

*Dental Care Corner***Oral Health Aids a Constitutional Right? Maybe**

by Nicholas S. Makrides, D.M.D., M.P.H.

Toothbrushes and dental floss have been the gold standard for removing dental plaque for decades. For most Americans brushing and flossing is an essential part of basic hygiene. At an early age, children are taught to brush their teeth twice a day and floss (with the help of a parent) at least once a day to maintain basic oral hygiene.^{1,2} This message is heard in classrooms, repeated on television advertisements selling oral health products, and reinforced during annual dental examinations and oral hygiene appointments.

This homecare, hygienic ritual is understood, if not faithfully practiced, in many American households. Lamentably, brushing and flossing is not a common practice within the socio-economic status that produces so many of our incarcerated offenders. Thus, in jails and prisons this basic oral hygiene either may be unknown, modified or even terminated. Oral hygiene aids while innocuous in most home settings may be purposed for more nefarious functions within a correctional setting. Toothbrushes have been fashioned into shanks while floss has been used to hoist contraband between floors, wrapped around objects as makeshift handles, tied into ropes, and used as garrotes. Some correctional officers even claim that floss has been used to cut through metal bars and locks.³

Floss as Threat?

In response to the apparent security threat, some correctional administrators have discontinued the use of dental floss in their respective facilities. In 2012, two groups of inmates challenged this decision. One group of inmates from Westchester, New York has filed a Federal civil rights suit against the county claiming that the restricted access to floss can cause caries (tooth decay). Moreover, the inmates claim the no-floss policy is causing pain and the loss of dentition. Inmate Santiago Gomez, the lead plaintiff, is quick to point out that the no-floss policy is incongruous with the institution's regulation manual where inmates are instructed to floss daily to prevent tooth

decay. The inmates are seeking an inflated \$500 million settlement.⁴

A second group of inmates, although less publicized, have also filed civil rights lawsuits (individually) against Palm Beach Sheriff, Ric Bradshaw, claiming deprivation of civil rights due to the sheriff's anti-floss policy. One plaintiff states that the Sheriff's no-floss policy prevents him from complying with the American Dental Association's (ADA) flossing recommendations.⁵

In the latter case, Magistrate Judge Patrick W. White dismissed the suits against the Sheriff and ruled that the denial of floss did not violate an inmate's constitutional rights. A similar ruling was also made in **Francis v. Carroll** where an inmate, William Francis Jr, brought suit against warden Thomas Carroll of the James T. Vaughn Correctional Center (VCC) for denying him access to floss while inmates at other Department of Correction facilities were given access to floss. Inmate Francis claimed that his constitutional rights were violated. Summary judgment was entered for the defendants. Francis was unable to demonstrate the difficult to prove deliberate indifference by correctional administrators and medical contractor. Moreover, Francis was not treated any differently from other inmates at the facility as the no-floss policy applied to all detainees.⁶

It is important to note that in both instances the inmates (Palm Beach and **Francis v Carroll**) appeared before the court *pro se*. It is not clear if the outcome would have been different if the inmates had the benefit of legal counsel or subject matter experts. Although the health record revealed that Francis received adequate care, patients like Francis, who have periodontal disease, need to maintain a robust homecare regimen. Had Francis obtained the expert opinion of a Periodontist, a dentist who specializes in periodontal health, the argument of appropriate homecare may have taken a different course since it is not clear if he could have maintained adequate periodontal health with the floss substitute sold at the commissary.

Is Floss Legally Required? Policy?

In light of these rulings the question at hand is: Are correctional facilities required to provide interdental aids to inmates? While toothbrushes generally can be agreed upon as an essential oral health aid, many jurisdictions have varying policies regarding the use of floss and other interdental aids. A cursory review of the American Correctional Association (ACA) and National Commission on Correctional Health Care (NCCCHC) standards do not mandate correctional facilities to provide interdental aids as essential adjunct products. It should be noted that in lieu of a standard, NCCCHC has published Guidelines for Correctional Dental Health Care where it is recommended that inmates should have access to interdental aids.⁷

A review of the Federal Bureau of Prisons (BOP) Dental Services Policy (6400.02) reveals that the Chief Dental Officer at each facility will ensure that the inmate population has suitable toothbrushes, floss or suitable floss substitutes.⁸

In the absence of clear or definitive guidance on the subject of oral health aids the BOP has embarked upon developing a resource guide that will provide dentists and correctional administrators meaningful information about available products. Chief Dental Officers are encouraged to work with correctional supervisors to provide a menu of acceptable devices to be used at each facility. Spooled floss may be an acceptable interdental aid at a low security facility (Camp) whereas it would be an unacceptable interdental aid at a high security unit.

A menu of approved products is important since having only one interdental aid is rarely a solution for all inmate patients. Systems and facilities that attempt to have a one-product solution for all oral health needs will quickly discover the special caveats due to unique patient presentation. Inmates with fixed partial dentures (crown and bridges), implants, and orthodontic appliances often require specialized interdental devices.

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The list of available products is wide ranging. Several manufacturers of dental products have discovered the niche market of corrections and have seized on the opportunity of providing security products for inmate oral health. Toothbrushes are now available in short handles and made of flexible plastics or plastics that cannot be sharpened or melted into other shapes. Interdental aids have also been introduced to correctional environments and include, flossers (one inch floss), modified floss products, precut floss, Floss Loops (an alternative to string floss), interdental picks and devices.

Although inmates currently do not have a clear constitutional right to dental floss, the provision of a modified floss or alternate substitute is a reasonable response to administrators' concerns about safety and security. At the Westchester facility in Vahalla, New York, correctional administrators reconsidered their policy. Although not required to provide floss they will sell a floss substitute.⁹

Win or lose, thousands of tax payer dollars and countless hours of staff time will be spent responding and defending these

legal cases. This is a needless exercise with a variety of relatively easy solutions at hand. How much of a burden is it for correctional commissaries to sell acceptable dental products to inmates who genuinely want to take care of their teeth?

The more intractable problem, however, is whether correction facilities will provide these oral health aids as a right in the same fashion as, say, soap. Access to soap, and a water supply for its use, is considered part of a basic constitutional right to basic hygiene.¹⁰

One would think that the courts would view access to a serviceable toothbrush and floss as part of a constitutional right to basic hygiene. Access to toothpaste, however, may not have the same status depending on how important one views toothpaste.¹¹

Finally, the floss or not conundrum may be viewed as part of the larger issue of whether access to preventive health care is "merely" good policy and economics. After all, constitutional requirements are minimal requirements and "how low can you go" is not a question that leads to good results.

Endnotes

1. <http://www.mouthhealthy.org/en/az-topics/f/flossing>.

2. <http://www.mouthhealthy.org/en/az-topics/b/brushing-your-teeth>.

3. <http://news.yahoo.com/jailers-worry-dental-floss-weapon-185039459.html>.

4. <http://healthjournalism.org/blog/2012/10/suit-over-dental-floss-gives-glimpse-into-inmates-health-care/>.

5. <http://www.floridavoices.com/columns/angel-castillo-jr/do-prisoners-have-constitutional-right-dental-floss>.

6. **Francis v. Carroll**, 773 F. Supp.2d 483 (D. Del. 2011). Casetext Website. Available at: <https://www.casetext.com/case/francis-v-carroll-2/>. A claim of discrimination, or denial of Equal Protection, does not seek to create a right (as with Due Process or Cruel and Unusual Punishment); it seeks a fair distribution of a right or amenity).

7. Standards for Health Services in Prisons. *Guidelines for a Correctional Dental HealthCare System*. Appendix G. page 169. National Commission on Correctional Health Care (2008).

8. Dental Services 6400.02. January 15, 2005, page 9. Available at: <http://www.bop.gov/PublicInfo/execute/policysearch?todo=query&series=6000>.

9. <http://bigstory.ap.org/article/jailers-worry-about-dental-floss-weapon>.

10. See **Whittington v. Ortiz**, 307 Fed.Appx. 179 (10th Cir. 2009).

11. See **Flanery v. Bonn**, 604 F.3d 249 (6th Cir. 2010), holding there is a right to toothpaste. Critiqued at Fred Cohen, A Constitutional Right to Toothpaste, XXII CLR 36 (Oct./Nov. 2010). ■



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