

# memorandum

DATE: December 3, 1996 Mid-Atlantic Regional Office, Annapolis Junction, MD 20701

REPLY TO: Bill Burlington, Regional Counsel  
ATTN OF: Mid-Atlantic Region

SUBJECT: November 1996 Monthly Report

TO: Wallace H. Cheney, General Counsel

ATTN: Nancy Redding, Executive Assistant

**ADMINISTRATIVE REMEDIES**  
**NOV**

|          | JAN | FEB | MAR | APR | MAY | JUN | JUL | AUG | SEP | OCT |
|----------|-----|-----|-----|-----|-----|-----|-----|-----|-----|-----|
| Received | 144 | 153 | 157 | 157 | 116 | 207 | 151 | 160 | 124 | 183 |
| 129      |     |     |     |     |     |     |     |     |     |     |
| Answered | 103 | 114 | 127 | 135 | 133 | 153 | 191 | 143 | 149 | 176 |
| 142      |     |     |     |     |     |     |     |     |     |     |

**TORT CLAIMS**  
**NOV**

|                  | JAN | FEB | MAR | APR | MAY | JUN | JUL | AUG | SEP | OCT |
|------------------|-----|-----|-----|-----|-----|-----|-----|-----|-----|-----|
| # Pending        | 199 | 217 | 246 | 263 | 285 | 278 | 250 | 215 | 218 | 231 |
| 216              |     |     |     |     |     |     |     |     |     |     |
| # Received       | 84  | 94  | 72  | 84  | 65  | 64  | 61  | 49  | 63  | 72  |
| 63               |     |     |     |     |     |     |     |     |     |     |
| # Answered       | 72  | 62  | 37  | 56  | 57  | 88  | 88  | 40  | 55  | 69  |
| 45               |     |     |     |     |     |     |     |     |     |     |
| # Pending        | 217 | 246 | 263 | 285 | 278 | 250 | 215 | 218 | 231 | 216 |
| 224              |     |     |     |     |     |     |     |     |     |     |
| # Over Six Month | 4   | 2*  | 2*  | 3*  | 4*  | 5*  | 5*  | 3*  | 4*  | 4*  |
| 4*               |     |     |     |     |     |     |     |     |     |     |

**FOI/PRIVACY**  
**NOV**

|                | JAN | FEB | MAR | APR | MAY | JUN | JUL | AUG | SEP | OCT |
|----------------|-----|-----|-----|-----|-----|-----|-----|-----|-----|-----|
| # Pending      | 125 | 126 | 124 | 135 | 104 | 91  | 94  | 96  | 88  | 82  |
| 57             |     |     |     |     |     |     |     |     |     |     |
| # Received     | 45  | 58  | 48  | 65  | 67  | 58  | 51  | 26  | 49  | 38  |
| 31             |     |     |     |     |     |     |     |     |     |     |
| # Answered     | 48  | 61  | 27  | 87  | 68  | 78  | 49  | 40  | 50  | 61  |
| 29             |     |     |     |     |     |     |     |     |     |     |
| # Pending      | 126 | 124 | 135 | 104 | 91  | 94  | 96  | 88  | 82  | 57  |
| 57             |     |     |     |     |     |     |     |     |     |     |
| # Over 30 Days | 87  | 76  | 105 | 62  | 50  | 63  | 63  | 67  | 49  | 39  |
| 34             |     |     |     |     |     |     |     |     |     |     |

**LITIGATION  
NOV**

|                               | <b>JAN<br/>DEC</b> | <b>FEB</b> | <b>MAR</b> | <b>APR</b> | <b>MAY</b> | <b>JUN</b> | <b>JUL</b> | <b>AUG</b> | <b>SEP</b> | <b>OCT</b> |
|-------------------------------|--------------------|------------|------------|------------|------------|------------|------------|------------|------------|------------|
| Cases Pending<br>285          | 277                | 279        | 296        | 291        | 301        | 311        | 322        | 314        | 310        | 297        |
| New Cases Received<br>17      | 8                  | 32         | 12         | 26         | 12         | 17         | 18         | 13         | 13         | 34         |
| Habeas Corpus<br>10           | 3                  | 22         | 5          | 13         | 5          | 8          | 12         | 2          | 5          | 13         |
| Bivens<br>2                   | 4                  | 4          | 5          | 11         | 3          | 6          | 4          | 4          | 6          | 13         |
| FTCA<br>3                     | 1                  | 4          | 2          | 1          | 4          | 2          | 0          | 4          | 1          | 3          |
| Other<br>2                    | 0                  | 2          | 0          | 1          | 0          | 1          | 2          | 3          | 1          | 5          |
| Cases Closed<br>6             | 4                  | 19         | 26         | 9          | 8          | 5          | 11         | 4          | 10         | 11         |
| Cases Pending<br>278          | 279                | 296        | 291        | 301        | 311        | 322        | 314        | 310        | 297        | 285        |
| Lit Reports Completed<br>23   | 16                 | 22         | 15         | 21         | 18         | 17         | 20         | 13         | 13         | 17         |
| Cases/Hearings or Trials<br>1 | 0                  | 0          | 0          | 1          | 2          | 0          | 0          | 0          | 0          | 0          |
| Settlements/Awards<br>0       | 1                  | 0          | 0          | 2          | 2          | 1          | 1          | 0          | 0          | 0          |
| \$ Settlements/Awards<br>0    | \$1.5              | 0          | 0          | \$500.15   | \$.53      | \$.15      | \$150      | 0          | 0          | 0          |
| (\$ in Thousands)             |                    |            |            |            |            |            |            |            |            |            |

\*We are in the process of obtaining settlement approval from the Central Office for these claims.

**ITEMS OF INTEREST, PERSONAL LEAVE, BUSINESS TRIPS, MOVES, ETC.**

We are celebrating Carolyn Lanphear's successful completion of the Paralegal Training Course, and in particular, her outstanding academic performance. Carolyn will be going to FCI Cumberland, January 19, 1997, where we are certain she will continue to excel.

Bill Burlington, Regional Counsel, attended the Captains Meeting at FCI Beckley December 2-5, 1996. Also, Mr. Burlington will be using 60 hours of use or lose annual leave this month.

Debbie Munson, Attorney, FCI Beckley, will be on annual leave December 23-27, 1996.

Joe Tang, Attorney, FMC Lexington, will be on annual leave December 25-January 3, 1997.

Kathy Harris, Paralegal, MARO, will be on annual leave December 23-December 31, 1996.

Randy Smith, Paralegal, FCI Ashland, will be on annual leave December 26-27, 1996.

Randi Everett, Legal Tech, USP Terre Haute, will be on annual leave December 23-27; and Bob Blackburn, Legal Tech, USP Terre Haute will be on annual leave December 11-13.

**SITUATION OF INTEREST, CONTACT WITH FEDERAL BENCH, HAZARDOUS WASTE SITES, ETC.:**

**Ensign Amendment - FCI Cumberland:** Inmate Keith Maydak has filed a First Amendment challenge to the Ensign Amendment. While the Bureau had not begun implementation of this amendment, Warden Bidwell informed the inmate population about the impact of the amendment on the Bureau, and upon an inmate's ability to receive sexually explicit publications. Within 10 days of Warden Bidwell's memo, inmate Maydak filed suit challenging on First Amendment grounds, his inability to receive future publications that are not obscene. We have 60 days to respond, but would appreciate any input regarding the Bureau's response to such suits.

**Prison Litigation Reform Act:** I have sent instructions to all legal staff in this region that we cannot simply disregard the kind of court orders we are now regularly receiving from the 4th and 7th Circuits. In these orders the inmate has signed a consent form authorizing staff to make monthly withdrawals from the commissary account. The court then orders us to calculate the amount the inmate owes and send it to the court on a monthly basis. At a minimum, I am instructing staff they need to monitor these cases very closely to insure the inmate is given staff assistance in calculating how much he owes, and clear directions on steps he needs to take to comply with the court order. My comments on the December Executive staff paper urge that we involve staff much more in this process, as I see potential for the Bureau receiving negative feedback from both courts and Congress if we continue to take a hands off approach.

**SUBSTANTIVE PLEADINGS (COMPLAINT, MOTION FOR SUMMARY JUDGMENT, ETC.):** None

**SETTLEMENTS:** None

**ADVERSE DECISIONS OR SIGNIFICANT DECISIONS:**

**FCI Butner - Rish v. Johnson** - We recently received a denial of our second Motion for Summary Judgment in this case. Inmate Rish, along with two other former Butner inmates, allege they were exposed to HIV and Hepatitis B, when Butner staff failed to provide them with appropriate protective gear in connection with their work as inmate orderlies in the hospital unit. As part of our motion we raised Qualified Immunity, and Section 803 of the PLRA, which requires proof of physical injury before you have a remedy for emotional damages. The Court ruled that the PLRA could not apply to this case as it was filed in 1993. We urged that applying section 803 was not a retroactive application of the statute, as the provision deals with the remedies that are available. We also urged dismissal based on qualified immunity. You will be receiving an appeal recommendation from us in the near future.

**FCI Memphis - Coley v. Burkhart, Civ. No. 95-2355-D/A**

Inmate Coley filed a Bivens action alleging disparate treatment in the granting of bedside visits and funeral trips. The defendants had placed before the court several arguments including qualified immunity and failure to establish a racially discriminatory motive. In rejecting Warden Burkhart's argument that he was entitled to qualified immunity, the Judge determined the inmate sufficiently alleged a violation of a clearly established right under the Fourteenth Amendment's Equal Protection Clause. She then found the Warden's denial of these allegations, to be an issue of fact material to the resolution of the issue; thus concluding that the Warden was not entitled to qualified immunity. An appeal memorandum has been prepared in this case.

**UPDATE ON CASES, TRIALS OR HEARINGS, ETC. NOTED IN PRIOR REPORTS:**

**FPC Alderson - Leacock v. Reno** - Plaintiff is a black medical doctor who was dismissed for poor work performance while still a probationary employee at FPC Alderson. The court granted the United States' Motion for Summary Judgment on the theories of disparate impact and retaliation and denied the Motion on the discriminatory discharge and disparate disciplinary treatment. A settlement could not be reached and the case was argued before a seven-person jury and lasted for six days. An order was entered November 7, 1996, from the U.S. District Court for the Southern District of West Virginia at Bluefield, in favor of plaintiff and against the U.S. in the amount of \$30,000. Subsequent to the judgment, motions for attorneys' fees and costs totaling approximately \$97,000 were filed. Plaintiff also seeks equitable relief by way of cancellation of the repayment of his physicians comparability allowance and moving expenses, which together total more than \$9,000. Objections to plaintiff's petition for attorneys fees and costs have been filed. We will not be recommending an appeal, as we see this as a case where the jury wanted

to give the plaintiff something. Additionally, a post trial Motion for a New Trial and/or Remitter pursuant to Rule 59 was filed on November 18, 1996. The time period for filing a Notice of Appeal ends on January 6, 1997.

**FCI Milan - Toyee v. Reno**, 95-CV-40150-FL, received notice that plaintiff has filed notice of appeal with the 6th Circuit. This an a former Milan employee alleging he was terminated based on his national origin (Iraqi). The case was dismissed on motion for summary judgment by the District Court.

#### **REPRESENTATION NOT RECOMMENDED FOR STAFF:**

##### **Nomar v. Reno, et al., 96-176, E.D. Ky., FCI Ashland**

Last month we reported that we were not recommending that Ashland Correctional Officer Williams be represented by the Department, based on a local SIS investigation which confirmed Officer Williams called inmate Nomar's wife a whore. We learned recently that the Department elected to represent Officer Williams. I have real concern about this case confirming some of Judge Wilhoit's negative opinions about Bureau of Prisons' staff.

#### **SIGNIFICANT FTCA CLAIMS:**

**FCI Butner** - Tort Claim T-MXR-96-627 was filed by the mother (and her attorney) of deceased inmate Fernando Zapata, Reg. No. 15664-057. Zapata died on November 4, 1994 just minutes after his arrival at FCI Butner from FCI Allenwood. This death was the subject of a focused review report to the OGC. We may have some difficulty with the promptness of care he received. This case involves FCI Allenwood and FCI Butner.

#### **MEDICAL MALPRACTICE CASES UPDATE:**

**Quality Assurance Review Procedures:** Bill Burlington will be participating with Dr. Subash Duggirala in a new program to evaluate problematic medical malpractice claims. Dr. Duggirala has asked that three to four Bureau attorneys participate with physicians in the Bureau, and from medical schools in the Washington, D.C. area, in evaluating cases that our legal and medical staff feel may present problems in litigation. Dr. Duggirala has initiated this program with the hope that it will offer the Bureau a quick, inexpensive, objective resource in evaluating such claims, and hopefully, will also develop a bank of expert witnesses who will assist us should we go to trial.

Dr. Duggirala was surprised and disappointed to hear that we are considering signing a contract with AFIP for similar services. I expressed my belief that we need AFIP until we have a viable alternative, and that a goal for this new group, is to prove to Bureau legal staff that we no longer need AFIP. I have suggested that Daryl Kosiak, and a member of the Litigation Branch join me as regular members of this committee, and that the final legal position be rotated among Bureau attorneys who are stationed at our medical referral centers.

**FCI Butner - Matlock v. Reno, et al., 1:CV-96-1102**

FCI Butner recently received this FTCA medical malpractice claim, transferred from the Middle District of Pennsylvania. The case alleges governmental negligence against staff at FCI Butner for failing to provide the plaintiff with the proper medication to control his narcolepsy. The plaintiff, through counsel, claims that his injuries (a fall from a top bunk) were directly caused by the lack of Ritalin.

**SIGNIFICANT ADMINISTRATIVE REMEDIES:**

**FCI Manchester** - The first remedy concerning determination of crime of violence under VCCLEA referencing the Wiggins decision out of Alderson has been filed. In fact, the remedy included a copy of the Judgment Order in that case. We anticipate that we will receive more of the same over the next several weeks.

**NEW RFRA CASES AND UPDATES ON PREVIOUSLY REPORTED CASES:**

**USP Terre Haute - Lacey v. Clark**, This RFRA case was dismissed based on failure to exhaust his administrative remedies. The issue raised in the case was a challenge to the modification to the policy which no longer permits groups to prepare food for their ceremonial meals.

**ALTERNATIVE DISPUTE RESOLUTION EFFORTS: None**

**18 U.S.C. § 3621(e) LITIGATION:**

**FMC Lexington - Fisher v. Beeler**, 96-309, Inmate challenges the interpretation of his current offense, Possession WITD Cocaine, 18 U.S.C. § 841, with a two-point weapon possession enhancement, as a crime of violence under 3621(e).

**FMC Lexington - Aday v. Beeler**, we are still awaiting a final order on the

favorable R&R in this case. Petitioner challenges the BOP's classification of 922(g) as a crime of violence. Petitioner did not file objections to the R&R.

**FCI Milan - Alston v. Pontesso**, 96-CV-60393-DT, challenges the BOP designation of Possession of Firearm by a Prohibited Person as a crime of violence for purposes of eligibility for the drug program.

**SIGNIFICANT NEW CRIMINAL REFERRALS SINCE LAST MONTH'S REPORT:**

**FCI Memphis** - Nathaniel Hamlett, Reg. No. 34233-060, was referred for Possession of Narcotics (discovered in bar of soap).

Joe Rosser, Reg. No. 13209-076, was referred for allegedly assaulting a civilian (a girlfriend illegally visiting him) on federal property at the Naval Air Station, Millington, Tennessee on November 26, 1996. The victim has indicated she would like the Government to pursue this matter.

**FCI Milan** - On November 10, 1996, inmate Ray, Reg. No. 21891-039, assaulted inmate See, Reg. No. 03549-039 and as Officer Clark attempted to intervene, Inmate Ray assaulted the officer who received facial injuries. AUSA has indicated he will present the assault case in conjunction with the current charge of assaulting a postal worker for which inmate Ray has already been indicted.

**UPDATE ON PREVIOUSLY REPORTED CRIMINAL MATTERS:**

**FCI Manchester** - On November 1, 1996, inmate Sherwin Taylor was sentenced in Federal court, London, Kentucky, for assault on inmate/possession of a weapon. Taylor received a sentence of six months to run consecutively to his current sentence.

On November 18, 1996, inmate Ricky Flowers pled guilty to introduction of narcotics in the Eastern District of Kentucky. Sentencing is scheduled in March of 1997.

**FCI Ashland** - Last month we reported three inmates had been indicted on escape charges. The three inmates left the camp to meet their spouses or significant others at a local hotel. On December 2, 1996, the three inmates appeared before the Court and change their pleas to guilty. The Court scheduled sentencing for January 3, 1997.

During the court proceedings, one defense counsel told Judge Wilhoit that his client was in the hole and was being denied telephone and visitation

privileges with his wife. Defense counsel requested Judge Wilhoit assist them in obtaining a telephone call or visitation since it was the holiday season. Judge Wilhoit told the attorney that he did not have control, authority or influence over those people. Judge Wilhoit further said that defense counsel would be better off in pursuing the matter himself because if those people knew that he [Judge Wilhoit] was involved that there is no telling what those people would do.

**FCI Petersburg - U.S v. Raney**, trial is set for today, in this criminal trial for escape from the camp at Petersburg. Competency hearing was held on November 15 and Raney was found competent to stand trial.

**FCI Milan** - former staff member Holmes, indicted for introduction of contraband, had his trial postponed indefinitely due to the withdrawal of his attorney.

**SUCCESSFUL PROSECUTIONS OR ANY ACQUITTALS SINCE LAST MONTH'S REPORT:** None

**REHABILITATION ACT:** None



New Litigation Cases by Institution and Type  
Received During the Month of November 1996

|      | ALD | ASH | BEC | BUT* | CUM | LEX | MAN | MEM | MIL | MRG |
|------|-----|-----|-----|------|-----|-----|-----|-----|-----|-----|
| BIV  | 0   | 0   | 0   | 0    | 1   | 0   | 1   | 0   | 0   | 0   |
| FTCA | 0   | 0   | 0   | 0    | 1   | 0   | 1   | 0   | 0   | 0   |
| HC   | 0   | 0   | 2   | 1    | 0   | 1   | 1   | 1   | 0   | 2   |
| OTH  | 0   | 0   | 0   | 0    | 1   | 0   | 0   | 0   | 0   | 0   |
| TOT  | 0   | 0   | 2   | 1    | 3   | 1   | 3   | 1   | 0   | 2   |

New Litigation Cases by Institution and Type  
Received Calendar Year to Date

|      | ALD | ASH | BEC | BUT* | CUM | LEX | MAN | MEM | MIL  | MRG |
|------|-----|-----|-----|------|-----|-----|-----|-----|------|-----|
| BIV  | 1   | 2   | 0   | 1    | 12  | 6   | 10  | 1   | 10** | 1   |
| FTCA | 3   | 2   | 1   | 2    | 1   | 2   | 4   | 6   | 3    | 0   |
| HC   | 21  | 3   | 7   | 13   | 2   | 15  | 4   | 4   | 7    | 10  |
| OTH  | 1   | 0   | 0   | 1    | 3   | 2   | 1   | 1   | 2    | 0   |
| TOT  | 26  | 7   | 8   | 17   | 18  | 25  | 19  | 12  | 22   | 11  |

\* Represents the Complex

\*\* One case subtracted because it was inadvertently counted twice.