presented a colorable claim justifying the appointment of counsel because Whisenant alleged facts indicating that the defendants displayed a deliberate indifference to his serious medical needs by the defendants' purposeful delay in providing Whisenant with proper medical care.⁴⁴

In assessing the existence of exceptional circumstances in *Whisenant*, the Fourth Circuit implicitly recognized that Whisenant could not adequately

39. *Id.* at 886.

40. *Id.*

41. *Id.* In *Maclin*, paralysis confined Maclin to a wheelchair. *Id.* Maclin requested that the defendant, Dr. Freake, prescribe valium or percodan to relieve the pain and muscle spasms attributable to Maclin's paralysis. *Id.* The defendant instead ordered substitute medication, which caused serious side effects. *Id.* Maclin further asserted that the defendant's refusal to provide any physical therapy resulted in further debilitation of Maclin's legs. *Id.*

42. *Id.* at 889. In *Maclin*, the Seventh Circuit held that Maclin presented a colorable claim because he was a paraplegic and the evidence clearly indicated that Dr. Freake had made no attempts to provide Maclin with physical therapy. *Id.* Maclin's complaint, therefore, stated a cognizable claim which, if substantiated, would prove that Dr. Freake exhibited a deliberate indifference to Maclin's serious medical needs. *Id.*

43. *Id.* In *Maclin*, the Seventh Circuit reversed and remanded the case for appointment of counsel and a new trial. *Id.*

44. 739 F.2d at 163. In *Whisenant*, the Fourth Circuit observed that the evidence indicated that Whisenant did suffer from oral and rectal bleeding. *Id.* Furthermore, the Fourth Circuit determined that Whisenant's charge that the defendants displayed a deliberate indifference to his serious medical needs was not frivolous because Whisenant's required life-saving treatment upon arrival at the local hospital. *Id.*

The *Whisenant* court also concluded that the district court incorrectly instructed the jury that Whisenant had to prove that the defendants delayed medical care for the express purpose of punishing him. *Id.* at 164. Rather, Whisenant was entitled to prevail if he could prove that the denial of timely medical attention was not related to a legitimate purpose or that defendants exhibited an intent to punish. *Id.*; see *Bell v. Wolfish*, 441 U.S. 520, 538 (1979) (pretrial detainee's due process rights are violated if officials impose challenged practice to punish detainees or if practice does not bear a reasonable relation to legitimate governmental purpose). The Fourth Circuit stated that no proper governmental purpose existed to legitimize the denial of medical care where, as in *Whisenant*, the need for such care was apparent. 739 F.2d at 164.

present a complex claim based upon an allegation of a deliberate indifference to his serious medical needs without the aid of counsel.⁴⁵ Similarly, in *Merritt v. Faulkner*,⁴⁶ the Seventh Circuit considered whether an allegation that prison officials displayed a deliberate indifference to a prisoner's serious medical needs constituted the type of case requiring the appointment of counsel.⁴⁷ In *Merritt*, the prison ophthalmologist diagnosed Merritt as suffering from a hemorrhage in his left eye.⁴⁸ The doctor, however, did not prescribe any corrective treatment until five months after the initial diagnosis.⁴⁹ After becoming functionally blind, Merritt filed suit alleging that the delay in medical treatment violated his rights under the eighth amendment.⁵⁰ The Seventh Circuit, in reversing the district court's refusal to appoint counsel, stated that the allegation of deliberate indifference to a prisoner's medical needs was too complex for lay representation.⁵¹ The *Merritt* court concluded that the district court should have appointed counsel to represent Merritt because the issue of deliberate indifference to serious medical needs rested upon the subtleties of legal causation and the duties imposed on prison officials by the eighth and fourteenth amendments.⁵² Furthermore, the Seventh Circuit noted that the case presented other exceptional circumstances because Merritt had proven a meritorious claim, he was unable to investigate the case, and because Merritt did not possess skills necessary to litigate his claim without legal assistance.⁵³ In accordance with *Merritt*, therefore, the Fourth Circuit properly determined that an allegation of a deliberate indifference to a prisoner's serious medical needs constitutes the type of cases which may justify the appointment of counsel to represent an indigent prisoner.⁵⁴

The *Whisenant* court also considered the prisoner's ability to investigate the facts of his case, and noted that Whisenant could not leave prison to question witnesses.⁵⁵ The United States Court of Appeals for the Eighth Circuit has concluded that a prisoner's incarceration guaranteed his inability

45. 739 F.2d at 163.

46. 697 F.2d 761 (7th Cir. 1983), *cert. denied*, 104 S. Ct. 434 (1983).

47. *Id.* at 762.

48. *Id.*

49. *Id.* In *Merritt*, although the prison ophthalmologist diagnosed Merritt as bleeding in his left eye, the doctor delayed treatment to determine whether Merritt also suffered from sickle cell anemia. *Id.* The Seventh Circuit further noted that another prison physician described the delay in treatment as unusual. *Id.* The prison medical staff, six months after the ophthalmologist's diagnosis, sent Merritt to a private hospital for treatment of the injured left eye. *Id.* The surgeons, however, erroneously performed corrective surgery on Merritt's right eye, which eventually resulted in functional blindness in both eyes. *Id.*

50. *Id.* at 762-63; *see* U.S. CONST. amend. VIII (federal government shall not impose cruel or unusual punishment).

51. 697 F.2d at 765.

52. *Id.*

53. *Id.*

54. 739 F.2d at 163.

55. *Id.*

to investigate and obtain evidence favorable to the case.⁵⁶ Similarly, the Seventh Circuit has observed that a prisoner cannot realistically investigate his claim, conduct discovery, or interview witnesses.⁵⁷ The Seventh and Eighth Circuit decisions suggest that circumstances like those in *Whisenant*, in which incarceration prevents a prisoner from adequately investigating his case, requires the appointment of counsel.⁵⁸

The Fourth Circuit also noted that discrepancies in testimony and the need for effective cross-examination necessitated the appointment of counsel to represent Whisenant.⁵⁹ This determination is consistent with *Manning v. Lockhart*,⁶⁰ in which the Eighth Circuit considered the importance of cross-examination in determining whether the trial court should have appointed counsel.⁶¹ In *Manning*, the defendant jail warden, Lockhart, accused Manning of committing a burglary while Manning was on work release.⁶² Manning alleged in his complaint that during a private confrontation between Manning and Lockhart, the warden handcuffed Manning and beat him severely in an attempt to gain a confession.⁶³ The Eighth Circuit, noting that the case turned on the credibility of Manning and the warden, emphasized the necessity for cross-examination.⁶⁴ The *Manning* court concluded that counsel should be appointed when witness credibility is a crucial factor in the case.⁶⁵ *Whisenant*, like *Manning*, depended upon witness credibility and required extensive cross-examination.⁶⁶ Therefore, the *Whisenant* court's determination that the district court should have appointed counsel to represent Whisenant was justified.⁶⁷

56. See *White v. Walsh*, 649 F.2d 560, 563 (8th Cir. 1981) (plaintiff prisoner's incarceration prevents adequate investigation of case).

57. See *McKeever v. Israel*, 689 F.2d 1315, 1321 (7th Cir. 1982) (plaintiff prisoner's failure to conduct discovery and inept investigation of own witnesses indicated prisoner could not investigate his case).

58. See *McKeever*, 689 F.2d at 1321 (appointment of counsel proper where prisoner cannot investigate his claim); *White*, 649 F.2d at 563 (prisoner's incarceration guarantees his inability to investigate his case); *Whisenant*, 739 F.2d at 163 (prisoner unable to investigate his claim due to imprisonment); see also *Rodriguez v. Broglin*, 563 F. Supp. 661, 662 (N.D. Ind. 1983) (appointment of counsel justified where claim requires investigation that applicant is unable to do himself).

59. 739 F.2d at 163.

60. 623 F.2d 536 (8th Cir. 1980).

61. *Id.* at 539.

62. *Id.* at 537. In *Manning*, the prison warden, Lockhart, assigned Manning to work at the Little Rock, Arkansas State Police Headquarters. *Id.* After a burglary occurred in Little Rock, Lockhart brought Manning back to prison for questioning. *Id.* During the interrogation, Lockhart allegedly handcuffed Manning and beat him for one hour and forty minutes. *Id.* at 538.

63. *Id.* at 538-39.

64. *Id.* at 538-39. In *Manning*, the Eighth Circuit noted that witness credibility determined the result of the case in the district court. *Id.* at 539. Manning testified that Lockhart beat him during a private interview, whereas Lockhart asserted that he used no physical force and that the assistant warden attended the interrogation. *Id.* at 538.

65. *Id.* at 540.

66. 739 F.2d at 163.

67. See *Manning*, 623 F.2d 540 (appointment of counsel necessary when cross-examination

Furthermore, the *Whisenant* court acknowledged Whisenant's lack of education and concluded that Whisenant did not possess sufficient abilities to litigate the case.⁶⁸ In *Childs v. Duckworth*,⁶⁹ the Seventh Circuit held that the district court properly declined to appoint counsel to represent an articulate prisoner bringing a civil rights case.⁷⁰ The Seventh Circuit stated that the appointment of counsel is appropriate when the prisoner is incapable of litigating his case, but found that an appraisal of Childs' advocacy skills revealed that the case could not have been conducted more effectively by an attorney.⁷¹ *Childs*, therefore, indicates that the Fourth Circuit properly considered Whisenant's lack of education as affecting his ability to litigate his claim and correctly concluded that Whisenant required the aid of counsel.⁷²

The Fourth Circuit, in *Whisenant*, held that district courts should appoint counsel to represent indigent prisoners bringing civil actions that present exceptional circumstances.⁷³ The *Whisenant* court, accordingly, determined that counsel should be appointed to represent Whisenant because he presented a meritorious claim,⁷⁴ because he could not investigate the facts of his case,⁷⁵ and because he did not possess the skills necessary to litigate a complex civil rights action.⁷⁶ The Fourth Circuit, in following the exceptional circumstances

of witnesses is crucial to case); *Whisenant*, 739 F.2d at 163 (appointment of counsel justified when witness credibility is decisive factor).

68. 739 F.2d at 163.

69. 705 F.2d 915 (7th Cir. 1983).

70. *Id.* at 923. In *Childs*, Childs held periodic informal discussions on satanism with other prisoners and without guard interference. *Id.* at 918. In 1976, Childs asked permission to form a satanic church at the Indiana State Prison, but the warden denied the request because the group could not find a proper sponsor. *Id.* at 919. The warden, Duckworth, also denied Childs' request for a crystal ball, incense and candles. *Id.* Childs alleged that the warden's refusal to provide him with the occult materials and the denial of certification of his religious meetings violated his first amendment rights. *Id.* at 918-19. The Seventh Circuit held that the prison did not violate Childs' first amendment rights of freedom of religion because Childs refused to provide information about his proposed organization, he never obtained a sponsor, and because the prison's interest in preserving discipline and security were legitimate state interests. *Id.* at 921.

71. *Id.* at 923. In *Childs*, the Seventh Circuit noted that the facts of the case were undisputed and the crucial issues were well within Childs' personal knowledge. *Id.* The *Childs* court particularly emphasized that Childs possessed oratory skills comparable to that of an attorney. *Id.*

72. 739 F.2d at 163.

73. *Id.* at 163-64. In *Whisenant*, the Fourth Circuit stated that the district court's failure to appoint counsel to represent Whisenant denied him a fundamentally fair trial. *Id.* at 163. The *Whisenant* court further concluded that the availability of federal funding for attorney's fees is unrelated to the issue of whether a person received a fair trial. *Id.* at 164.

74. See text accompanying note 22 (plaintiff in *Whisenant* presented meritorious claim); notes 37-43 and accompanying text (appointment of counsel justified where prisoner presents meritorious claim).

75. See text accompanying note 25 (plaintiff in *Whisenant* could not leave prison to question witnesses); notes 55-59 and accompanying text (court should appoint counsel where incarceration prevents investigation of case).

76. See text accompanying note 24 (plaintiff's lack of education in *Whisenant* precludes