

memorandum

DATE: December 10, 1998 Mid-Atlantic Regional Office, Annapolis Junction, MD 20701

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

SUBJECT: November 1998 Monthly Report

TO: Wallace H. Cheney, General Counsel

ATTN: Amy Whalen Risley, Executive Assistant

ADMINISTRATIVE REMEDIES JAN FEB MAR APR MAY JUN JUL AUG SEP OCT NOV DEC

Received 135 187 229 160 168 200 214 225 191 212 179
 Answered 143 181 178 201 174 194 156 195 254 268 170

TORT CLAIMS JAN FEB MAR APR MAY JUN JUL AUG SEP OCT NOV DEC

Pending 230 195 179 190 191 195 154 138 149 166 171
 # Received 68 54 75 62 42 49 45 47 59 53 68
 # Answered 91 71 58 60 38 83 67 30 40 43 34
 # Pending 195 179 190 191 195 154 138 149 166 171 188
 # Over Six Month 0 0 0 0 0 1 0 1 1 1 1*

sent to C.O. with recommended settlement memo

PRIVACY JAN FEB MAR APR MAY JUN JUL AUG SEP OCT NOV DEC

Pending 13 23 12 23 24 18 35 30 26 37 19
 # Received 43 24 54 54 36 47 52 52 54 32 55
 # Answered 34 34 41 53 42 32 57 56 43 50 36
 # Pending 23 12 23 24 18 35 30 26 37 19 38
 # Over 20 Working Days 1 2* 0 0 4** 2* 3* 1* 2 1* 1*

*File has been requested from archives. **One file requested from archives; another request archives sent wrong file.

LITIGATION JAN FEB MAR APR MAY JUN JUL AUG SEP OCT NOV DEC

Cases Pending 338 331 329 314 273 261 261 272 281 284 287
 New Cases Received 7 16* 4* 11 16 13 36 17 17 18 12
 Habeas Corpus 4 7 4 3 6 7 11 5 8 10 8
 Bivens 1 5* 0* 6 5 5 3 5 3 3 1
 FTCA 1 2 0 1 2 1 2 3 1 2 1
 Other 1 2 0 1 3 0 20 4 5 3 2
 Cases Closed 14 19 21 62 28 12 25 10 15 15 3
 Cases Pending 331 329 314 273 261 261 272 281 284 287 296
 Lit Reports Completed 15 12 14 8 13 21 7 8 12 19 12
 Cases/Hearings or Trials 2 2 1 4 0 0 0 1 0 0 1
 Settlements/Awards 1 2 0 1 2 0 0 0 0 0 0
 \$ Settlements/Awards \$147.7 \$52.0 0 \$13.9* \$9.0 0 0 0 0 0 0

(in Thousands)

Estimated figures

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

[REDACTED]

[REDACTED]

b6

[REDACTED]

[REDACTED]

[REDACTED]

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

Execution Date for Paul Hammer - We learned this week that Paul Hammer had recently indicated that he intends to abandon the appeal which he recently filed. Inmate Hammer has previously been given a January 14, 1999, execution date by Judge Muir. This date was stayed by Hammer's initial decision to file an appeal.

FMC Lexington - On November 16, Judge Sharp signed an Order granting compassionate release to [REDACTED]. On November 19, [REDACTED] accompanied by FMC Lexington staff, was flown by special air charter to Florida, where he will reside in a state nursing home. [REDACTED] will be on ten years of supervised release. Much credit is due to FMC Lexington staff for facilitating the release process, particularly Chief Social Worker Darrell Lauer, who coordinated the release plans for [REDACTED].

b7C

FCI Milan - The institution attorney was contacted on December 3, 1998, by an attorney at Main Justice, Environmental Law Division, concerning a superfund site in Northeastern Indiana, and possible waste that was generated by FCI Milan UNICOR many years ago. The attorney was referred to the Commercial Law Branch, OGC, as they have coordinated issues arising from superfund sites in Northwestern, [REDACTED].

FCI CUMBERLAND - On November 30, Chief Judge Ziegler of the

Western District of Pennsylvania ordered the BOP to transport inmate [REDACTED] to a hospital in Pittsburgh for a death-bed visit with his mother. This inmate is a high profile "underboss" in organized crime out of Pittsburgh. Upon review the Warden objected to the trip for security reasons so we filed a motion to vacate the order based upon the court's lack of jurisdiction to order, rather than recommend, this course of action. The motion was granted. The court has now issued an order recommending that the inmate be transported to Pittsburgh for family visitation at the funeral home, and has made arrangements with the Marshal's Service to provide a special security detail at the funeral home. The Warden has written a letter to the Court that would deny the recommendation, citing the safety of staff and high potential for escape. b7C

Prisoner Litigation Reform Act:

FCI Ashland - Bush v. Lowry - As previously reported, Judge Wilhoit entered an order denying our Motion to Dismiss based on PLRA exhaustion, following the Garrett and Lunsford decisions which held that exhaustion is not required in money damages only Bivens cases. We sought approval to bring an interlocutory appeal, based upon the new favorable decision from the 11th Circuit in Alexander. Turning down our request for permission to appeal, DOJ informed our Litigation Branch that they will not allow any exhaustion appeals to be brought until our administrative remedy rule is amended. However, we are authorized to continue raising the exhaustion argument in the district courts and in cases where appeals have already been brought.

FCI Milan - Willis v. Leonard - The Magistrate Judge issued a favorable R&R in which the Court analyzed the Waiver of Reply provision of PLRA and indicated that there is a heightened standard of review, which warrants clarification by the 6th Circuit. The Court proceeded to recommend dismissal pursuant to the 12(b)(6) standard.

FCI Milan - Graham v. Mercer, et al - This case was dismissed pursuant to a review by the Court under the exhaustion requirements of the PLRA. The AUSA and the institutional attorney are seeking publication of the decision.

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

SETTLEMENTS:

FCI Memphis - Litrell v. United States - (failure to diagnose throat cancer case). On Tuesday, December 2, 1998, Matthew Mellady, Attorney, FCI Memphis, spoke to the AUSA out:

Nashville, Tennessee, who is handling this case. He indicated that the Court has set a settlement conference for Friday, January 15, 1999. The AUSA expects a report early next week from our expert (an oncologist at the VA in Nashville) concerning how the medical treatment would have been different had the cancer been diagnosed sooner. Based on the October 8, 1998, memorandum Matthew sent to Bill Burlington concerning settlement of this case, Matthew would like to move forward with some discussions concerning a reasonable assessment of the Plaintiff's damages. Matthew plans to attend the settlement conference and would like to have authority to settle if we can arrive at an appropriate amount.

FCI Butner - Inmate Dee Farmer has initiated settlement discussions with the U.S. Attorney's Office in Colorado. Farmer has four cases pending there, and is offering to settle those cases in exchange for the Bureau not stating opposition to his parole application. We have requested that all pending cases be included in the settlement agreement, including the case of Farmer v. Hawk, now pending in the District of Columbia Court of Appeals.

ADVERSE DECISIONS OR SIGNIFICANT DECISIONS:

FCI Memphis - Sheets v. DOJ - (Title VII case: sexual harassment, sex discrimination, retaliation and constructive discharge). On Wednesday, November 25, 1998, the institution attorney was contacted by AUSA Brian Quarles who informed him that the jury had returned a verdict in favor of the Plaintiff awarding her \$25,000 for disparate treatment/sex discrimination, \$75,000 for sexual harassment, \$100,000 for retaliation and \$116,000 in back pay. At the close of the Government's case, AUSA Quarles moved for a Judgment as a Matter of Law. The Judge stated that she was denying the motion and submitted the case to the jury with the understanding that she was reserving her authority to review the jury's verdict. Based upon what we still believe to be an convincing legal defense, we intend to file a Renewed Motion for Judgment after Trial pursuant to Rule 50(b) of the Federal Rules of Civil Procedure.

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

FCI Beckley - Depew v. Hawk - This inmate originally filed suit in Massachusetts claiming his right to receive privileged written communications from his attorney had been wrongfully restricted for one year after sado-masochistic magazines were mailed in under the guise of legal mail. The case was

transferred to the Southern District of West Virginia. Motions for Summary Judgment were filed. In November, the inmate's Attorney, Mel Dahl, was disbarred as a result of his resignation (in light of pending disciplinary charges). The District Court has been notified that Mel Dahl is no longer licensed to practice law.

FMC Lexington - Gravenmier v. Holland, et al. - This is a Bivens case alleging deprivation of adequate pain medication for a back condition. On November 16, 1998, FMC Lexington staff received notice that Plaintiff died of natural causes while in state custody. Plaintiff apparently contracted an infection while in the county jail and was in intensive care for a number of days. The cause of death was apparently unrelated to the subject matter of this case. Once a copy of the death certificate is obtained, a Notice of Death of Plaintiff and Motion to Dismiss will be filed.

FCI Memphis - Bernal-Manes v. Luttrell, (INS case). On Monday, November 30, 1998, the Judge conducted an evidentiary hearing in this habeas corpus petition. This hearing followed the Court's October 1, 1998, Order granting the Petitioner's writ of habeas corpus. In that Order the Court decided that INS has failed to demonstrate a rationale relationship between the Petitioner's detention (excess of 13 years) and the goal of protecting the public. The Court also determined that it had jurisdiction to review the INS Review Panel decision in this case. The Government filed a Notice of Appeal staying the Court's Order. Finally, the Court did state that the Petitioner is not entitled to unconditional release, but that the Court would convene another evidentiary hearing to consider that issue. We are reporting this case for informational purposes, given the number of Cuban detainees in BOP facilities.

USP Terre Haute - Karamo V. Breakvill - This is the case we reported last month where the District Court issued a preliminary injunction that dealt with the issue of four point restraints. On December 3, 1998, the inmate was transferred to USP Marion. Based on the language of the entry that accompanied the preliminary injunction, which states that the entry does not regulate the BOP's treatment of Karamo at any institution other than USP Terre Haute, we feel, unless he returns to USP Terre Haute before December 20 (when the PI expires) that the PI has been made moot and, therefore, does not have any bearing on this or any other institution.

FCI Butner - Blohm v. Johnson, et al. - We received a favorable R&R in this case. An inmate held pursuant to 18 U.S.C. § 4246 brought this civil rights action claiming invasion of privacy, battery and civil conspiracy, and claims that he has illegally and unconstitutionally been subjected to involuntary medication since July 1994. All claims are:

defendant Dr. Sally Johnson were dismissed due to her status as an officer of the U.S. Public Health Service pursuant to Title 42 U.S.C. §233(a). The Court recommended dismissal holding that the remaining defendants were entitled to qualified immunity because the hearing was conducted in accordance with applicable law and satisfied due process requirements, citing Washington v. Harper, and based on the record showing the plaintiff's condition justified involuntary medication.

REPRESENTATION NOT RECOMMENDED FOR STAFF: None

SIGNIFICANT FTCA CLAIMS: None

MEDICAL MALPRACTICE CASES UPDATE:

FMC Lexington - Maltz & Maltz v. USA - An answer to the complaint (FTCA action alleging failure to diagnose Plaintiff's lung cancer) was filed. A dispositive motion for summary judgment may later be filed once our expert is obtained and additional discovery is conducted. Plaintiff's expert does not appear to factually support plaintiff's theory of causation.

FCI Petersburg - Tommy Lee Suber v. Carlos Ascencio, et al. - In this Bivens case, the inmate alleges the orthopedic specialist recommended surgery for a torn rotator cuff in August of 1997, but the institution failed to schedule the surgery. Plaintiff claims he has suffered for more than a year with pain in his shoulder from the injury which occurred at Milan while working in food service. Service on the defendants was attempted by sending their summons and complaints to the U.S. Attorney's Office.

FCI Petersburg - Bergquist v. U.S. - This is an FTCA case alleging a PA's failure to refer the plaintiff to a doctor resulted in a delay in the diagnosis of his colon cancer. The AUSA and the institution paralegal interviewed the former FCI Petersburg doctor, Dr. Naval. He remembered that he first saw the plaintiff in the hallway and asked him how he was doing and the inmate informed him of his complaints. It was then that Dr. Naval examined Bergquist and referred him immediately for colon cancer screening. Bergquist was not referred to Dr. Naval by the PA's. The AUSA has obtained a medical expert to review Bergquist's medical record. A scheduling order was issued November 11, 1998, setting pretrial conference for February 19, 1999; and discovery conclusion by January 29, 1999. The Trial will be set for a day certain within 4-6

weeks of the pretrial conference.

SIGNIFICANT ADMINISTRATIVE REMEDIES: None

NEW RFRA CASES AND UPDATES ON PREVIOUSLY REPORTED CASES: None

ALTERNATIVE DISPUTE RESOLUTION EFFORTS: None

18 U.S.C. § 3621(e) LITIGATION:

Pelissero v. Thompson - (4th Circuit) - In a 2-1 decision, a panel upheld the Bureau's old and new rules on early release. A Petition for Rehearing With Suggestion For Rehearing En Banc was filed on behalf of the inmates, pointing out that the Court addressed the 1997 Interim Rule, whereas BOP applied the 1995 Rule to each appellant. On November 27, 1998, the Court vacated its opinion at 155 F.d. 470 (4th Cir. 1998), and remanded the matter back to the panel. The Court declined Petitioner's suggestion that the matter should be heard by the full court.

FCI Beckley - Boyle, Segerson & Williams v. Hemingway - These inmates were originally deemed ineligible for early release under P.S. 5162.02, based on their two-point enhancements for weapons. Although not parties in Wiggins v. Wise, these inmates were subsequently deemed eligible under the Wiggins decision. Based on the Fourth Circuit's Pelissero decision, the Bureau subsequently determined the inmates were ineligible for early release under P.S. 5162.02. The inmates requested a preliminary injunction to prevent the Bureau from denying their eligibility for early release, relying on statements made by the Bureau in past cases to support their position that the Bureau had entered into a "Consent Decree" or "Settlement Agreement". Based on the recent action by the Fourth Circuit, vacating the Pelissero decision, the inmates are again deemed eligible for early release under Wiggins v. Wise. A motion to dismiss the inmates' request for preliminary injunction will be filed, based on the lack of a live case or controversy.

FCI Beckley - Bayles v. Wise - A motion to reinstate this case has been filed. The inmate originally filed her action in the wake of Wiggins v. Wise, and a Judgment Order was entered remanding the case to the Bureau to determine her eligibility for early release in a manner consistent with Wiggins. The Bureau subsequently determined her to be eligible for early release. The Bureau intended to file a Motion to Vacate Judgment Order in this case, based on the Fourth Circuit's Pelissero decision. Although the Bureau had not yet filed the Motion, the inmate requested a preliminary injunction to prevent the Bureau from changing her eligibility for early release. This case has been consolidated with Boyle et. al.

v. Hemingway. Based on the recent action by the Fourth Circuit, vacating the Pelissero decision, the Bureau does not intend to file a motion to vacate the judgment order at this time. As the inmate is considered eligible for early release, a motion to dismiss the inmate's request for preliminary injunction will be filed, based on the lack of a live case or controversy.

FMC Lexington - Pratt v. Holland - The petitioner has filed a habeas petition alleging the BOP improperly interpreted Felon in Possession of a Firearm as a crime of violence. Petitioner's eligibility has been determined under P.S. 5162.02. Petitioner cites the Sixth Circuit decision in Orr. In our response we set forth what we felt were the Sixth Circuit's errors in arriving at their decision in Orr, and request the Court to follow the applicable precedent in Davis v. Beeler, or in the alternative, hold the case in abeyance pending the Sixth Circuit's ruling on the Government's Motion for Rehearing in Orr.

FCI Manchester - Moore v. Chandler - This habeas case challenges the denial of early release eligibility under 3621(e) for an inmate who received a two-point enhancement because another member of the drug conspiracy possessed a firearm. In a November 24, 1998, Opinion, the court, relying on Orr v. Hawk, reconsidered its prior ruling in Davis v. Beeler. The court found the policy allowing consideration of factors outside the offense is in conflict with the plain language of the VCCLEA. The court also held "the BOP may not rely on the sentencing enhancement for possession of a firearm to deny eligibility for early release." The court has given us 20 days to reconsider our position in light of this ruling.

FCI Milan - Taylor v. Pontesso - This habeas was an old Program Statement RDAP case which the BOP won at the District Court Level. The inmate appealed and in light of Orr the District Court required briefing by October 15, 1998. The Court granted our motion to deny the inmate bail, and we are filing a protective notice of appeal due to the 6th Circuit's delay in ruling on the Government's motion for rehearing in the Orr case.

SIGNIFICANT NEW CRIMINAL REFERRALS SINCE LAST MONTH'S REPORT:

USP Terre Haute - Inmate [REDACTED] signed a plea bargain on November 24, 1998, for 24 consecutive months, 3 years supervised release and a \$100 special assessment. Inmate [REDACTED]

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MXR Monthly Report

signed a plea bargain on November 24, 1998, for 15 consecutive months and a \$100 special assessment. Both of the offenses were drug related.

FCI Manchester - U.S. v. Clark - This criminal case is scheduled for trial on December 7, 1998, in London, Kentucky. This case concerns inmate Ernest Clark's assault upon another inmate at FCI Manchester. Defendant's Motion to Dismiss on the basis of selective prosecution was denied by the Court in September 1998.

FCI Milan - U.S. v. Snow - The criminal trial of inmate Snow has been delayed until after the first of the year. Snow is being prosecuted for assault on a correctional officer. The officer is no longer employed by the BOP, and this has created some difficulty, which has been resolved.

SUCCESSFUL PROSECUTIONS OR ANY ACQUITTALS SINCE LAST MONTH'S REPORT:

USP Terre Haute - Inmate Lonnie Taylor, Reg. No. 95147-071, was found guilty of second degree murder on November 14, 1998, in a jury trial. Inmate Taylor used a 2x4 to hit inmate Bruce Campbell on the right side of his head, above and behind his right ear. This blunt force trauma resulted in the death of inmate Campbell.

REHABILITATION ACT: None

Ensign Amendment Cases: None

Dismissals Under PLRA: None

New Litigation Cases by Institution and Type
Received During the Month of November 1998

	ALD	ASH	BEC	BUT*	CUM	ELK	LEX	MAN	MEM	MIL	MRG	PET	SEY	THA	TOT
BIV	0	0	0	0	0	0	0	0	0	0	0	1	0	0	1
FTCA	0	0	0	0	0	0	0	0	0	0	0	0	0	1	1
HC	2	0	1	0	0	1	2	0	2	0	0	0	0	0	8
OTH	0	0	1	1	0	0	0	0	0	0	0	0	0	0	2
TOT	2	0	2	1	0	1	2	0	2	0	0	1	0	1	12

*Represents both the FCI and LSCI

New Litigation Cases by Institution and Type

Received Calendar Year to Date

	ALD♦	ASH	BEC♦	BUT*	CUM	ELK●	LEX	MAN	MEM	MIL	MRG●	PET	SEY	THA	TOT
BIV	0	1	1	5	4	4	6	1	1	3	2	3	0	6	37
FTCA	1	0	0	1	2	0	2	2	1	3	0	0	0	4	16
HC	3	2	3	5	16	3	2	2	7	9	6	5	1	9	73
OTH	0	0	4	25	2	4	1	1	1	1	0	0	0	2	41
TOT	4	3	8	36	24	11	11	6	10	16	8	8	1	21	167

*BUT represents both the FCI and the LSCI ●Corrected figure (case counted twice) ♦Case counted for BEC should have been ALD.