

# LITIGATION 1992 SECOND QUARTER REPORT

LOC	NUM	HC	FTC	BIV	OTH	ANS	PEN	CLD	H/T	SET	AWD
MXR	42	19	5	11	17	29	*	16	1	2	5400
NER	38	13	4	10	11	28	259	28	3	2	0
SER	46	22	3	17	4	46	*	30	2	1	70
NCR	65	21	11	28	15	*	438	22	3	0	0
SCR	46	29	7	9	10	26	58	60	2	0	0
WXR	27	7	3	12	4	*	466	17	10	4	15771
CO	10	5	1	3	1	17	83	18	2	1	0
TOT	274	116	34	90	62	146	1302	191	23	10	21241

## NARRATIVE ANALYSIS

### DEFINITIONS

LOC - LOCATION

NUM - NUMBER OF TOTAL LAWSUITS FILED IN QUARTER

HC - NUMBER OF HABEAS CORPUS ACTIONS FILED

FTC - NUMBER OF FTCA ACTIONS FILED

BIV - NUMBER OF BIVENS ACTIONS FILED

OTH - OTHER ACTIONS FILED

ANS - NUMBER OF LITIGATION REPORTS COMPLETED

PEN - PENDING

CLD - NUMBER OF ACTIONS CLOSED

H/T - NUMBER OF HEARINGS OR TRIALS (INCLUDE INFO IN NARRATIVE)

SET - NUMBER OF SETTLEMENTS (INCLUDE INFO IN NARRATIVE)

AWD - NUMBER OF AWARDS (INCLUDE INFO IN NARRATIVE)

GOVERNMENT ACTION AND DATE OF ACTION - (INCLUDE IN NARRATIVE)

# **LITIGATION ANALYSIS**

THE NUMBER OF LAWSUITS FILED REMAINED APPROXIMATELY THE SAME WITH 265 FILED THE FIRST QUARTER AND 274 FILED THE SECOND QUARTER. THE AMOUNT OF MONETARY DAMAGES DUE TO SETTLEMENT OR AWARD DECREASED FROM \$82,897 THE FIRST QUARTER TO \$21,241 THE SECOND QUARTER.

## I. HEARINGS OR TRIALS

### NORTH CENTRAL REGION

Castaneda v. Miller, Southern District of Illinois.

The plaintiff alleges that he was assaulted by USP Marion staff after his removal from the general population to the special housing unit. At the trial, the inmate was unable to keep his testimony consistent with the facts he had alleged in his FTCA claim or the subsequent complaint. The court, after a short recess, made its decision from the bench and dismissed the plaintiff's action in its entirety.

### NORTHEAST REGION

Bailey v. United States, Western District of Pennsylvania.

- This FTCA case originated at FCI Loretto. On January 11, 1988, former inmate Stephen Bailey complained to the PA at FCI Loretto of chest pains radiating to each arm and shortness of breath.
- Subsequently, he visited the PA on several occasions for related problems. On January 22, 1988, the inmate suffered cardiac arrest. The inmate was transferred to Springfield and mandatorily released in May 1988.

The Armed Forces Institute of Pathology rendered an opinion on this case stating, that when the staff failed to move the inmate to the hospital on the night of January 11, 1988, they were acting outside acceptable medical practice. In addition, through the questioning of the PA and Dr. Moore, the AUSA has uncovered additional problems. No additional EKG was done before the inmate was sent back to his quarters. Dr. Moore expressed that the inmate might have been suffering a heart attack when the PA called. Nevertheless, he had ruled it out for no apparent reason.

The case was tried from April 13-17, 1992, and on May 3, 1992, the court entered an adverse judgment against the Government. A final settlement was made with the plaintiff for \$243,000, \$143,000 for lost earnings, and 100,000 for pain and suffering.

Babcock v. Gawrysiak, Middle District of Pennsylvania.

This Bivens action, against the former Health Services Administrator at USP Lewisburg, went to trial on February 3, 1992 and was dismissed on February 3, 1992. The plaintiff alleged that the defendant had been deliberately indifferent to his medical needs after the inmate had fallen from an upper bunk. Immediately before jury selection, the court granted the plaintiff's motion to dismiss his complaint. Consequently, we have been pursuing the costs against the inmate.

Welty v. Gawrysiak, Middle District of Pennsylvania.

This Bivens action, against the former Health Services Administrator at USP Lewisburg, went to trial on February 5, 1992. The inmate, John Welty, had allegedly sustained a knee injury during his work detail at USP Lewisburg. He alleged that the defendant, having been deliberately indifferent to his medical needs, had delayed necessary surgery and failed to provide physical therapy. After deliberation, the jury returned a verdict for the defendant.

The plaintiff, however, has brought two other actions to recover losses for the same injury. Although the judge dismissed his FTCA complaint as it was time barred, the Inmate Accident Compensation complaint is still pending.

Young v. Quinlan, Third Circuit Court of Appeals.

With this Bivens action against the staffs at USP Lewisburg, FCI Seagoville, FCI El Reno, and the Central office, the plaintiff alleges that staff had violated his constitutional rights; including, deliberate indifference to medical needs, improper procedure during a prison discipline hearing, improper transfer from FCI Seagoville to USP Lewisburg, failure to protect him from attacks by other inmates, subjection to unsanitary conditions, and conspiracy to murder the plaintiff. During August 1990, the District Court had granted summary judgement in the favor of the defendants. The Third Circuit has reversed the decision in part concerning the grant of summary judgment on two issues; the court held that an issue of fact existed as to whether some of the defendants failed to protect the inmate from attacks, and whether some of the defendants subjected the inmate to inhumane conditions when confining him to a dry cell after a disciplinary infraction. The Third Circuit court remanded the case to the District Court.

Gaggi v. Lansing, Eastern District of New York.

This combination Federal Tort Claims Act and Bivens case was filed by the inmate's estate and focuses on the alleged wrongful death of the inmate at MCC New York. On April 16, 1988, the inmate complained to a physician's assistant that he had been experiencing chest pains and gas pains for two days. The inmate had had a known history of coronary artery disease and hypertension. The PA had treated him with anti-gas medication and Motrin. Later that same day the inmate experienced more severe pain and was escorted to the MCC hospital under his own power. Shortly thereafter he had a cardiac arrest and died. The case was settled in April, 1992. The United States Attorneys Office has requested that we not disclose the amount of the settlement in this case.

## **SOUTHEAST REGION**

Betty Nicholson V. D.V. Industries, et al., Northern District of Alabama.

A post office employee, alleging that a defective mail gurney had caused her permanent injury on November 11, 1989, brought a product liability action against UNICOR and a private firm. The judge dismissed the action against UNICOR without prejudice because the plaintiff was unable to proceed under the Federal Tort Claims Act.

Paul Chisolm V. United States, Northern District of Florida.

On March 20, 1984 a former inmate, while on a bathroom visit at FCI-Tallahassee, was hit on the head with a brick. The bathroom had been under repair when the accident occurred. The inmate filed an FTCA claim that the court denied. A lawsuit was filed seeking \$200,000 in damages, and the case went to trial on January 8, 1992. The judge rendered a verdict of for the plaintiff of \$750. Affirming the original decision, the court denied the government's "Motion for Reconsideration." An appeal was not made.

## **MID-ATLANTIC REGION**

Thomas v. Lewis

On March 5, 1992, Thomas brought this case before the Fourth Circuit. The inmate alleged that Federal Marshals would not take him from a state institution to a federal institution after being sentenced to both a state and federal term. The Bureau appealed the order of the District Judge which granted credit against the Federal sentence for time spent in state custody on an unrelated sentence. The Fourth Circuit vacated the district court's order. The appellate court held that a federal sentence does not commence to run until the inmate is received at the institution for service of his federal sentence.

Parker v. UNICOR

On December 16, 1991 this case was tried in the Southern District of Indiana. This personal liability action involved a work related injury. The inmate claimed the injury was caused by a job assignment that was outside his medical restrictions. The case was tried on December 16, 1991. The magistrate issued a ruling in favor of the defence, and we are awaiting the court's ratification.

Nazelrod v. DOJ, Eastern District of Kentucky.

The plaintiff, an employee at FCI Ashland, brought a Title VII law suit. The plaintiff sought a court order restraining the BOP from using an investigative technique on her during the staff's investigation of a theft at FCI, Ashland. The plaintiff alleged

that staff members had sexually harassed her because she was touched on the arm and leg during the interview before her confession to the theft. This technique is still in use and is the same for both men and women. The Court dismissed the case on procedural issues.

#### WESTERN REGION

##### Grady v. Crabtree, Ninth Circuit Court of Appeals.

In the Ninth Circuit, a criminal defendant was convicted of violating his probation and sentenced to a term of imprisonment. Because the individual had spent time in a CCC as a condition of his probation, the court granted him jail time credit against his new term of imprisonment for that period of time. That ruling was contrary to the BOP's practice of denying jail time credit unless the time was served in a "jail type" facility. However, because the case involved "old law" and would not have directly overturned the Ninth Circuit's previous ruling in Brown v. Rison, authorization to seek a rehearing en banc, or certiorari to the U.S. Supreme Court, was denied.

##### U.S. v. Robert Anderson, Northern District of California.

The District Court judge has ordered the Attorney General/BOP to pay for psychiatric care costs of a conditionally released individual who is no longer in the custody of the Attorney General. The Bureau is recommending to the Department of Justice that this case be appealed because: (1) The district court has ordered the Bureau to take actions which are outside of its statutory authority and has thereby violated the separation of powers doctrine. And (2) the order contravenes the plain meaning and intent of Chapter 313 of Title 18.

##### U.S. v Wallstrum, Northern District of California.

The inmate alleges that he is due "jail credit" on the instant sentence for an 18 month period spent on writ from an earlier federal sentence. The inmate seeks "dual credit" for the 18 months for both his instant and earlier sentence.

##### Martel Black v. Dobre, District of Nevada.

An inmate who was sentenced in the 8th Circuit sought 9th Cir. Brown v. Rison credit towards a sentence computation for time he had spent in a halfway house as a condition of pretrial release.

#### SOUTH CENTRAL REGION

##### Shaw v. Thornburgh, Western District of Oklahoma.

In this Bivens action out of FCI, El Reno, the plaintiff alleges that he was cut with a razor blade by a Correctional Officer and seeks \$500,000.00 in damages. The plaintiff's allegations are

essentially correct. A correctional officer, who is no longer employed by the Bureau of Prisons, appears to have intentionally cut an inmate's hand with a razor blade. The Bureau of Prisons has recommended against Department of Justice representation for the former staff member.

McFarlane v. INS, et al., Eastern District of Louisiana.

In this Bivens and FTCA action out of FDC, Oakdale the plaintiff has challenged the authority of the United States to hold INS detainees beyond the completion of their convictions. The plaintiff seeks immediate release from custody or immediate deportation. This case is one of several cases which was recently filed by INS Detainees at both FCI, and FDC, Oakdale. The detainees allegations include having been required to work against their will during job assignments and having been confined to housing areas with convicted felons.

## II. SETTLEMENTS

### NORTHEAST REGION

Apatano v. United States, District of New Jersey.

This is an FTCA case in which inmate Librado Apatano alleges that staff at FCI Otisville were negligent and caused him to slip and fall on an icy walkway. At the arbitration hearing, the arbitrator recommended no award because the plaintiff had failed to establish liability by the United States. On November 7, 1991, the arbitrator found no negligence under New York state law. The plaintiff filed a demand for trial de novo. The Magistrate Judge urged a settlement for a nuisance value of \$3250 at pretrial conference, and both parties settled for that amount.

Vallade v. United States, Middle District of Pennsylvania.

This is an FTCA case out of USP Lewisburg wherein the plaintiff Ishmael Vallade, after being escorted to the shower room in handcuffs, slipped on a piece of soap and fell, resulting in his back injury. Although the Inmate sought \$150,000 in damages, the case was settled for \$250.

Forte v. United States, Eastern District of Pennsylvania.

This is the combination of a Federal Tort Claims Act and a Bivens action. The plaintiff alleged that staff members at FCI Danbury were liable for his injury and for subsequent medical care afforded by USMCFP Springfield. An outside consultant had performed neck surgery on the plaintiff on September 7, 1988. On November 7, 1988, the plaintiff had suffered the near collapse of a lung. A medical expert advised that the post operative care by the BOP had not been consistent with community standards. Specifically, the

plaintiff had not been immobilized after surgery and had not been placed in an elevated position. The plaintiff's lying in a flat position had been the proximate cause of the lung injury. The case was settled in February, 1992 for \$50,000.00, with \$25,000.00 of the proceeds attached by the United States to pay plaintiff's criminal fine.

#### **SOUTH CENTRAL REGION**

Rivera v. U.S., Southern District of Texas.

The plaintiff alleged that the medical staff had failed to timely diagnose and treat an infection of his spine. He was evaluated and treated at FCI La Tuna, FCI Big Spring and FCI Forth Worth. The plaintiff is now a paraplegic. He was released from custody in 1984 or 1985. Due to many factual and legal problems with the case, the Department of Justice has approved a settlement in the amount of \$1.3 million in March, 1992.

#### **MID-ATLANTIC REGION**

Naderman v. U.S., Southern District of Indiana.

The inmate alleged that he had been denied medical treatment for appendicitis while en route for two days from El Reno to Terre Haute. The magistrate urged a settlement. There was no evidence of negligence, but the case was settled for \$5000 because the cost of the trial would have been over \$15,000.

Butler v. U.S., Eastern District of Kentucky.

This was an FTCA suit for the loss of an inmate's personal property. The inmate sought damages of \$5000 but accepted \$400 for settlement of his claims.

#### **CENTRAL OFFICE**

Doe v. BOP, et al., Northern District of Illinois.

This was a Bivens action brought by an HIV-positive dentist from MCC Chicago for the BOP's disclosure of the dentist's medical condition. On March 24, 1992, the parties reached a settlement resulting in the dismissal of the suit and an insignificant modification of the BOP's disclosure procedures. In the settlement agreement, the BOP paid no monetary damages and made no admissions of liability.



### III. PENDING LITIGATION

#### NORTHEAST REGION

Perez v. United States, Western District of Pennsylvania.

This is an FTCA case out of FCI Loretto. On June 1, 1989, inmate Luis Perez, 36944-066, was sent to an outside doctor for sinus surgery. The doctor purposely left a Tefla pad in the inmate's nose following the surgery. The doctor gave written instructions for the inmate to return on June 5, 1989. On June 2 and 6, 1989, the inmate complained of pain and soreness. The doctor saw the inmate 4 additional times before making a further evaluation. On July 29, 1989, an examination revealed the pad in his nose, which was to be surgically removed that day. Dr. Moore made an entry in the patient's medical record (CHP) stating that he was at fault for the inmate's condition. The delay in removing the pad apparently caused no permanent injury, and, as a result, the damages have been - limited to pain and suffering. The plaintiff seeks \$500,000 in damages. The AUSA sees this case as having a nuisance value of - about \$10,000. Because liability is probable, settlement is being pursued.

#### MID-ATLANTIC REGION

Barry v. Whalen, Eastern District of Virginia.

Former D.C. mayor Marion Barry has filed this claim against five BOP staff members at Petersburg and one DOJ employee. The disciplinary action taken against the former mayor regarding allegations of misconduct with a female visitor is the topic of this suit. Mr. Barry alleges that the staff violated his right to privacy, and that they were in the wrong when taking disciplinary action against Mr. Barry. On May 18, 1992, a hearing was held on our motion to dismiss. We are awaiting the court's ruling.

Peterson v. U.S., Eastern District of Michigan.

A former contract employee at FCI, Milan, alleging that the warden improperly denied her the right to visit an inmate, filed this action against the warden and a unit manager. The suit is not only a Bivens action but also a request for the plaintiff's right to visit. The court has yet to rule on the plaintiff's and defendant's motions to dismiss.

#### SOUTH CENTRAL REGION

Young v. Meece, Northern District of Texas.

An African-American male has appealed the MSPB decision stating that he sexually harassed a European-American female. The plaintiff contends that the firing was racially motivated. A

hearing was held in this action to set a trial date.

Bailes v. United States, Northern District of Texas.

This is an FTCA action wherein the plaintiff argues that the government acted negligently by losing numerous legal papers belonging to the plaintiff during his transferrals from LEX to BIG to SPG to FTW. A hearing was held in this action to set a date for trial.

#### **NORTH CENTRAL REGION**

Kikumura v. USA

The plaintiff complained that, while he was away from his cell during a recreation period, staff members stole commissary items from his cell. The staff members deny any involvement in the inmate's alleged loss. Trial was held on March 10, 1992, and a decision is pending.

Sizemore v. Miller

The plaintiff alleged that staff members violated his constitutional rights by placing him in a strip cell without any items of personal comfort for an extended period of time and by beating him. On March 30, 1992, the trial began and was expected to last for two weeks.

#### **CENTRAL OFFICE**

Horne v. U.S., District of the District of Columbia.

This FTCA action stems from the wrongful death of an inmate who died from heart disease at FCI Petersburg. Opinions of two cardiac surgeons convey that the medical care given to Mr. Horne was not up to community standards. The Bureau conceded liability and is contesting the amount of damages. Trial on damages is tentatively scheduled for April, 1993.

#### **IV. MISCELLANEOUS**

##### **WESTERN REGION**

INS/Soler issues

"Soler" motions or writs for deportation hearings by alien inmates continue to increase in the Western Region. Although Mike Hood reports that the SCRO is beginning to see these, the volume of litigation has been unique to the Western Region because of the Soler decision, which was appealed for rehearing en banc. This rehearing has been denied (4/9/92) and we expect petitioners will start to move for action on the stayed cases. Although the issue

not one that the BOP can resolve, the litigation is a concern in the region since the warden is usually the first named defendant. Approximately 48 new filings occurred in the quarter.

Henthorn requests

U.S. v. Henthorn, 931 F.2d 29 (9th 1991) requires the United States to make a search of law enforcement employee's personnel files for information relating to employee's honesty & veracity when the employee is to be called by the U.S., and when the defense makes a request for review of the file. The AUSA is not required to personally review the file, the Regional Counsel Personnel Officer handles the review for BOP employees. The process for handling a Henthorn request is the subject of a General Counsel Memorandum assuring a uniform handling of all requests from AUSAS. Requests usually include multiple witnesses and a short turn around time as requests are generally made very close to the trial date.

U.S. v. Cruz, Southern District of California.

This case has resulted in a guilty verdict in the second hostage-taking trial. In order to save Bureau witnesses the trauma of a second court appearance, the AUSA charged career criminal statute rather than the actual kidnapping/hostage counts. Cruz receives a sentence of 360 months to life.

# **LITIGATION - 1992 SECOND QUARTER REPORT**

LOC	NUM	HC	FTC	BIV	OTH	ANS	PEN	CLD	H/T	SET	AWD
MXR	34	18	2	13	1	36	N/A	25	2	0	0
NER	53	20	2	14	16	47	278	33	3	4	1#
SER	49	32	2	7	8	49	277	28	0	1	702
NCR	73	24	13	34	2	N/A	494	18	3	0	0
SCR	59	28	2	21	7	49	208	47	0	2	5000
WXR	87	15	7	28	38	N/A	488	25	6	0	0
CO	16	6	3	6	1	13	80	8	0	0	0
TOT	371	143	31	123	73	194	1825	184	14	7	5702*

## **DEFINITIONS:**

# - Settlement award sealed by the court.  
N/A - Not Available - no method of tracking this information  
LOC - Location  
NUM - Number of Total Lawsuits Filed in Quarter  
HC - Number of Habeas Corpus Actions Filed  
FTC - Number of FTCA Actions Filed  
BIV - Number of Bivens Actions Filed  
OTH - Other Actions Filed  
ANS - Number of Litigation Reports Completed  
PEN - Pending  
CLD - Number of Actions Closed  
H/T - Number of Hearings or Trials (Narrative analysis follows)  
SET - Number of Settlements (Narrative analysis follows)  
AWD - Number of Awards

# **LITIGATION - 1992 SECOND QUARTER REPORT**

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SER	46	22	3	17	4	46	N/A	30	2	1	70
NCR	65	21	11	28	15	N/A	438	22	3	0	0
SCR	46	29	7	9	10	26	58	60	2	0	0
WXR	27	7	3	12	4	N/A	466	17	10	4	15771
CO	10	5	1	3	1	17	83	18	2	1	0
TOT	274	116	34	90	62	146	1302	191	23	10	21241

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MXR	42	19	5	11	17	29	*	16	1	2	5400
NER	38	13	4	10	11	28	259	28	3	2	0
SER	46	22	3	17	4	46	*	30	2	1	70
NCR	65	21	11	28	15	*	438	22	3	0	0
SCR	46	29	7	9	10	26	58	60	2	0	0
WXR	27	7	3	12	4	*	466	17	10	4	15771
CO	10	5	1	3	1	17	83	18	2	1	0
TOT	274	116	34	90	62	146	1302	191	23	10	21241

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LOC - LOCATION  
NUM - NUMBER OF TOTAL LAWSUITS FILED IN QUARTER  
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GOVERNMENT ACTION AND DATE OF ACTION - (INCLUDE IN NARRATIVE)

# LITIGATION - 1992 FIRST QUARTER REPORT

LOC	NUM	HC	FTC	BIV	OTH	ANS	PEN	CLD	H/T	SET	AWD
MXR	32	14	2	8	8	26	*	23	1	2	\$82,500
NER	36	10	8	13	8	25	249	63	4	1	0
SER	33	17	4	9	3	33	*	34	3	1	\$ 397
NCR	66	25	8	26	7	*	448	48	0	0	0
SCR	50	17	4	18	11	27	201	24	0	0	0
WXR	29	18	2	7	2	*	443	29	18	1	*
CO	19	2	2	8	7	8	97	8	5	0	0
TOT	265	103	30	89	43	119	1438	229	31	5	\$82,897

## 1992 QUARTERLY LITIGATION REPORT

### THIRD QUARTER

#### I. HEARINGS OR TRIALS

##### **NORTHEAST REGION**

##### Bailey v. United States, Western District of Pennsylvania.

Bailey, a former inmate at FCI Loretto, brought this case to trial alleging that treatment from the BOP for his heart attack constituted medical malpractice. Armed Forces Institute of Pathology reviewed this case and stated that some of the care provided was outside acceptable medical practice. Following a trial on April 23, 1992 the judge found the government liable and awarded damages in the amount of \$243,000. However, the plaintiff requested reconsideration of the award, and the judge increased the amount to \$258,460. No appeal has been taken because there are no legal grounds upon which to appeal.

##### Bartsch v. Federal Bureau of Prisons, Third Circuit Court of Appeals.

This is a Bivens action against former Warden Keohane and unidentified SIS lieutenants at USP Lewisburg. The plaintiff was one of four inmates who had requested and was denied protective custody. In his complaint the plaintiff alleged that the inmate investigations were not properly conducted. The district court granted the motion to dismiss for failure to state a claim. The case was appealed and argued before the Third Circuit Court of Appeals on July 9, 1992. The Court of Appeals recognized that courts afford prison officials broad discretion when deciding who is to receive protective custody. No decision has been rendered at this time.

##### United States v. Motto, Eastern District of Pennsylvania.

An inmate at FCI Danbury was serving an old law sentence of 13 years. The sentence was recently imposed after resentencing was ordered on appeal. The inmate filed a Rule 35 motion alleging improper medical care and denial of CCC placement. The inmate was sent to FMC Rochester, which initially placated the Judge and caused her to withhold a decision on the Rule 35 motion. The inmate returned to FCI Danbury after receiving treatment for chronic hepatitis C. Following a hearing, the court granted the Rule 35 motion and ordered the sentence reduced. The inmate was released on July 31, 1992.

## **MID-ATLANTIC REGION**

### **Barry v. Whalen, Eastern District of Virginia.**

The former Washington, D.C. mayor filed this case against five BOP staff members and one DOJ employee for disciplinary action taken against Barry for his alleged misconduct with a female visitor. Barry dismissed Warden Pat Whalen as a defendant prior to the hearing. The court dismissed all of the remaining defendants, but has given the plaintiff leave to amend on one issue that the DHO had determined before the hearing. The court then resolved all of the other issues in the defendants' favor. To date no administrative tort claim has been filed, but an amended complaint was filed, and we have a motion for summary judgment pending.

### **Reed v. Braxton, Eastern District of Virginia.**

Plaintiff alleged that the BOP had no authority to correct an error in his sentence computation. Both the D.C. and federal judges ordered the plaintiff's two sentences to be consecutive; however, both the BOP and D.C. computed the sentence from when he arrived in federal custody. When the error was discovered a year later, the BOP made a correction and set the starting date of his federal sentence back. At the hearing, the district court denied plaintiff's motion. He has filed an appeal notice in the Fourth Circuit.

## **NORTH CENTRAL REGION**

### **Dune v. United States of America, Southern District of Illinois.**

In this action, the plaintiff, an inmate at USP Marion, alleged that he slipped and fell on ice and snow in a recreation cage on three separate occasions during December 1989. An evidentiary hearing was conducted at the penitentiary on June 4, 1992 and the judge determined that the inmate failed to prove the elements of his allegations. The court granted judgment in our favor.

### **McKoy v. Brennan, Western District of Wisconsin.**

This action raised the question of BOP's obligations, if any, to provide an inmate access to state law materials, or to otherwise provide some form of assistance to federal inmates in state law cases. The action was dismissed with prejudice on June 10, 1992, and on July 27, 1992 the court denied plaintiff's motion for reconsideration.

## WESTERN REGION

U.S. v. Goetz, Northern District of California.

The court sentenced the defendant to the minimum sentence for counterfeiting under the 1984 guidelines. It was ordered that time served in a drug rehabilitation program shall be a condition of release, and shall be credited toward the service of the sentence. The court held hearings to determine whether the conditions of the program are as restrictive as those in the case of Brown v. Rison. The court has also invited the defendant to appeal to the Ninth Circuit which could uphold its ruling in Brown.

Grant v. Taylor, Central District of California.

The magistrate held a hearing on May 19 at FPC Boron on the inmate's allegations that the Warden denied his furlough application in retaliation for his activities as a "jailhouse lawyer." In June, the court issued a ruling and upheld the Warden's decision, finding that the decision was not "arbitrary or capricious."

Coupar v. UNICOR, Department of Labor.

Following a hearing, the Administrative Law Judge for the Department of Labor issued a recommended order that Inmate Coupar is an "employee" for purposes of "whistleblower" protection. The BOP's position is that federal inmates are not entitled to protection as a "whistle blower" under CERLCA or CAA as they are not "employees," and UNICOR is not an "employer." This is only a recommended decision which is automatically reviewed by the Secretary of Labor. The BOP will file an appeal with the Secretary of Labor.

## II. SETTLEMENTS

### SOUTHEAST REGION

Cochran v. Southerland, et al., Northern District of Alabama.

An inmate claimed that he was dismissed from a business office job at FCI Talladega in retaliation for filing an administrative remedy. Because the court denied the government's motion to dismiss and the risk of trial, the case was settled by reinstating him to his former job and paying him \$702 in back wages. The plaintiff's attorney reserved the right to bring an action for attorney's fees against the BOP.



## NORTHEAST REGION

Gaggi v. Lansing, Eastern District of New York.

This case is based on the FTCA and Bivens. The plaintiff, the inmate's estate, alleged wrongful death at MCC New York. The Armed Forces Institute of Pathology reviewed the case and determined that the BOP deviated from acceptable medical care. The case was settled in May, 1992. The U.S. Attorney's Office has requested that we not disclose the amount of the settlement because of the publicity surrounding this case.

Perez v. United States, Western District of Pennsylvania.

This was an FTCA case out of FCI Loretto. On June 1, 1989, Inmate Perez was sent for sinus surgery to an outside doctor. The doctor purposely left a Tefla pad in Perez's nose for the institution physician to remove at a later date. The pad was not removed as instructed. Perez requested \$500,000 in damages. The plaintiff had no permanent injury; therefore, damages were limited to pain and suffering. The case was settled for \$12,000.

Coa-Pena v. United States, Middle District of Pennsylvania.

This FTCA case was filed by Inmate Coa-Pena at USP Lewisburg alleging that staff members lost some of his property on transfer from FCI Ray Brook to USP Lewisburg. Rather than pursue the requested \$431.60 in damages, USP Lewisburg Paralegal Jeff Fromm convinced Coa-Pena to settle for six pairs of confiscated sneakers.

Moore v. United States, District of Connecticut.

An inmate brought a FTCA case for property allegedly worth \$300 which was lost in transit from FCI Danbury to FMC Rochester. The case was settled for \$200 and three pairs of confiscated sneakers.

Worthington v. Bureau of Prisons, Southern District of New York.

Former Inmate Robert Worthington alleged that staff members gave him improper medical treatment at FCI Otisville in this FTCA case. Worthington arrived at FCI Otisville on January 8, 1987 with advanced glaucoma in his left eye, and he lost vision in that eye later that year.

Our medical expert does not think that the blindness in the eye was caused by the plaintiff's medical treatment by the BOP. However, even in a favorable scenario, our expert believes that the BOP ophthalmologist gave Worthington less than optimal follow up treatment. BOP's main defense at trial is expected to be causation. This argument is that the blindness was inevitable and was not the result of BOP negligence. The court has requested that settlement be explored. We will probably support a reasonable

Settled for  
\$165,000  
in 1995.  
10/29/97

#142,500 Settlement  
10/29/97  
JW

settlement, given the permanent injury and the lack of optimal care. No settlement figures have been presented at this time.

#### **NORTH CENTRAL REGION**

Campbell v. U.S.A., Southern District of Illinois.

The plaintiff alleges that subsequent to his transfer to USP Marion from a state facility his television was packed and remailed by Marion staff in a negligent manner causing the television to be damaged in transit.

There is no question the television was in good working condition at USP Marion. In doubt is the manner in manner in which it was packed, and the treatment of the package received while in the possession of the U.S. Postal Service. The action was settled by the AUSA for \$65.00 on July 2, 1992.

Abodeely et al. v. United States v. St. Luke's Hospital, District of Minnesota.

The plaintiffs in this action, a former inmate at FPC Duluth and his wife, alleged that the medical staff had acted negligently in delaying transportation to the hospital, which resulted in permanent injury to Abodeely's heart. The damages sought totalled \$850,000. The government represented to the court that certain defendants were employed by the government at the time the alleged tort occurred. The government later determined that those defendants were employees of St. Luke's Hospital. However, the court would not allow the government to amend its answer because this would prejudice the plaintiffs, who could no longer sue the individuals since the statute of limitations had run. A compromise and settlement was reached for \$45,000 in June, 1992. The United States and St. Luke's Hospital split this amount and each paid \$22,500. The individuals involved in this case are now BOP employees.

#### **SOUTH CENTRAL REGION**

Lamb v. Barr, Western District of Texas.

An African-American female at La Tuna brought an EEO action alleging that staff members sexually and racially discriminated against her. Both parties signed a stipulation for Compromise Agreement in April 1992. The settlement awards Ms. Lamb \$5,000 and a promotion to GS-11.

### III. CASES OF INTEREST

#### **MID-ATLANTIC REGION**

Thomas v. Lewis, Fourth Circuit Court of Appeals.

On May 5, 1992, the Fourth Circuit issued a favorable opinion for the Bureau, and reversed the district court's decision. The BOP had appealed the district judge's order granting credit against the federal sentence for time spent in state custody on an unrelated sentence.

#### **NORTHEAST REGION**

Forte v. United States, et al., Eastern District of Pennsylvania.

Although this case was listed as a settled case in the last quarterly report, former inmate Forte has requested to withdraw his prior agreement to settle this case. In February, 1992, the parties had agreed to settle for \$50,000 with \$25,000 of the proceeds attached by United States to pay the inmate's criminal fine. However, when his attorney presented the settlement stipulation to Forte for signature, Forte refused to sign, apparently unhappy with the settlement of \$25,000 and with the attorney's fee of \$12,500. The AUSA is attempting to compel settlement under agreed terms. On July 13, 1992, U.S. Magistrate Judge Angell held a conference in an attempt to resolve the settlement, and ordered an evidentiary hearing for July 30, 1992 unless Forte agrees to the same terms.

Santos v. United States, et al., Second Circuit Court of Appeals.

Former Inmate Ana Santos brought an FTCA and Bivens action against former MCC Warden Doug Lansing and two former MCC staff members. One of the staff member defendants was a correctional officer who was denied representation by the U.S. Attorney, and the other was a physician's assistant who has not yet been served or requested representation. Santos alleges that the correctional officer raped her in July 1987, and that she requested an abortion from the PA in September 1987. The PA ordered a pregnancy test and allegedly told Santos not to say anything about the pregnancy because Santos could be punished. Santos was transferred to the FCI Alderson on September 30, 1987, released from custody on March 31, 1988, and had a son on May 3, 1988. The officer admitted to having sex with the inmate but denied it was a rape.

On June 16, 1992, the court denied our motion to dismiss Doug Lansing from the Bivens action based on qualified immunity. The court held that plaintiff's rights, as alleged in the complaint, were clearly established at the time the events complained of occurred. The U.S. Attorney's office is appealing this decision to the Second Circuit Court of Appeals. The U.S. Solicitor General

authorized an appeal of the qualified immunity issue in August, 1992. The U.S. Attorney's office is assigned responsibility for handling the appeal.

#### **SOUTH CENTRAL REGION**

West v. Clark, Western District of Tennessee.

This is a Bivens action out of FCI Memphis in which the plaintiff has sought injunctive relief, as well as compensatory and punitive damages in the amount of \$20,000, from a defendant who allegedly conducted himself in a racially offensive manner. The plaintiff's allegations are essentially correct. The plaintiff, an African-American, alleges that the defendant, a European-American and quality assurance manager at UNICOR, handed him a racially inflammatory document, and in doing so, laughed about the matter. The staff member did this in the presence of the plaintiff as well as other staff members and inmates. The Bureau of Prisons has recommended against Department of Justice representation for the staff member, and the Department has not yet rendered a decision. Disciplinary action was taken against the employee, and he received a reprimand.

Goggin v. United States, Western District of Tennessee.

This is an FTCA action out of FCI Memphis wherein the plaintiff has sought \$375,000 in damages and attorneys fees as compensation for alleged medical malpractice. Specifically, the plaintiff alleges that medical staff members did not accurately diagnose an ankle injury which resulted in permanent damage as well as in unnecessary pain and suffering. The case is in the discovery stage. It is possible that the court may rule against the United States, as the record indicates there is merit to the plaintiff's complaint.

#### **WESTERN REGION**

Mills v. Taylor, Ninth Circuit Court of Appeals.

The panel of judges have applied Brown v. Rison jail credit in this case, thus granting dual credit to a 10th Circuit sentence. Appeal will be taken and the Department of Justice will be handling the appeal.

Grady v. Crabtree, Ninth Circuit Court of Appeals.

The Ninth Circuit overruled the district court's decision dismissing a habeas petition for "jail credit" and expanded Brown v. Rison to include time spent in a halfway house as a condition of probation upon commitment for probation violation. The U.S. Attorney for the District of Oregon and the Criminal Division of the DOJ will support an appeal.

U.S. v. Anderson, Northern District of California.

The court found Defendant Anderson not guilty by reason of insanity (18 U.S.C. 4243), and has conditionally released him to the custody of his sister along with supervision by the U.S. Probation Office. The court also ordered that the costs of medical/psychiatric care be paid by the Attorney General/BOP. Although the U.S. Attorney filed an appeal, it will be withdrawn. This decision was based on the determination that placement will be cost effective in spite of all the administrative hurdles. Moreover, the risk of an adverse decision from the Ninth Circuit is considered too great to pursue the issue.

U.S.v Checchini, Ninth Circuit Court of Appeals.

The Plaintiff spent 88 days under house arrest in Italy pending the outcome of extradition proceedings to the United States. At his trial, the district court denied plaintiff's claim that he was entitled to credit against his sentence for the days spent under house arrest in Italy. On appeal, the court held that according to United States v. Wilson, the Attorney General, rather than the district court, is vested with the authority to grant credit for time spent under house arrest. This is the only Ninth Circuit decision to acknowledge or apply Wilson.

U.S. v. Cheryl Graham, District of Arizona.

An FCI Safford employee, sentenced for her guilty plea to Theft of Government Property, was committed to custody for 16 months and ordered to pay restitution of \$66,795.32. This amount was equal to the embezzled institution funds.

U.S. v. Bravo, Southern District of California.

The court sentenced Inmate Bravo to life without possibility of parole because he was an armed career criminal. Bravo was one of two inmates who took a correctional officer hostage at MCC San Diego in December 1990. Co-defendant Alvarez was sentenced earlier this year.

Martin & Chronicle v. BOP, Ninth Circuit Court of Appeals.

The appellants, Martin and the San Francisco Chronicle, have each filed a petition for rehearing en banc with the Circuit. We anticipate a response from the court shortly.

# LITIGATION - 1992 THIRD QUARTER REPORT

LOC	NUM	HC	FTC	BIV	OTH	ANS	PEN	CLD	H/T	SET	AWD
MXR	34	18	2	13	1	36	N/A	25	2	0	0
NER	53	20	2	14	16	47	278	33	3	4	#
SER	49	32	2	7	8	49	277	28	0	1	702
NCR	73	24	13	34	2	N/A	494	18	3	0	0
SCR	59	28	2	21	7	49	208	47	0	2	5000
WXR	87	15	7	28	38	N/A	488	25	60	0	0
CO	16	6	3	6	1	13	80	8	0	0	0
TOT	371	143	31	123	73	194	1825	184	14	7	5702#

## DEFINITIONS

# - Settlement award sealed by the court.  
N/A - Not Available - no method of tracking this information  
LOC - Location  
NUM - Number of Total Lawsuits Filed in Quarter  
HC - Number of Habeas Corpus Actions Filed  
FTC - Number of FTCA Actions Filed  
BIV - Number of Bivens Actions Filed  
OTH - Other Actions Filed  
ANS - Number of Litigation Reports Completed  
PEN - Pending  
CLD - Number of Actions Closed  
H/T - Number of Hearings or Trials (Narrative analysis follows)  
SET - Number of Settlements (Narrative analysis follows)  
AWD - Amount of Awards

## LITIGATION ANALYSIS

There was an increase in the number of lawsuits filed in the third quarter, with 371 filed in the third quarter and 274 filed in the second quarter. The amount of monetary damages due to settlement or award increased this quarter over the second quarter. However, the total amount of money awarded this quarter cannot be calculated because a settlement out of the Northeast Region has been sealed by the court.

## 1992 LITIGATION QUARTERLY REPORT

### FOURTH QUARTER

#### I. HEARINGS OR TRIALS

##### **CENTRAL OFFICE**

###### Cameron v. Thornburgh, et al., District of Columbia

On September 24, 1992, oral arguments were heard in the case of Cameron v. Thornburgh, et al., Case No. 91-5055, D.C. Cir. The case is a Bivens action against BOP staff for allegedly failing to provide inmate Cameron with a low-salt diet, as prescribed by a physician. The district court granted qualified immunity to the defendants. Inmate Cameron appealed that ruling.

###### Kimberlin v. J. Michael Quinlan, et al., U.S. Court of Appeals for the District of Columbia

On October 16, 1992, oral argument was held before the U.S. Court of Appeals for the D.C. Circuit regarding the District Court's failure to dismiss the Bivens claims in this action. The government has filed a renewed motion for summary judgment regarding Kimberlin's allegations of illegal wiretapping in violation of Title III. Discovery continues in the District Court on the claims against the United States, which included the deposition of former Attorney General Dick Thornburgh on October 2, 1991. In early October, Senator Carl Levin issued a report which concluded that inmate Kimberlin had been the subject of political retaliation. The Inspector General has initiated an investigation into Kimberlin's allegations, and both the Bureau of Prisons and the Torts Branch are cooperating in that investigation.

##### **MID-ATLANTIC REGION**

###### Evans v. Captain Wolfe, et al., Southern District of Indiana

This case was a Bivens/FTCA claim in which the plaintiff alleged that he was assaulted by BOP staff after the he had assaulted a female psychologist. Following a two-day trial, the jury returned a verdict in favor of the defendants and the court entered judgement in favor of the United States on the tort claim. In a post-trial order dated October 14, 1992, the court denied a motion for retrial and imposed sanctions on the plaintiff in the amount of \$470.12. This sanction was imposed because the plaintiff refused to answer questions during a deposition and failed to provide written responses pursuant to a court order. If the plaintiff

fails to pay within 21 days, the government may move to attach plaintiff's inmate account.

Peterson and Balistreri v. Bogan, Eastern District of Michigan

This case involves a former contract teacher's request for visitation and authorization to marry an FCI Milan inmate. The warden denied the request due to serious security concerns. Plaintiffs, the inmate and former teacher, filed a Request for Preliminary Injunction. The magistrate submitted a report on August 6, 1992, recommending that plaintiffs be allowed to marry at FCI, Milan and that the former employee be allowed to visit. Judge Woods issued an order accepting the magistrate's report on September 30, 1992, granting Plaintiffs' Motion for Preliminary Injunction. The government filed a motion to stay the preliminary injunction, which is pending before the court.

U.S. v. Daniels, Northern District of West Virginia

On July 7, 1992, inmate Richard Daniels was convicted by a federal jury in the Northern District of West Virginia of assault with a dangerous weapon arising from an inmate on inmate assault at FCI, Morgantown.

U.S. v. Ceballas, Eastern District of Virginia

On July 31, 1992 a federal court convicted inmate Ceballas of assault on a federal employee. The incident occurred in February 1992, when inmate Ceballas attacked James Michael Hodge at FCI, Petersburg. Two inmates testified for the government. Ceballas was sentenced to 36 months consecutive to any sentence now being served.

U.S. v. Gallo, Eastern District of Kentucky

Inmate Lourdes Gallo, a 32 year old female Mariel Cuban detainee, was found guilty after a criminal trial in a prosecution for assault on a federal employee. The inmate punched a PHS nurse in the head causing bruises. The incident occurred at FMC Lexington. On September 24, 1992 the district court imposed a four month sentence.

**NORTHEAST REGION**

Bartsch v. Federal Bureau of Prisons, Third Circuit Court of Appeals

This was a Bivens action against former Warden Keohane and unidentified SIS Lieutenants at USP Lewisburg. An attorney filed this action on behalf of four inmates who had requested and were



denied protective custody. The district Court granted the government's motion to dismiss for failure to state a claim. The case was argued before the Court of Appeals on July 9, 1992. On August 10, 1992, the Third Circuit affirmed the dismissal of the complaint for failure to state a claim. The Court of Appeals focused on the allegations of each of the four inmates in the complaint. The complaint alleged that the investigations were not properly conducted. The Court of Appeals recognized the broad discretion afforded to prison officials in deciding who will receive protective custody. The Court of Appeals applied a deliberate indifference standard and found that the facts alleged in complaint did not state a constitutional violation.

United States v. Carter, Eastern District of Pennsylvania

At a July 28, 1992 sentencing hearing the defendant argued for a downward departure from the sentencing guidelines because the Bureau of Prisons was not able to provide adequate medical care. The defendant, who was serving a separate federal sentence, had tested HIV positive. The judge rejected the defendant's arguments concerning Bureau medical care and sentenced the defendant to the normal range of the guidelines.

United States v. Gambina, Middle District of Pennsylvania

This case involves the criminal prosecution of inmate Ralph Gambina, who is charged with plotting to escape from USP Lewisburg by kidnapping Warden Brennan and his family. The inmate was first housed at FCI Otisville. After the charges surfaced, the inmate was transferred to USP Marion. The judge issued a writ of habeas corpus ad prosequendum to bring the inmate to trial. The judge ordered the U.S. Marshal to bring the inmate closer to the court house located in Williamsport, Pennsylvania, so he could communicate with the Federal Public Defender. The Bureau of Prisons decided to permit the U.S. Marshal to place the inmate at FCI Schuylkill. The Public Defender moved the court to order the inmate to be housed at USP Lewisburg. A hearing was held on July 28, 1992, in which USP Lewisburg Associate Warden Don Romine testified concerning the decision not to place the inmate at USP Lewisburg. Judge McClure denied the Public Defender's motion after the hearing. The judge held that FCI Schuylkill was of sufficient proximity for the attorney to meet with the inmate. The court did not reach jurisdictional arguments addressing the court's ability to designate the place of incarceration.

There were no reports of pending trials or hearings received from institutions within these regions: Southeast, North Central, South Central and Western.

## II. SETTLEMENTS

### A. PROPERTY SETTLEMENTS

#### **MID-ATLANTIC REGION**

##### Mears V. U.S., Northern District of West Virginia

This case involves a claim under the FTCA for lost property. The plaintiff alleged loss of property at FCI, Petersburg in September of 1990. A stipulated settlement in the amount of \$126.98 was reached on September 21, 1992.

#### **NORTHEAST REGION**

##### Buhl v. Hershberger, Southern District of New York

In this FTCA case, an inmate at USP Marion alleged BOP responsibility for the loss of his sneakers while at FCI Otisville. The inmate requested damages of \$75.00. The court strongly urged the Assistant U.S. Attorney to settle the case. The inmate rejected a settlement offer of \$58.00. The inmate settled for one pair of sneakers.

##### Khalig v. United States, Eastern District of Pennsylvania

In this FTCA case, an inmate at FCI Schuylkill alleged that the BOP lost his property during his transfer from MCC New York to FCI Schuylkill. The Northeast Regional Office concluded that the box of property was mailed to the wrong address. The only remaining issue left was the value of the property. The inmate claimed a value of \$855.00 for lost clothes and a pair of eyeglasses. He rejected an offer to settle for \$325.00. The Assistant U.S. Attorney arranged for two telephone conferences on September 3 and September 21, 1992 with the inmate, the magistrate, and a BOP attorney. The magistrate persuaded the inmate to settle for \$225.00 and a pair of government issued eyeglasses.

#### **SOUTH CENTRAL REGION**

##### Hernandez v. United States, Eastern District of Texas

The plaintiff alleged that staff at FCI Texarkana lost legal papers valued at approximately \$5,000.00. The BOP initially offered the plaintiff \$25.00 in response to Mr. Hernandez' administrative tort claim, but at trial BOP determined \$250.00 to be a more equitable settlement offer. A \$250.00 dollar out of court settlement was agreed upon by all parties, and the case was dismissed on July 9, 1992.

## B. OTHER SETTLEMENTS

### **NORTHEAST REGION**

#### Sanchez v. United States, Southern District of New York

This complaint was filed as a combination Bivens, Federal Tort Claims Act, and 42 U.S.C. §1983 claim against New York City officials and the United States. On June 28, 1990, the inmate, a state prisoner who was in the custody of New York City authorities at Rikers Island, was produced at MCC New York via a federal writ of habeas corpus ad testificandum to testify in federal court. The inmate finished testifying on June 29, 1990 and the federal judge ordered the state officials to take the inmate back to MCC New York. The inmate remained at MCC New York until August 17, 1990. The inmate alleged in his complaint that he was held 45 days beyond the date of his parole. The MCC staff made numerous contacts with New York City officials in an attempt to return the inmate to Rikers Island. The case manager at MCC New York confirmed that the inmate had received a parole date, however, the parole could not take effect until he was returned to New York City custody. While the New York City officials were primarily at fault, the United States was partly responsible. The case against the United States settled for \$3,000; the case against the New York City officials settled for \$25,000.

#### Friedman v. Meese, District of Connecticut

This case was a class action suit by Yale Legal Services, on behalf of FCI Danbury inmates, protesting exposure to asbestos at FCI Danbury. A joint motion to dismiss was granted by the district judge on August 11, 1992, ending this prolonged litigation. (This case was first filed in 1987 by an inmate who alleged that he was exposed to asbestos as he was forced to work with tar which contained asbestos.) A voluntary stipulation of dismissal was executed by both parties. The stipulation involved no money damages. The Bureau agreed to continue to do what it had already planned to do, which is to abate all asbestos from FCI Danbury. The stipulation also included a confirmation of our written policy stating that inmates are not permitted to remove asbestos as part of their work.

### III. CASES OF INTEREST

#### **NORTH CENTRAL REGION**

##### U.S. v. Michael Gurgone, Northern District of Illinois

Inmate Gurgone is near the end of a seven year term for attempted robbery. He has a long criminal history of robbery, burglary, and weapon possession. Further, he is currently not eligible for furloughs or CTC placement. On September 24, 1992, Judge Leinenweber ordered the BOP to interrupt inmate Gurgone's sentence of imprisonment for four days in order to allow his attendance at his son's wedding and reception dinner. The Bureau objected to the inmate's release for the following reasons: 1) separatees resided in the community where the inmate was to be released, 2) he did not qualify for furlough, 3) his release date was not until June, 1993, and 4) the court was without authority to order a temporary release of the inmate under the conditions and reasons present in this case. On September 30, 1992, the judge rescinded his Order interrupting inmate Gurgone's sentence.

##### Kikumura v. Turner, Southern District of Illinois

The plaintiff, an inmate at USP Marion and a member of the Japanese Red Army, alleges that USP Marion's rejection of two Japanese books sent to him violates his First and Eighth Amendment rights. BOP staff at Marion followed an internal regulation that requires foreign publications to be sent directly from the publisher. Currently the institution is in the process of re-drafting its institution supplement (internal regulations) to address the receipt of foreign publications. The proposed supplement will discuss the qualifications to receive such materials and the acceptable sources for the publications. The current national rules on inmate correspondence, found at 28 CFR §540.10, do not address the issue of whether an inmate who does not comprehend English may receive foreign language publications.

Additionally, staff are attempting to assess the inmate's true English reading comprehension skills to determine if his receipt of foreign language texts is necessary.

#### **NORTHEAST REGION**

##### Santos v. United States, et al., Southern District of New York

This FTCA/Bivens case brought by former inmate Ana Santos was discussed in last quarter's report. This Bivens lawsuit names former warden Doug Lansing, a former correctional officer (who was denied representation by U.S. Attorney) and a physician's assistant

(who has not yet been served or requested U.S. representation). All the defendants were employed at MCC New York at the time the allegations occurred. Santos alleged that the correctional officer raped her in July 1987 and that she requested an abortion from the physician's assistant in September 1987. The physician's assistant ordered a pregnancy test and allegedly told Santos not to say anything because she could get in trouble. Santos was transferred to FCI Alderson on September 30, 1987, released from custody on March 31, 1988, and had a son on May 3, 1988. The officer admitted having sex with the inmate, but denied it was rape.

On June 16, 1992, the judge denied the Northeast Regional Office's motion to dismiss Doug Lansing from the Bivens action. The court held that the complaint alleged a cause of action against Mr. Lansing for failing to adequately train and supervise staff at MCC New York, and for promoting an atmosphere where the violation of inmates' abortion rights could occur. The court also held that an inmate's constitutional right to an abortion is clearly established. The U.S. Attorney's office has requested a rehearing with the District Court. On August 3, 1992, the Solicitor General granted the Bureau's request to file for an interlocutory appeal to the Second Circuit. A notice of appeal has been filed.

#### NORTH CENTRAL REGION

##### Robert James Howard v. FCI Englewood, District of Colorado

Inmate Howard alleged a violation of his constitutional right to practice religion when he was not allowed to practice Satanism at FCI Englewood. In particular, Howard wishes to introduce items which he believes are necessary to his religious practices into the institution. These include skulls, dead animals, claws, appendages, and other similar articles. A motion to dismiss has been filed and a ruling is pending. The Department of the Navy also has an interest in this case. It seems that Satanism practiced on-board ship is an occasional problem for them.

Farmer v. U.S.A., Western District of Wisconsin;  
Farmer v. Mothersead, et al., Western District of Missouri  
Farmer v. Haas, et al., Western District of Wisconsin

These cases have been appealed by plaintiff to the Seventh Circuit after the government prevailed at trial. In all of these cases, Farmer complains of the Bureau of Prisons' alleged failure to accommodate his transsexualism. In particular, he seeks surgery and estrogen treatment. Inmate Farmer is not satisfied with the psychiatric treatment he is receiving. Litigation of this case is interesting because of the procedural issues and the atypical subject matter. Farmer has filed essentially the same claim in two different states (Wisconsin and Missouri) and in two types of actions (two cases are Bivens actions and one is a FTCA claim). The Assistant U. S. Attorney is attempting to have Farmer's claims

concerning FCI Oxford dismissed as res judicata pending a favorable outcome of the appeal. Consolidation of the Wisconsin and Missouri case might also be attempted.

#### **SOUTH CENTRAL REGION**

##### **Harper v. Clark, Western District of Tennessee**

This is a Bivens action by an inmate against Warden Clark and other Inmate Systems personnel at FCI Memphis, Tennessee. The plaintiff has alleged that his sentences were improperly applied by the Bureau of Prisons. Apparently, the inmate was sentenced by the court without any indication whether his second sentence was to run concurrent or consecutive to his first sentence. Based on Bureau of Prisons' policy, the defendants interpreted the plaintiff's sentence as consecutive because the court was silent as to this issue. Approximately one year later, the sentencing judge ruled that the sentences were to be served concurrently. Nevertheless, because of Bureau of Prisons policy, the defendants continued to compute inmate Harper's sentences as consecutive. The government filed a Motion for Summary Judgment based upon qualified immunity. On September 24, 1992, the court issued an order denying the defendant's motion. However, the court pointed out that the defendants should have appealed the court's order that they believed to be illegal, and not simply ignored it. The order was not appealed because the time for appeal had passed by the time the Bureau learned of the court's order.

##### **Veteto v. Ralph, et al., Western District of Oklahoma**

This is a Bivens action against several Bureau of Prisons employees, including Herbert Patterson, a Correctional Officer. In his lawsuit, the plaintiff has alleged that he was physically and verbally assaulted at FCI El Reno in December 1989 and in September 1990. This case is significant in that there appears to be merit to the plaintiff's complaint as it pertains to one of the named defendants. An investigation into this matter by the Office of Internal Affairs found that defendant Herbert Patterson did assault Mr. Veteto as alleged. Based on this investigation, the South Central Regional Office did not recommend representation for Mr. Patterson from the Department of Justice, and his request was denied by Main Justice on September 24, 1992. Mr. Patterson was reduced in rank from a GS 8 to a GS 7 and suspended for 30 days as a result.

## WESTERN REGION

### Mills v. Taylor, Ninth Circuit Court of Appeals

This case involves a published Ninth Circuit Court of Appeals decision granting prior custody credit under 18 U.S.C. § 3585 for time spent in a half way house as a condition of release on bond. The government's Motion for Reconsideration with Request for Rehearing en banc was denied. Currently only inmates sentenced in the Ninth Circuit receive prior custody credit for time in community programs as a condition of release. The Bureau and DOJ interpret the applicable sentencing statute, 18 U.S.C. § 3585, as prohibiting the award of such credit. The Bureau will recommend to the Solicitor General the filling of a writ of certiorari to the Supreme Court.

### Tyree v. Lum and Taylor, Central District of California

This is a Bivens case in which the plaintiff claims money damages for the time that he was held beyond the date of his release. By way of background, the plaintiff previously won a case against Warden Larry Taylor for an award of prior custody credit for the time he spent in a community treatment center. The plaintiff won his case by citing Ninth Circuit caselaw, even though he was sentenced in the Tenth Circuit, which has caselaw specifically preventing the award of such credit. Because the plaintiff was successful in this prior suit and is considered a "late release" as a result of the Ninth Circuit decision, he now sues Warden Taylor and AUSA Jennifer Lum for money damages. Tyree previously filed a FTCA action for damages due to his late release and it was dismissed on summary judgment.

# **LITIGATION - 1992 FOURTH QUARTER REPORT**

LOC	NUM	HC	FTC	BIV	OTH	ANS	PEN	CLD	H/T	SET	AWD
MXR	28	7	1	15	5	N/A	277	32	3	1	0
NER	74	22	5	23	21	63	322	30	5	4	0
SER	51	29	0	16	6	51	N/A	37	2	0	0
NCR	54	22	8	20	4	N/A	513	34	0	0	0
SCR	72	39	12	16	5	53	239	50	0	2	0
WXR	60	27	7	21	5	N/A	N/A	12	6	0	0
CO	13	4	1	6	2	19	60	10	1	0	0
TOT	352	150	34	117	48	186	1,411	205	17	7	0

## **DEFINITIONS:**

# - Settlement award sealed by the court.  
N/A - Not Available - no method of tracking this information  
LOC - Location  
NUM - Number of Total Lawsuits Filed in Quarter  
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FTS - Number of FTCA Actions Filed  
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CLD - Number of Actions Closed  
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# **LITIGATION - 1992 THIRD QUARTER REPORT**

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NER	53	20	2	14	16	47	278	33	3	4	1#
SER	49	32	2	7	8	49	277	28	0	1	702
NCR	73	24	13	34	2	N/A	494	18	3	0	0
SCR	59	28	2	21	7	49	208	47	0	2	5000
WXR	87	15	7	28	38	N/A	488	25	6	0	0
CO	16	6	3	6	1	13	80	8	0	0	0
TOT	371	143	31	123	73	194	1825	184	14	7	5702*



# LITIGATION - 1992 FOURTH QUARTER REPORT

LOC	NUM	HC	FTC	BIV	OTH	ANS	PEN	CLD	H/T	SET	AWD
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SER	51	29	0	16	6	51	N/A	37	2	0	0
NCR	54	22	8	20	4	N/A	513	34	0	0	0
SCR	72	39	12	16	5	53	239	50	0	2	0
WXR	60	27	7	21	5	N/A	N/A	12	6	0	0
CO	13	4	1	6	2	19	60	10	1	0	0
TOT	352	150	34	117	48	186	1,411	205	17	7	0

## DEFINITIONS

N/A - Not Available - no method of tracking this information.

LOC - Location

NUM - Number of Total Lawsuits Filed in Quarter

HC - Number of Habeas Corpus Actions Filed

FTS - Number of FTCA Actions Filed

BIV - Number of Bivens Actions Filed

OTH - Other Actions Filed

ANS - Number of Litigation Reports Completed

PEN - Pending

CLD - Number of Actions Closed

H/T - Number of Hearings or Trials (Narrative analysis follows)

SET - Number of Settlements (Narrative analysis follows)

AWD - Amount of Awards

## LITIGATION ANALYSIS

There was a slight decrease in the number of lawsuits filed in the fourth quarter, with 352 filed in the fourth quarter and 371 filed in the third quarter. Overall, the number of lawsuits filed from the first quarter to the fourth quarter of FY 92 increased, with 265 filed in the first quarter, 274 in the second quarter, 371 in the third quarter, and 352 in the fourth quarter. The amount of monetary damages awarded in the fourth quarter was zero.