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**U.S. Department of Justice**  
**Federal Bureau of Prisons**  
**North Central Regional Office**

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*Tower II, 8th Floor*  
*400 State Street*  
*Kansas City, KS 66101-2421*

February 12, 1999

**MEMORANDUM FOR**            **CHRISTOPHER ERLEWINE**  
                                         **ASSISTANT DIRECTOR/GENERAL COUNSEL**  
                                         **GENERAL COUNSEL AND REVIEW DIVISION**

**FROM:**                            **JOHN R. SHAW, Regional Counsel**

**SUBJECT:**                        **Monthly Report (January, 1999)**

**LITIGATION, CLAIMS, AND ADMINISTRATIVE REMEDY STATISTICS**

**LITIGATION:**

inst	num	hc	ftc	biv	oth	ans	pen	cld	h/t	set	awd
NCR	50	27	4	14	5	21	492	29	3	1	

**NUM** - Number of total lawsuits filed in the month  
**HC** - Number of habeas corpus actions filed in the reporting period  
**FTC** - Number of FTCA actions filed  
**BIV** - Number of Bivens actions filed  
**OTH** - Number of other actions filed, e.g., mental health, mandamus  
**ANS** - Number of litigation reports completed  
**PEN** - Number of cases pending

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CLD - Number of cases closed  
 H/T - Number of hearings or trials (include in narrative)  
 SET - Number of settlements (include in narrative)  
 AWD - Number of Awards (include in narrative)

**ADMINISTRATIVE CLAIMS:**

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
67											

**ADMINISTRATIVE REMEDIES**

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
188											

**Total for Calendar Year 188**

**FREEDOM OF INFORMATION ACT/PRIVACY ACT REQUESTS**

	PRIVACY ACT	FOIA
ACTUAL ON-HAND	35	13
ACTUAL RECEIVED	66	14
ACTUAL PROCESSED	67	12
ACTUAL BACKLOG	1	0

Backlog represents those requests which have not been responded to within the twenty work days target set by DOJ.

\* Awaiting records from archives.

**ADVERSE DECISIONS**

**Appleby-el v. USA, Case No. 97-N-0671, ADX Florence**

Plaintiff alleged he slipped and fell because the cell floor was wet after he showered. The R&R

recommends denial of government's motion to dismiss and for summary judgement. The R&R was received after the 10 day period in which to file objections. Settlement with plaintiff is being discussed.

**Knowles v. BOP, et al., Case No. 97-Z-2645, FCI Florence**

Petitioner sentence deemed non-parolable while he was at FCI Greenville. due to representations made by AUSA. When complaint was filed, we asked the court whether the sentence was to be parolable. We were advised that it was to be parolable, and so advised the inmate. A parole hearing was held and petitioner was released on parole. He filed a motion for costs, as he was a prevailing party. We were unfortunately unable to find any precedent supporting the assertion that he should not receive costs. On January 21, 1999, pursuant to a stipulation for dismissal and costs, the court entered an order directing the USA to pay \$346.18 in costs to petitioner in this mandamus action.

**SETTLEMENTS OR JUDGMENTS**

**Barnes v. United States, 96-3280-CV-S-4, MCFP Springfield**

Plaintiff filed an FTCA against government officials alleging negligence when officials allowed him to retain a razor blade and his eye glasses thus facilitating his suicide attempt. He also alleged medical negligence by the physician in failing to properly diagnose and treat his heart attack. This case was settled for \$20,000 on December 30, 1998.

**DECISIONS OF INTEREST**

**Snow v. USA, 98-CV-0161-PER, FCI Greenville**

While incarcerated at FCI Greenville, plaintiff filed suit under the FTCA claiming that during an open movement, he was struck on the head and was rendered unconscious by unknown persons who "inflicted mutilation upon his sexual organs destroying his genitalia." Plaintiff alleged that the BOP was negligent in that employees failed to prevent the unknown persons from obtaining a weapon and failed to prevent the assault and mutilation.

The discretionary function exception to the FTCA was argued in a motion to dismiss. The court found that the protection of inmates falls within the discretion of prison officials and that prison officials could not have breached their duty under 18 U.S.C. 4042 (providing that the BOP provide safekeeping and protection for inmates). Judge Riley dismissed the case for lack of subject matter jurisdiction holding that the discretionary function exception is a jurisdictional prerequisite to the suit. The court did however, indicate that Snow may be able to state a Bivens, Eighth Amendment claim in this matter.

**Villarreal v. Knowles and Harrison, Case No. 97-S-1798, USP Florence**

Court granted defendants' motion to dismiss. holding plaintiff has stated no claim for a due process or equal protection claim or a claim under the 8<sup>th</sup> Amendment (plaintiff alleged his rights were violated by being identified as a gang member and placed in SHU for 2 years).

**Jolivet v. USA, Case No. 98-B-0937, ADX Florence**

In this case, the R&R recommended dismissal of FTCA claim alleging inadequate dental care. Dismissed for failure to file complaint within the statute of limitations.

**Stevenson v. Keohane, et al., Case No. 98-3312-CV-S-RGC-H, MCFP Springfield**

Case dismissed wherein petitioner alleged that he is being denied an organ transplant.

**Barnes v. Hawk, et al., Case No. 98-CV-3165 10th Cir. 98-3188, USP Leavenworth**

On January 13, 1999, the Tenth Circuit Court of Appeals affirmed the decision on the District Court in this case where the plaintiff alleged violations of his rights under the Eighth and First Amendment because medical personnel were deliberately indifferent to his medical needs. This case had been dismissed by the District Court pursuant to 42 U.S. C. Section 1997e (c). On appeal, the plaintiff alleged that the district court erroneously failed to conduct a sufficient investigation of the allegations set forth in his complaint. failed to liberally construe his complaint in accordance with his pro se status, and failed to allow him to amend his complaint to correct any shortcomings. This court has not previously set forth the appropriate standard of review for dismissals under 42 U.S.C. section 1997e(c). In this decision, the court concluded that the appropriate standard of review for dismissal pursuant to 42 U.S.C. section 1997e (c) for failure to state a claim is de novo.

**Dodds v. Del Muro, Case No. 95-3011-RDR, USP Leavenworth**

On January 15, 1999, the Tenth Circuit Court of Appeals affirmed the decision of the district court. In this case, the plaintiff sought damages because of alleged denial of medical care when staff failed to examine his January 1993 TB test results and also because he was not informed of the test results. Approximately a year later medical staff discovered plaintiff had active TB, and that plaintiff's January 1993 test result had been positive. It was undisputed in this case that plaintiff had to be tested at least three times, and that plaintiff went without medical treatment for TB for thirteen months after the positive test result was noted in his medical records. However, the facts do not entitle plaintiff to relief if no deliberate indifference to a serious medical need of plaintiff was demonstrated.

**Kenneth M. Brack v. United States, Case No. 97-3350-MLB, USP Leavenworth**

On November 3, 1998, the court granted the government's motion for summary judgment in this

civil action wherein the plaintiff alleged negligence based upon the medical treatment that he received when he was found in his cell in a completely unresponsive state at USP Leavenworth. The plaintiff alleged that medical personnel caused him four different types of injuries. The four injuries were: diabetic ketoacidosis: numbness of his left foot: painful nodules and infection of his throat because staff were allegedly negligent when they attempted to intubate him: and, his penis was injured when a urinary bladder catheter was inserted. The court determined there was no evidence that medical staff breached a duty or caused plaintiff's ketoacidosis by administering dextrose on December 27, 1995. Furthermore, there was no evidence that staff independently caused plaintiff's penis, throat or left foot injuries during their emergency care of the plaintiff after finding him unconscious.

**Massey and Otten v. Helman et al, Case No. 97-1401, FCI Pekin**

This case was initially filed as a class action alleging that the BOP Health Services policy was unconstitutional. The complaint was joined by Dr. Otten who alleged that he was removed from his position as Clinical Director after assisting the plaintiff in this litigation. The class claims were disallowed in June of 1998. On February 4, 1999, the court ruled that plaintiff Massey could not proceed on his claims based upon his failure to exhaust his administrative remedies. The court relied heavily upon the Alexander v. Hawk opinion in reaching its decision. The court dismissed Dr. Otten's claims on jurisdictional grounds. This is the third Bivens action for monetary damages that has been dismissed in the Central District for failure to exhaust.

**Angarita-Garzon v. Helman, Case No. 98-1259, FCI Pekin**

Inmate challenged disciplinary action which found him guilty of committing a sex act in the visiting room. In the course of the proceedings, the court ordered the institution to produce the videotape of the alleged act. Unfortunately, the tape had been recycled in accordance with normal procedures. At the time of the recycling there was no indication that the petitioner would proceed beyond the administrative remedy procedure. The court found that the recycling was not done in bad faith and ruled the discipline appropriate.

**PENDING CASES OF INTEREST**

**Patricia Good Voice Flute v. Pine Medical Center, et al., #98-1735, NCRO/FPC Duluth/FCI Sandstone**

Dr. Homeister, from FPC Duluth is a defendant as well as the Pine Medical Center, St. Mary's Duluth Clinic Health System and the Sandstone Medical Group. Plaintiff contends that BOP doctors and contract medical facility were responsible for the wrongful death of her inmate husband who suffered from a fatal heart attack while at FCI Sandstone. NCRO Legal staff have primary responsibility for this case.

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**Teich v. U.S.A., et al., Case No. CV-S-98-01213-HDM, MCFP Springfield**

Plaintiff's filed a Bivens/FTCA action wherein they allege wrongful death of a quadriplegic inmate who died at the medical center. An answer was filed by the AUSA in the District of Nevada. This will be a difficult case and settlement is being explored.

**Rodriguez v. Officer Acosta, et al., Case No. 98-3352-GTV, USP Leavenworth**

In this civil action, the plaintiff sues the United States and two correctional officers requesting (\$400,000) four hundred dollars to compensate him for his false teeth that were confiscated while he was confined at USP Leavenworth.

**Christopher Green v. Kathleen Hawk, et al., Case No. 98-CV02761, USP Leavenworth**

In this Bivens-styled action the plaintiff alleges violations of his constitutional rights by the defendants because he was forced to pay his (\$250.00) two hundred fifty dollar court ordered fine.

**Walker, et al v. Greenfield, et al., Case No. 96-3237-GTV, USP Leavenworth**

The inmates allege they were assaulted with a nightstick and were referred to by staff who used racial slurs.

**Burke v. Wise, 99-77-PAM-FLN, FMC Rochester**

Inmate Burke filed a Petition for Writ of Habeas Corpus alleging that staff at FMC Rochester have inaccurately computed his sentence. Specifically, petitioner alleges that the BOP erroneously failed to aggregate his SRA sentence with his PLRA sentence contrary to the plain language of 18 U.S.C. § 3585(c).

**McNeal v. Keohane, et al., Case No. 98-3506-CV-S-RGC-H, MCFP Springfield**

Petitioner contended that the respondents should halt the practices for Christmas and all future Christmas'.

**Williams v. Keohane, Case No. 98-3182-CV-S-RGC-H, MCFP Springfield**

Petitioner contended that the respondent should activate a liver transplant procedure and/or provide him with an immediate release so that he can arrange for a liver transplant on his own.

**Massey v. Wheeler et al, Case No. 98-1348, FCI Pekin**

Plaintiff alleged failure to allow weekly unmonitored calls to his attorney is a violation of his constitutional rights. The inmate filed an amended complaint in January alleging that three staff members violated his constitutional rights by opening and reading his legal mail in his presence. The inmate is requesting monetary damages and injunctive relief. A motion to dismiss has been drafted based upon the inmates continued failure to use the administrative remedy procedures.

### **RELIGIOUS FREEDOM RESTORATION ACT CASES**

None.

### **HEARINGS AND TRIALS**

#### **Jake v. Hershberger, Case No. 96-2780, USP Marion**

Arguments were held before the 7th Circuit in January of 1999. Petitioner alleged that he should receive credit toward his federal sentence while he was in state custody serving time for state offense and while awaiting sentencing in state offense. The District Court properly denied his application for writ of habeas corpus holding that unless a federal court specifically recommends concurrent time, inmates who receive separate state and federal sentences are ordinarily not granted federal sentence credit for time under state custody. Petitioner's counsel attempted to bind the Bureau of Prisons to California state law where under California state law allows for a petitioner to be transferred to the BOP based upon the Bureau policy. However, one of the circuit Judges questioned why California law was relevant and he also pointed out that the policy affords the BOP with discretion when it states that the BOP **may** transfer an inmate. The policy does not state that the BOP shall transfer an inmate.

### **UPCOMING HEARINGS OR TRIALS**

#### **Dunn v. Black, 96-928-JPG, FCI Greenville**

This is a case arising from the October 1995 disturbance at FCI Greenville. Plaintiff alleges that correctional officer Black and other unidentified staff, dressed in riot uniforms, used excessive force while transporting him to R & D. Trial is set for April 19, 1999.

#### **Rodriguez v. Wise, Case No. 99-128-MJD-RLE, FMC Rochester**

Inmate Rodriguez filed a Petition for Writ of Habeas Corpus alleging that staff at FMC Rochester have been deliberately indifferent to his serious medical need. Petitioner alleges that medical staff have failed to provide him with appropriate treatment for his cancer because the short amount of time remaining on his sentence. A telephonic hearing is scheduled for February 3, 1999.

#### **U.S. v. Zepeda, Case No. 98-10073, FCI Pekin**

Final pretrial hearing was held on November 6, 1998. Defendant pled guilty to Count 1 and waived right of appeal. Sentencing set for February 26, 1999.

**Tuite v. True, et al., Case No. 93-CV-3248, MCC Chicago**

Attorney alleges that conversations with his client were recorded by MCC Chicago in 1992. Court set status hearing for April 13, 1999.

**Martinez v. Counts, et al., Case No. 90-3224-CV-S-4, MCFP Springfield**

The trial for the constitutional tort case, scheduled to begin on January 19th, has been postponed. This lawsuit is an old one that went up on appeal, 977 F.2d 421(8th Cir. 1992) and resulted in a reversal of the judge's order dismissing the complaint. After the case was remanded, we again attempted to dismiss the case but our efforts were unsuccessful. We continue to believe the three remaining in the case will prevail. Court granted plaintiff's motion for continuance of the trial due to the fact that he could not locate some of the records necessary to prove his case. The implied Bivens constitutional tort jury trial will be rescheduled some time in the future.

**U.S. v. Francis and Haney, USP Florence**

Inmates charged with attempted escape from USP and possession of contraband (escape paraphernalia). The in camera hearing to rule on the security issue of request for plans and blueprints has been moved to February 18, 1999.

**USA v. Simmonds, ADX Florence**

Arraigned on two counts of assault on staff at ADX. Matter initially charged as misdemeanors but due to history of assaultive behavior, inmate indicted on felony counts. Trial postponed indefinitely due to AUSA illness. Defendant filed motion to dismiss the indictment due to prosecutorial vindictiveness. Claimed the matter was charged as a felony instead of remaining a misdemeanor because defendant filed civil litigation against BOP staff. Hearing was held December 10, 1998. Court declined to dismiss indictment and set the matter for trial on February 22 & 23, 1999.

**Bernal v. Black, FCI Pekin**

The court has delayed the trial in Bernal. Trial set to begin on February 2 & 3, 1999.

**CRIMINAL MATTERS**

**U.S. v. Francis and Haney, USP Florence**

See above (Hearings and Trials).

**U.S. v. Riddle and Black, USP Florence**

Plea negotiations ongoing regarding the charge of an inmate murder at USP. Discovery and protective order issues continue with respect to inmate Riddle. Inmate Black pleaded guilty to aggravated assault. Sentencing in set for March of 1999. Riddle filed motion for relief from



protective order. Hearing held by Judge Sparr on December 16, 1998. At that time, Judge wanted testimony from BOP on what documents had been provided for Riddle to review in accordance with the court orders. BOP testified that all documents had been provided on several occasions for Riddle's review. The Judge held that the BOP had complied with the order and that no relief was necessary. On January 16, Riddle changed his plea to guilty of Voluntary Manslaughter and 4 counts of assault on staff. Sentencing set for sometime in April.

**U.S. v. Simmonds, ADX Florence**  
See above (Hearings and Trials).

**U.S. v. Zepeda, Case No. 98-10073, FCI Pekin**  
See above (Hearings and Trials).

**U.S. v. Battle, USP Leavenworth**  
Battle was sentenced on January 27, 1999 for Possession of a Knife by an Inmate in violation of 18 U.S.C. section 1791(a)(2). He received a 24 month sentence for this offense.

**U.S. v. Alvarado, USP Leavenworth**  
Inmate indicted for violation of 18 U.S. C. Section 1791(a)(2) possession of a weapon on or about November 16, 1998 in the District of Kansas.

**U.S. v. Duckett; U.S. v. Wills; U.S. v. Wadrell, USP Leavenworth**  
The above inmates were each recently indicted for possession of a weapon in violation of 18 U.S.C. 1791(a) (2) which occurred on or about December 4, 1998 at USP Leavenworth, Kansas

**PERSONNEL ISSUES**

[REDACTED]

**STAFF TRAVEL AND LEAVE**

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[REDACTED] February 19 ART

[REDACTED] February 18 ART



**U.S. Department of Justice**  
**Federal Bureau of Prisons**  
**North Central Regional Office**

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March 11, 1999

MEMORANDUM FOR CHRISTOPHER ERLEWINE  
ASSISTANT DIRECTOR/GENERAL COUNSEL  
GENERAL COUNSEL AND REVIEW DIVISION

FROM: JOHN R. SHAW, Regional Counsel

SUBJECT: Monthly Report (February, 1999)

**LITIGATION, CLAIMS, AND ADMINISTRATIVE REMEDY STATISTICS**

**LITIGATION:**

inst	num	hc	ftc	biv	oth	ans	pen	cld	h/t	set	awd
NCR	46	32	2	8	4	22	506	17	5	1	

NUM - Number of total lawsuits filed in the month  
HC - Number of habeas corpus actions filed in the reporting period  
FTC - Number of FTCA actions filed  
BIV - Number of Bivens actions filed  
OTH - Number of other actions filed, e.g., mental health, mandamus  
ANS - Number of litigation reports completed  
PEN - Number of cases pending

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CLD - Number of cases closed  
 H/T - Number of hearings or trials (include in narrative)  
 SET - Number of settlements (include in narrative)  
 AWD - Number of Awards (include in narrative)

**ADMINISTRATIVE CLAIMS:**

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
67	70										

**ADMINISTRATIVE REMEDIES**

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
188	208										

**Total for Calendar Year 396**

**FREEDOM OF INFORMATION ACT/PRIVACY ACT REQUESTS**

	PRIVACY ACT	FOIA
ACTUAL ON-HAND	38	12
ACTUAL RECEIVED	49	14
ACTUAL PROCESSED	50	13
ACTUAL BACKLOG	1	1

Backlog represents those requests which have not been responded to within the twenty work days target set by DOJ.

\* Awaiting records from archives.

**ADVERSE DECISIONS**

**Christopher Lopez v. Randy Davis, Case No. 98-4158, FPC Yankton**  
**Roderick Walter v. Al Herrera, Case No. 98-4192, FPC Yankton**

**Duane Larison v. Al Herrera, Case No. 98-4142, FPC Yankton**  
**Peter Betz v. Al Herrera, Case No. 98-4174, FPC Yankton**

In each of these cases the Court found that the BOP acted beyond its statutory authority when it used firearms enhancements as a basis for denying inmates early release eligibility under 18 U.S.C. 3621(e)(2)(B). A notice of appeal has been filed in Lopez and we anticipate doing the same in the other cases. There are currently nine cases which have been consolidated into one appeal before the Eighth Circuit (Bellis v. Davis). The appeal brief in Bellis is due by March 12, 1999, and oral argument has been slated for the second week of May 1999.

**Scroger v. J.W. Booker, Jr., Case No. 98-3260-RDR, USP Leavenworth**

In this case, Scroger received a 2 level enhancement because loaded accessible firearms as well as drugs were discovered. Here, the court determined that the BOP does not have authority to create an additional eligibility requirement which conflicts with the plain language of the statute. This court's holding was limited to invalidating the improper eligibility requirement. The court further stated that the BOP's interpretation of 3621(e)(2)(B) abrogating the statutory term "convicted" was not within its discretion and was entitled to no deference by the court.

**Ward v. J. W. Booker, Jr., Case No. 98-3274-RDR, USP Leavenworth**

Ward was convicted of a violation of 21 U.S.C. 841(a)(1) Possession with intent to distribute heroin. His offense level was increased by 2 points because firearms were possessed in connection with the offense. The merits were not addressed in this case, instead ripeness and failure to exhaust available administrative remedies were asserted.

**Guido v. Booker, Case No. 98-3266-RDR, USP Leavenworth**

In this case, the BOP was ordered to consider Guido's early release eligibility notwithstanding his two-level enhancement for weapons possession. The court relied heavily on the Fristoe v. Thompson case as binding authority. We have until March 8th to inform the court of the status of Guido's re-evaluation.

**SETTLEMENTS OR JUDGMENTS**

**Joseph L. Davis v. Page True, et al.** D. Kan.. Case No. 96-3316-GTV, USP Leavenworth  
**Joseph L. Davis v. Warden Sieter, et al.** S. D. of Ill.. Case No. 97-809-JPG. FCI Greenville



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[REDACTED] These cases will be settled  
for (\$2,200.00) Two Thousand and Two Hundred Dollars. [REDACTED]

**Bailey v. United States, Case No. 96-680-JPG, USP Marion**

This was originally filed as a mixed FTCA/Bivens action. We originally offered \$33 in settlement of the administrative claim. The Bivens claim was dismissed and a tort claim seeking \$209.55 for property loss remains. In response to our motion for summary judgement, claims for loss of property totaling \$102 was dismissed, leaving a total claim for \$107. [REDACTED]

**DECISIONS OF INTEREST**

**Taylor v. U.S. BOP, et al., 10th Cir. 1999, Case No. 98-3176, USP Leavenworth**

In this unpublished decision, the Tenth Circuit Court of Appeals affirmed the decision of the district court's denial of the petitioner's writ of habeas corpus. In this case, the petitioner challenged the denial of his early release. The petitioner is serving a sentence for violations of 21 U.S.C. 841 (a)(1) and possession of a firearm by a convicted felon in violation of 922 (g)(1). In reaching this decision, the Court concluded that even if the BOP had exceeded its discretion in finding that a section 922 (g) violation is a crime of violence, Taylor would not have been eligible for early release because he had a prior conviction for aggravated assault.

**Perez-Diago v. Page True, Case No. 95-3512-RDR, USP Leavenworth**

Petitioner, a Cuban detainee alleged his detention was illegal and he challenged the constitutionality of the conditions of confinement at USP Leavenworth. In an order dated January 27, 1999, the court determined that petitioner was not entitled to relief on his claim of illegal confinement as civil immigration detention is not punishment. In addition, the court also determined that the petitioner's claim concerning conditions of confinement was moot because he is currently confined at USP Lewisburg, PA.

**Rhodes v. Page True, Case No. 96-3490-RDR, USP Leavenworth**

In this petition for writ of habeas corpus (DHO appeal), inmate Rhodes raised numerous issues relating to the decision of the Discipline Hearing Officer at FCI Englewood that he committed the prohibited acts of Planning a Killing and Escape. The court, in denying the petition, found the

inmate had no right to obtain a copy of the FBI Investigation conducted in relation to the acts giving rise to the DHO report, nor did he have the right to obtain the testimony of various inmate and staff witnesses.

**Arrasmith v. United States, 10th Cir.1999, Case No. 98-3214,USP Leavenworth**

In this favorable DAP decision, the 10th Circuit Court of Appeals vacated the decision of the district judge which held Arrasmith's conviction for felon in possession of a firearm in violation of 18 U.S.C. section 922 (g)(1) was not a "crime of violence" for purposes of the DAP program. In the response to the appeal, the government chose not to file a brief, but instead filed a letter to the Clerk of the Court indicating that inmate Arrasmith had litigated and lost the issue in the 5th Circuit (*Venegas v. Bureau of Prisons*, 126 F.3d 760 (5th Cir. 1997)). After granting the petitioner's motion for expedited disposition, the Court held that petitioner's motion was successive as a matter of law and remained the case to the district court with instructions to dismiss the petition.

**Zamarippa v. Kathleen Hawk, et al., Case No. 99-C-079-S, FCI Oxford**

Plaintiff alleged that FCI Oxford had a duty to transfer him to an institution near his family pursuant to 18 U.S.C. § 4042. Judge Shabaz held that the statute does not require that inmates be housed in an institution of their choice and dismissed the complaint for failure to state a claim pursuant to 28 U.S.C. § 1915A(b)(1).

**Russell-el v. USA, et. al., Case No. 98-D-941, USP Florence**

Court dismisses this case, with prejudice, for failure to file within the 2 year state statute of limitations controlling for Bivens actions in the District of Colorado. Court indicated that there was no basis for "tolling" the statute of limitations in this case. They also dismissed the United States as defendant for failure to file within the time prescribed under the FTCA.

**PENDING CASES OF INTEREST**

**Kiperts v. Keohane, et al., Case No. 99-3043-CV-S-RGC-H, MCFP Springfield**

Petitioner requested that respondents provide any and all treatments, surgical procedures, or medication, including a heart transplant needed to preserve his life and/or, immediate release from prison so he could obtain the necessary procedures.

**Rahman v. Keohane, et al., Case No. 97-3270-CV-S-RGC, MCFP Springfield**

We received an R&R, wherein the Magistrate recommends that the case be dismissed without prejudice. If the Judge agrees, it would mean that the official capacity aspects of the case (conditions, medical care, etc.) could be filed anew in Minnesota. However, the Magistrate also

recommends that the Bivens defendants be granted qualified immunity. If the Court agrees with immunity, it is our opinion that these defendants could not be sued again in Minnesota since the decision addresses the various constitutional claims against the defendants (1st, 5th, and 8th Amendment allegations) and finds that defendants are entitled to qualified immunity.

**Garcia v. U.S.A., Case No. 98-3089-CV-S-RGC, MCFP Springfield**

Plaintiff alleged that doctor improperly performed surgery, removed an ulnar bone and "crippled" his left arm.

**Paulsen v. Alleman, et al., Case No. 98-1403, FCI Sandstone/NCRO**

Plaintiff alleges violation of his Fifth, Sixth, and Eighth Amendment rights. The issues stem from 1996 to present involving medical complaints, denial of a portion of medical records, destruction of personal property (to include legal material), falsification of Incident Reports and investigations, opening of legal mail, defacing incoming mail, placement on FRP refuse, alleging breach of FRP contract by increasing the amount of payment, failure to provide unmonitored legal calls, deleting telephone numbers from his phone list without notice, alleged denial of a visitor, impartial DHO hearings, and basic allegations of harassment and retaliation. The North Central Region is providing the litigation on this case due to the conflict of interest wherein the Paralegal at FCI Sandstone is one of the defendants.

**Ueland v. US, Case No. 99-3032, FCI Pekin**

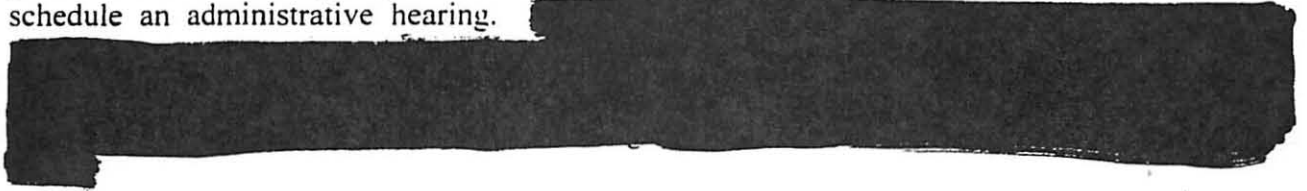
FTCA claim stemming from a bus accident in May of 1996. The case was transferred from the District of Minnesota to the Central District of Illinois on February 25, 1999.

**Bernal v. Black and Lewis, Case No. 96-1209, FCI Pekin**

Plaintiff has filed a motion for new trial based upon his alleged inability to access his legal materials in the days immediately preceding the civil trial. (See below under Hearings or Trials as to the underlying trial decided in favor of the government defendants.).

**Anderson v. Tenenbaum et al., Case No. 98-CV-8, FMC Rochester**

An Order and Report and Recommendation was issued in this case, wherein it was ordered that the Bureau of Prisons are required to show cause why Summary Judgment should not be granted in Plaintiff's favor, which would declare that the BOP has not provided Plaintiff with the post-medication hearing required by the Due Process Clause and would compel the BOP to schedule an administrative hearing.



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**Rouse v. United States of America, Case No. CR 94-40015/CIV 98-4213, USP Leavenworth**  
In this 2255 appeal, inmate Rouse alleges that due to institution lockdowns in the fall of 1998, he was unable to timely file his 2255 appeal. Petitioner further alleges he sent legal correspondence via certified mail which was not received by the Clerk of the Court for a month. The legal services department is assisting the AUSA working on the case in responding to the petitioner's contentions.

**Williams v. USA, Case No. 97-222, FCI Greenville**

In this FTCA action where inmate alleged that BOP staff were negligent in the loss of his property during the disturbance in October 1995. In a motion to dismiss, it was argued that the court lacked subject matter jurisdiction because 28 U.S.C. § 2680(c) provides that the general waiver of sovereign immunity in the FTCA does not apply to claims arising from "the detention of any goods or merchandise by any officer of customs or excise or any other law enforcement officer." It was argued that BOP employees fall within this exception as law enforcement officers.

The Magistrate Judge issued an R&R denying our motion to dismiss. He found that the §2680(c) exception does not apply to all law enforcement officers and that there was no showing that the BOP employees were in their "law enforcement mode" during the events giving rise to this action. He further stated that there is no indication that the officers were engaged in an activity that is related to BOP employees' power of arrest as provided in 18 U.S.C. §3050. The Magistrate found that the seizure was not a law enforcement function, but rather a penological function. We are considering whether to submit objections to this Report & Recommendation or to take other action.

**RELIGIOUS FREEDOM RESTORATION ACT CASES**

None.

**HEARINGS AND TRIALS**

**Bernal v. Black and Lewis, Case No. 96-1209, FCI Pekin**

Plaintiff alleged that he was retaliated against after he threatened to file a formal grievance



concerning the working conditions in the commissary. This First Amendment claim went to a jury trial February 3d and 4th. The jury returned a verdict in favor of the defendants. Janice Bonneville assisted at trial.

**U.S. v. Francis and Haney, USP Florence**

Inmates charged with attempted escape from USP and possession of contraband (escape paraphernalia). The in camera hearing to rule on the security issue of request for plans and blueprints was held on February 18, 1999. The Court directed that certain statements be made to the defense and advised that no further statements or information would be required at this time. This was viewed as a fairly favorable decision. Final pretrial hearing was set for May 18, 1999.

**USA v. Simmonds, ADX Florence**

Arraigned on two counts of assault on staff at ADX. Matter initially charged as misdemeanors but due to history of assaultive behavior, inmate indicted on felony counts. Jury acquitted the inmate of assaulting two officers at the ADX.

**UPCOMING HEARINGS OR TRIALS**

**Dunn v. Black, 96-928-JPG, FCI Greenville**

This is a case arising from the October 1995 disturbance at FCI Greenville. Plaintiff alleges that correctional officer Black and other unidentified staff, dressed in riot uniforms, used excessive force while transporting him to R & D. Trial is set for April 19, 1999.

**Tuite v. True, et al., Case No. 93-CV-3248, MCC Chicago**

Attorney alleges that conversations with his client were recorded by MCC Chicago in 1992. Court set status hearing for April 13, 1999.

**CRIMINAL MATTERS**

**U.S. v. Francis and Haney, USP Florence**

See above (Hearings and Trials).

**U.S. v. Riddle and Black, USP Florence**

Plea negotiations ongoing regarding the charge of an inmate murder at USP. Discovery and protective order issues continue with respect to inmate Riddle. Inmate Black pleaded guilty to aggravated assault. Sentencing is set for March of 1999. Riddle filed motion for relief from protective order. Hearing held by Judge Sparr on December 16, 1998. At that time, Judge

wanted testimony from BOP on what documents had been provided for Riddle to review in accordance with the court orders. BOP testified that all documents had been provided on several occasions for Riddle's review. The Judge held that the BOP had complied with the order and that no relief was necessary. On January 16, Riddle changed his plea to guilty of Voluntary Manslaughter and 4 counts of assault on staff. Sentencing set for sometime in April.

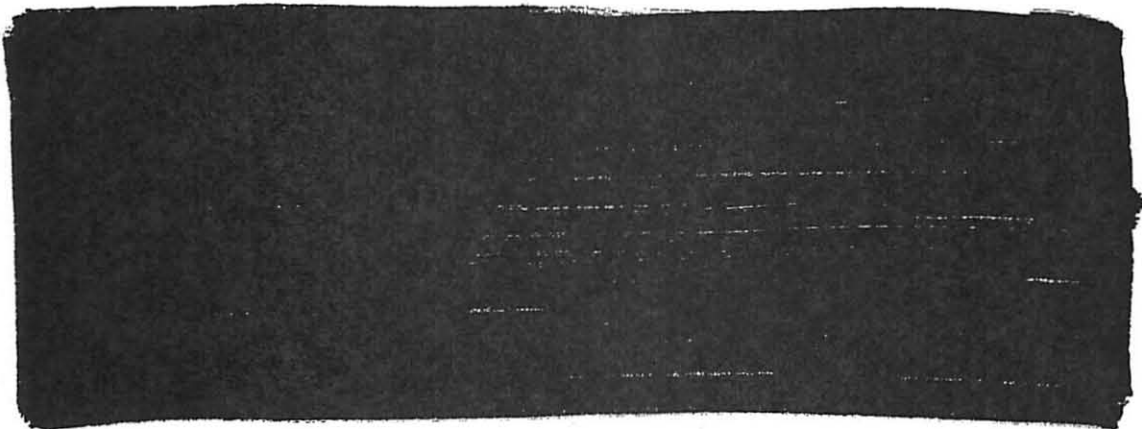
U.S. v. Zepeda, Case No. 98-10073, FCI Pekin  
See above (Hearings and Trials).

PERSONNEL ISSUES



STAFF TRAVEL AND LEAVE

ble



Tort dBASE Files sent via e-mail to Monica Potter. OGC. on 2/2/99.



2 PRA

U.S. Department of Justice  
Federal Bureau of Prisons  
North Central Regional Office

Tower II, 8th Floor  
400 State Street  
Kansas City, KS 66101-2421

April 12, 1999

MEMORANDUM FOR CHRISTOPHER ERLEWINE, ASSISTANT DIRECTOR/GENERAL  
COUNSEL  
GENERAL COUNSEL AND REVIEW DIVISION

FROM: JOHN R. SHAW, Regional Counsel

SUBJECT: Monthly Report (March, 1999)

**LITIGATION, CLAIMS, AND ADMINISTRATIVE REMEDY STATISTICS**

**LITIGATION:**

inst	num	hc	ftc	biv	oth	ans	pen	cld	h/t	set	awd
NCR	85	52	9	15	9	19	503	29	4	1	

**Total cases for Calendar Year 181**

NUM - Number of total lawsuits filed in the month  
HC - Number of habeas corpus actions filed in the reporting period  
FTC - Number of FTCA actions filed  
BIV - Number of Bivens actions filed  
OTH - Number of other actions filed, e.g., mental health, mandamus  
ANS - Number of litigation reports completed

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**PEN** - Number of cases pending  
**CLD** - Number of cases closed  
**H/T** - Number of hearings or trials (include in narrative)  
**SET** - Number of settlements (include in narrative)  
**AWD** - Number of Awards (include in narrative)

**ADMINISTRATIVE CLAIMS:**

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
67	70	99									

**ADMINISTRATIVE REMEDIES**

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
188	208	228									

**Total for Calendar Year 624**

**FREEDOM OF INFORMATION ACT/PRIVACY ACT REQUESTS**

	PRIVACY ACT	FOIA
ACTUAL ON-HAND	29	8
ACTUAL RECEIVED	61	15
ACTUAL PROCESSED	69	10
ACTUAL BACKLOG	3*	1

**Total for Calendar Year 219**

Backlog represents those requests which have not been responded to within the twenty work days target set by DOJ.

\* Awaiting records from archives.

**ADVERSE DECISIONS**

**Collins v. Bureau of Prisons, et al., 97-WM-1533, USP Florence**

The Court dismissed the United States on sovereign immunity, however, it recommended the case go forward as plaintiff described in sufficient detail circumstances of his alleged assault by 4

correctional officers in the SHU on January 1996 at the USP. The Court ruled that, if true, the allegations would violate the 8<sup>th</sup> Amendment. This is a "he said, we said" matter that will probably go to trial.

### SETTLEMENTS OR JUDGMENTS

**Teich v. U.S.A., et al., Case No. CV-S-98-01213-HDM, MCFP Springfield**

Plaintiff's filed a Bivens/FTCA action wherein they allege wrongful death of a quadriplegic inmate who died at the medical center. A settlement agreement was made for \$88,000.00. The Magistrate was pressing for a \$100,000 settlement and the AUSA stated that cases in her district were usually worth more than the estimated value of \$6,000 - \$50,000 range. [REDACTED]

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### DECISIONS OF INTEREST

**Clark v. Keohane, et al., Case No. 98-3485-CV-S-RGC -H, MCFP Springfield**

Petitioner requested an immediate release from custody so that he could obtain an autologous bone marrow transplant, which the respondents have denied. On March 19, 1999, the case was dismissed.

**Rahman v. Keohane, et al., W.D. MO. Civil No. 97-3279-CV-S-RGC, MCFP Springfield**

Inmate Rahman is serving a life sentence for crimes associated with the bombing of the World Trade Center in New York City. This lawsuit alleged some 41 violations of plaintiff's constitutional rights, as well as violations of the RFRA of 1993. On March 30, 1999, the Western District of Missouri dismissed the case.

**Castor v. USPC and Helman, Case No. 98-1306, FCI Pekin**

Petitioner alleged violations by the Parole Commission and that his case manager altered his PSI. The allegations against the Parole Commission were dismissed on February 12, 1999. However, an issue of material fact remained with respect to the alleged alteration of his PSI. A telephone conference was held on March 5, 1999, in which the court was advised that the petitioner had not raised this matter through the administrative remedy procedure. Petition dismissed on March 23, 1999 for failure to exhaust.

**Flanory v. Helman, et al, Case No. 98-1115, FCI Pekin**

**Roberson v. Helman, et al, Case No. 98-1162, FCI Pekin**

Plaintiffs alleged that the implementation of the health services policy resulted in a violation of their constitutional rights. This case copied the original Massey case (97-1403). As with that case, these complaints were dismissed for failure to exhaust administrative remedies.

**Akbar v. Hawk and Pugh, Case No. 98-WM-0968, FCI Florence**

The Magistrate Judge recommended dismissal of this petition and on March 11, 1999, the Judge adopted the recommendation and dismissed the petition. This was an allegation *a la* Workmen that the BOP could not set the amount and schedule of payments for a court ordered fine. Court held that the fine was due immediately in full and the BOP is merely used to facilitate collection of the payments. No judicial function has been delegated.

**Cleveland v. FPI, et al., Case No. 96-N-0133, USP Florence**

This was a challenge to the inmate's removal from a UNICOR work assignment for medical reasons and to his classification and placement at an United States Penitentiary. On March 5, 1999, the Court granted the government's motion to dismiss.

**Russell-el v. USA, et. al., Case No. 98-D-941, USP Florence**

Court dismisses this case, with prejudice, for failure of defendant to file within the 2 year state statute of limitations controlling for Bivens actions in the District of Colorado, indicating that there was no basis for "tolling" the statute of limitations in this case. In addition, the Court dismissed the United States for failure to file within the time prescribed under the FTCA.

**Villarreal v. Harrison, et al., Case No. 97-N-1352, USP Florence**

Plaintiff alleged his placement in SHU and classification as a gang member violated the constitution. Court found it did not and the matter has been dismissed with prejudice. On March 20, 1999, the Court accepted the R&R that recommended granting government's motion for summary judgement.

**Anderson v. Tenenbaum et al., Case No. 98-CV-8, FMC Rochester**

On February 18, 1999, an administrative due process hearing was provided to Alex Anderson. It was determined that Anderson continues to suffer from a mental disorder and that he continues to require psychotropic medication because he is dangerous to himself and/or others and he is gravely disabled. Accordingly, on March 1, 1999, the BOP filed a response to the show cause order noting that it agreed that plaintiff should be (and in fact was) provided a hearing, and respectfully requested that the court refrain from addressing the constitutionality of the 30 day review provision. On March 9, 1999, the Magistrate issued an R&R holding that an adversary hearing is constitutionally mandated every 180 days to challenge the program of ongoing psychotropic medication. The Magistrate further recommended that the Court retain continuing jurisdiction over this matter. On March 23, 1999, the Judge issued an Order declining Anderson's objections to the R&R.

**PENDING CASES OF INTEREST**

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**Warden, et al. v. Perrill, Case No. 95-S-13, FCI Englewood**

This case involves allegations that inmates on a prison work assignment were exposed to asbestos. There are seventeen inmate plaintiffs represented by counsel. The U.S. Attorney's Office filed a motion to dismiss on behalf of all represented defendants, alleging, inter alia, that the Bivens claim was precluded by Demko and the Inmate Accident Compensation Act. The motion to dismiss was pending for three years. The Magistrate Judge assigned to the case recently issued a report denying the motion to dismiss on the Demko grounds.

**Free v. U.S.A., et al., Case No. CIV 98-1284 W, MCFP Springfield**

Plaintiff alleges that a Lieutenant assaulted him in various ways during the course of his transfer from the Federal Transportation Center in Oklahoma City, OK, to the U.S. Medical Center for Federal Prisoners, Springfield, MO.

**Shockey v. T.C. Peterson, Case No. #99-247, FCI Sandstone**

Habeas action where petitioner alleges he was eligible for 3621e release in March 1996, however, a Change Notice to the Crime of Violence Program Statement, added his offense to a crime of violence. Petitioner alleges his sentence was re-computed to reflect the one year off, however, almost a year later, was re-computed to reflect the loss of 3621e, which petitioner alleges the BOP cannot do as it is retroactive and violates ex post facto. Petitioner requests the restoration of 3621e release.

**Cook v. Melusnic, et al., Case No. 98-D-2537, FCI Florence**

Inmate claims BOP staff erred in failing to correct Central File records which caused discrimination toward him in placement, custody, and programming. He is seeking monetary damages and transfer back to the Western Region. Inmate filed pursuant to 28 U.S.C. 2241, and claims violations of the Privacy Act, and the Speedy Trial Act of 1974.

**Verdecia v. R.E. Holt, et al, Case No. 98-B-2535, USP Florence**

Inmate alleges staff placed him in a cell with other inmates who assaulted him, despite his warnings of the danger. Seems to be arguing that "Latin King" gang members are inherently dangerous and infers that no other inmate should ever be housed with them.

**Appleby-el v. USA, Case No. 97-N-0671, ADX Florence**

In this FTCA case, inmate alleges he fell while getting out of the shower. The inmate claims he was not provided a shower mat and that he suffered injury. Judge accepted the R&R and denied the government's motion for summary judgment. He recommitted the matter to the Magistrate for pretrial proceedings, with direction to schedule matters so that he can make a recommendation as to disposition no later than August 31, 1999. AUSA interested in attempting settlement negotiations with inmate.

**Bustillo v. Hawk, Case No. 95-WM-2242, ADX Florence**

On November 24, 1998, a hearing (video) was held on plaintiff's motion for a preliminary injunction. In an Order filed March 17, 1999, the Court denied the motion. In citing SCFC ILC, Inc. v. Visa USA, Inc., 936 F.2d 1096, 1098 (10<sup>th</sup> Cir. 1991), the Court noted that plaintiff had failed to show any evidence of retaliation for exercise of his First Amendment rights to seek judicial redress; that plaintiff failed to show evidence of an Eighth Amendment violation or that he will suffer irreparable injury if the injunction is not issued: that plaintiff failed to show competent evidence [actually showed none] that he was denied due process in taking of property and in disciplinary hearings; defendants submitted competent evidence showing that plaintiff has visited the law library and has regular access to legal materials for use in his cell and that defendants showed competent evidence why he was not allowed to use an ink pen and that plaintiff failed to show any actual injury.

**Cuoco v. Lopez, Case No. 98-D-1182, ADX Florence**

District Court rescinded its prior dismissal of the FTCA claims as they relate to assault and battery allegations. Court correctly noted that the defendant is a law enforcement officer, which subjects the USA to potential FTCA liability for such actions. Reinstated the claim and provided government with 20 days in which to respond on the FTCA allegations.

**Garrett v. Hawk, et al., Case No. 96-Z-1379, ADX Florence**

This Bivens action (which was up on appeal of the administrative exhaustion initial dismissal) is back in District Court for further proceedings. The Court ordered plaintiff to show cause why the matter should not be dismissed for failure to prosecute. Plaintiff's counsel filed an inaccurate declaration to the court asserting that legal staff at Florence were not properly responding to his inquiries and stating that they had offered to provide him assistance in identifying proper defendants. Legal staff provided the USAO with a letter and declaration explaining that they did not and would not offer up BOP staff for personal liability as defendants but that they were willing to provide addresses for staff members if plaintiff's counsel would provide the names. Plaintiff's counsel has not been forthcoming with identifiable staff names.

**USA v. McElhaney, D.Kansas, USP Leavenworth**

Coordinated effort between USP Leavenworth, ADX Florence, and USP Marion in response to the attempts to visit various inmates at these institutions by court-appointed investigators and the circumvention of our correspondence regulations by the stand-by counsel in this matter.

**RELIGIOUS FREEDOM RESTORATION ACT CASES**



See Rahman v. Keohane, et al., W.D. MO. Civil No. 97-3279-C  
Springfield

### HEARINGS AND TRIALS

**Waclaw v. Gilkey, et al., Case No. 99-CV-0526, MCC Chicago**

Inmate alleges he should remain at MCC Chicago, and not be transferred to FDC Oakdale pursuant to an INS detainer. Petitioner was transferred to FDC Oakdale. He subsequently filed motion to hold the respondents in contempt of court for the transfer while the habeas petition was pending. The Court ordered the plaintiff to file a brief in support of motion to show cause and Respondents to file a motion to dismiss. Status hearing held on March 18, 1999. The judge dismissed the case without prejudice for want of prosecution on April 1, 1999. Counsel for the plaintiff failed to appear at the last two status hearings, and failed to file any further motions/responses.

**Merritt v. Hawk, et al., Case No. 95-Z-2653, ADX Florence**

A hearing was held regarding plaintiff's attempt to reactivate a TRO request he filed in late 1995. Specifically, plaintiff was concerned that his placement in an ADX general population unit put his life in jeopardy. At the hearing, plaintiff asserted that he only wanted to be guaranteed no physical contact with other inmates and single recreation. He is already receiving those things and the BOP does not intend to do otherwise with him. The hearing turned into a settlement conference with no final outcome. Clearly, the TRO will not be issued, as the court does not believe a threat to his immediate safety exists. Oral argument on the outstanding motions in the underlying case set for April 22, 1999.

**Martinez v. Counts, et al., Case No. 90-3224-CV-S-4, MCFP Springfield**

The issue was whether a decision to have inmate Martinez work while he was on pre-trial status resulted in punishment prohibited by the Fifth Amendment. On March 30, 1999, a verdict was given in favor of the defendants. Inmate Martinez has advised the legal staff that he will pursue another appeal. The jury deliberated for about one hour and the Judge's evidentiary rulings were quite favorable to inmate Martinez.

### UPCOMING HEARINGS OR TRIALS

**U.S. v. Francis and Haney, USP Florence**

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Inmates charged with attempted escape from USP and possession of contraband (escape paraphernalia). Final pretrial hearing set for May 18.

**Dunn v. Black, 96-928-JPG, FCI Greenville**

This is a case arising from the October 1995 disturbance at FCI Greenville. Plaintiff alleges that correctional officer Black and other unidentified staff, dressed in riot uniforms, used excessive force while transporting him to R & D. Trial is set for April 19, 1999.

**Tuite v. True, et al., Case No. 93-CV-3248, MCC Chicago**

Attorney alleges that conversations with his client were recorded by MCC Chicago in 1992. Court set status hearing for April 13, 1999.

**CRIMINAL MATTERS**

**U.S. v. Riddle and Black, USP Florence**

Inmate Black pleaded guilty to aggravated assault and was sentenced to 73 months consecutive. Inmate Riddle changed plea to guilty of Voluntary Manslaughter and 4 counts of assault on staff and is set for sentencing May 11.

**U.S. v. Miller, Case No. 98-10046, FCI Pekin**

The defendant was found guilty in November of 1998 of Possession of Contraband Inside a Penal Institution and Possession with Intent to Distribute Heroin. This finding placed the inmate in "Career Offender" status. On March 5, 1999, he was sentenced to a consecutive term of imprisonment of 210 months.

**PERSONNEL ISSUES**

Lisa Eckl, Honors Attorney, has been selected as Attorney at FCI Fort Dix, NJ.

**STAFF TRAVEL AND LEAVE**



**U.S. Department of Justice  
Federal Bureau of Prisons  
North Central Regional Office**

*Tower II, 8th Floor  
400 State Street  
Kansas City, KS 66101-2421*

May 12, 1999

**MEMORANDUM FOR CHRISTOPHER ERLEWINE,  
ASSISTANT DIRECTOR/GENERAL COUNSEL  
GENERAL COUNSEL AND REFORM DIVISION**

**FROM: JOHN R. ...  
SUBJECT: Monthly Re**

*© RFR*

**LITIGATION, CLAIMS, AND ADI**

**REMEDY STATISTICS**

**LITIGATION:**

inst	num	hc	ftc	biv	oth	ans	pen	cld	h/t	set	awd
NCR	54	30	3	15	6	31	503	41	6		

**Total cases for Calendar Year 235**

- NUM - Number of total lawsuits filed in the month**
- HC - Number of habeas corpus actions filed in the reporting period**
- FTC - Number of FTCA actions filed**
- BIV - Number of Bivens actions filed**
- OTH - Number of other actions filed, e.g., mental health, mandamus**
- ANS - Number of litigation reports completed**

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**PEN** - Number of cases pending  
**CLD** - Number of cases closed  
**H/T** - Number of hearings or trials (include in narrative)  
**SET** - Number of settlements (include in narrative)  
**AWD** - Number of Awards (include in narrative)

**ADMINISTRATIVE CLAIMS:**

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
67	70	99	88								

**ADMINISTRATIVE REMEDIES**

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
188	208	228	215								

**Total for Calendar Year 839**

**FREEDOM OF INFORMATION ACT/PRIVACY ACT REQUESTS**

	PRIVACY ACT	FOIA
ACTUAL ON-HAND	32	15
ACTUAL RECEIVED	60	26
ACTUAL PROCESSED	56	19
ACTUAL BACKLOG	2	1

**Total for Calendar Year 305**

Backlog represents those requests which have not been responded to within the twenty work days target set by DOJ.

\* Awaiting records from archives.

**ADVERSE DECISIONS**

The following RDAP cases are being currently appealed:

South Dakota

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1. **Bellis v. Davis** (enhancement. 922(g))
2. **Pierson v. Davis** (enhancement)
3. **Shields v. Davis** (enhancement)
4. **Miller v. Davis** (enhancement)
5. **Cook v. Davis** (enhancement)
6. **Clark v. Davis** (enhancement)
7. **Winston v. Davis** (enhancement)
8. **Walker v. Davis** (enhancement)
9. **Lopez v. Davis** (enhancement)
10. **Martin v. Davis** (enhancement)
11. **Betz v. Davis** (enhancement)
12. **Walter v. Davis** (enhancement)
13. **Larison v. Davis** (enhancement)

1-10 have been consolidated and oral argument will be made for these case on May 12, 1999, before the 8th Circuit in St. Louis.

We also have adverse opinions in five other cases that must be filed by June 1, 1999.

#### Minnesota

1. **Zacher v. Tippy** (prior conviction)(brief filed)

#### Colorado

1. **Hicks v. Brooks** (enhancement)

#### Kansas

1. **Guido v. Booker**, 98-3266-RDR (enhancement)
2. **Scroger v. Booker**, 98-3260-RDR (enhancement)
3. **Ward v. Booker**, 98-3274-RDR (enhancement)

In these 3 cases, the District Court found that the Director of the Federal Bureau of Prisons exceeded her authority in denying relief to petitioner's under 18 U.S.C. section 3621 (e)(2)(B) based on a sentence enhancement for possession of a firearm. Dan Eckhart has generously volunteered to provide AUSA with litigation assistance in appealing these 3 cases to the 10th Circuit Court of Appeals.

#### **Okai v. Federal Bureau of Prisons, Case No. 97-549-DRH, FCI Oxford/FCI Greenville**

The plaintiff in this case used the Freedom of Information Act to request documents related to the October 1995 disturbance at FCI Greenville. The BOP released some documents and withheld others by asserting various exemptions under the FOIA. The Magistrate issued an R&R that denied the BOP the use of the "law enforcement records" exemption found at 5 USC §

522(b)(7)(C) for 19 documents. Subsequently, a Memorandum and Order issued by the Judge in this case, mistakenly denied the BOP exemptions under § 522(b)(7)(c). As a result, we have requested that the order be appealed and that the DOJ Office of Information Privacy handle the appeal.

### SETTLEMENTS OR JUDGMENTS

None.

### DECISIONS OF INTEREST

#### Hinton v. Willie Scott, et al., Case No. 95-3120-RDR, USP Leavenworth

A copy of the district court's Judgment and Order granting the defendants summary judgment and Order from the 10th Circuit dismissing the appeal was recently received in this case. In this Bivens, styled action, the plaintiff had alleged he was unconstitutionally subjected to excess force during a forcible removal from his cell. he claimed he was denied necessary medical care for his resulting injuries and he claimed he was denied due process in the resulting disciplinary action that was taken against him. The plaintiff had participated in a work stoppage and as a result received disciplinary infractions for encouraging others to refuse to work or participate in the strike, assault, and refusing to obey an order.

The court recognized the security risk presented by all inmates participating in the work stoppage, the use of force to restrain plaintiff was understandable and hardly unexpected given plaintiff's refusal to cuff up for transport as ordered, and the altercation that ensued when the first guard entered plaintiff's cell. The court also determined that the plaintiff received adequate and timely medical attention for his injuries which were relatively minor. Finally, the court determined that the record demonstrated the due process standards under Wolff were fully satisfied, and that sufficient evidence supported the disciplinary findings of guilt.

#### Griffin v. United States Parole Commission, Case No. 96-0342-(JR), USP Leavenworth

This which was before the court on remand from the Court of Appeals was brought pursuant to the Privacy Act wherein the plaintiff sought damages for defendant's allegedly wilful use of erroneous information to justify setting his parole rehearing date beyond the guideline range. The court granted the defendant's motion for summary judgment on the grounds that the action was barred by the statute of limitations and that the information relied upon was accurate. The defendant's motion for summary judgment was granted on March 31, 1999.

#### Donna Buford, as legal guardian for Kendon Leger, a minor v. United States of America,

**Case No. 97-2263-JWL, USP Leavenworth**

In this FTCA wrongful death action, plaintiff's decedent was killed in the USP, Leavenworth Special Housing Unit (SHU) by a fellow inmate during recreation. Plaintiff was represented by private counsel. After discovery, including depositions of numerous staff and inmate witnesses, the United States filed a motion for summary judgment citing the discretionary function exception to the FTCA as well as failure to state a claim under Kansas negligence law. The plaintiff's case after discovery alleged staff negligence in four security related areas: 1) Failure to conduct cell searches every ten days; 2) Failure to search the recreation pen; 3) Failure to utilize a transfrisker on inmates; 4) Failure to pat search inmates going to recreation. The court ruled in favor of the United States under the discretionary function exemption on all above issues, with the exception of the failure to pat search. Because Plaintiff submitted affidavits from both the murderer as well as an inmate witness which indicated they were not pat searched, the discretionary function exemption was not applied. However the court ruled in favor of the United States under pure negligence analysis regarding the pat search issue. The court held that before liability could be imputed under Kansas law, plaintiff must offer evidence indicating that prison employees knew, or should have known, of the risk posed by the aggressor to the victim, and then failed to take sufficient actions to prevent a subsequent attack. Because the evidence failed to establish during discovery that staff knew or should have known of an impending attack, the court dismissed this claim as well.

**Nowicki v. J. T. O'Brien, 98-C-875-C, FCI Oxford**

Petitioner alleges that we have violated 18 U.S.C §3658 by refusing to credit presentence time he spent in state custody against his current federal sentence. Respondents maintained that the time the petitioner is requesting was based solely on state charges before a federal detainer was lodged. The Court agreed and held that respondent properly refused to grant such credit because the time petitioner spent in state custody was not connected with offense for which the federal sentence was imposed. However, the Court noted that nothing in the record or in petitioner's allegations suggested that his custody was affected by the mere issuance of the probation warrant, as opposed to the lodging of the detainer. In Doyle v. Elsea, 658 F.2d 512 (7th Cir. 1981), the petitioner adduced evidence that he was unable to post bail as a direct result of the issuance of the federal warrant. Hence, the court in Doyle held that as a "practical matter" he was in pretrial custody "in connection with" his federal charges. As a result, the Doyle court found he was entitled to credit for time spent in pretrial custody prior to the detainer. Consistent with Doyle, the Court hints that the petitioner may be entitled to the time he seeks if he can make a similar showing and exhausts his remedies. The Court is in essence encouraging the petitioner to pursue a new angle.

**Hampton v. Keohane, et al., Case No. 98-3390-CV-S-RGC-H, MCFP Springfield**

Petitioner contended that the BOP should activate a heart transplant procedure necessary to

preserve his life or grant him an immediate release from custody to arrange for a heart transplant. Court dismissed the case on April 27, 1999.

**Davis v. Seiter, et al., Case No. 97-809-DRH, FCI Greenville**

On April 13, 1999, the Magistrate Judge, *sua sponte*, issued a Report and Recommendation that the case be dismissed with prejudice. The Magistrate noted that since the companion case in the District of Kansas has been settled, and because a provision of that settlement was to dismiss this action, that there is no reason this case should not be dismissed. Plaintiff was given 10 days to object.

**PENDING CASES OF INTEREST**

**Stewart v. Seiter, et al., Case No. 96-983-GPM, FCI Greenville**

On April 11, 1999, the Court issued an order setting aside the default judgment against defendants Seiter and Allen previously entered by the Magistrate. The District Judge construed the previous orders as Reports & Recommendations and construed defendant's appeal as objections to the R & R. The Judge relied upon 42 U.S.C. §1997e(g), a section of the PLRA which provides that "[a]ny defendant may waive the right to reply to any action brought by a prisoner under section 1983 of this title or any other Federal law." and that "such waiver shall not constitute an admission of the allegations contained in the complaint." 42 U.S.C. §1997e(g)(1). This section also provides that "[n]o relief shall be granted to the plaintiff unless a reply has been filed." *Id.*

**Kilgore v. (FNU) Booker, et al., Case No. 98-3264-GTV, USP Leavenworth**

In this Bivens-styled action, the plaintiff alleges defendants knew that his life was in serious danger and failed to transfer him out of USP Leavenworth. As a result, the plaintiff alleges that "a murder attempt was made on his life in January 1998 which caused serious injuries with prolonged damages."

**Young-Bey v. Rolland Swanson, et al., Case No. 98-3126-GTV, USP Leavenworth**

This Bivens-styled action alleges several staff members prevented Young-Bey from profiting from alleged information he provided to the FBI. He also alleges he was promised his sentence would be significantly reduced. Plaintiff cites such statutes as RICO as a jurisdictional basis for his complaint.

**Wartman v. United States, Case No. 98-395-WDS, USP Marion**

Plaintiff alleges that he was assaulted by a known white racist inmate when released from his cell for breakfast on February 28, 1997. He states he received five stab wounds which caused



loss of hearing in his right ear. loss of range of motion in his neck and a pronounced limp. Plaintiff asserts that staff knew of a race war between the "D. C. Blacks and white racist prisoners" but he was not warned or offered protection. Plaintiff claims prison staff should have known that he was in danger and should not have released from his cell.

**Soliz v. Keohane, et al., Case No. 99-3133-CV-S-RGC-H, MCFP Springfield**

Petitioner contended that he should have received a compassionate release due to renal failure and denial of a kidney transplant.

**Ballato v. Romine, et al., Case No. 99-552, FCI Sandstone**

Plaintiff alleges that he slipped on ice buildup and fell by J Unit causing severe injury to his back and head. Plaintiff alleges staff inaction to maintain the sidewalk caused the slip and fall, and that he received inadequate medical treatment.

**Banks v. Federal Bureau of Prisons, et al., Case No. 99-400, FCI Sandstone**

Plaintiff alleges false information in his PSI. that staff failed to correct false information in his PSI. thus adversely impacting his custody classification. housing, CCC. transfer. etc.

**Hudson v. Holt, Case No. 99-X-0014, USP Florence**

Inmate seeks to have BOP preserve tape recording of a telephone conversation he had on ITS with attorney. The Court ordered the BOP to preserve the recording and directed plaintiff to file an amended pleading within 30 days curing deficiencies. The court noted it will dismiss action and rescind order to preserve tape if no amended pleading is filed.

**Shinpaugh v. Carlson, et al., Case No. 98-WM-0706, FCI Florence**

Received adverse R&R denying qualified immunity in this 1<sup>st</sup> Amendment case. Institution disciplined an inmate for making insolent comments about staff in outgoing mail. Objections to the R&R have been filed.

**RELIGIOUS FREEDOM RESTORATION ACT CASES**

**Kikumura v. Hurley, et al., 98-B-1442, ADX Florence**

Inmate challenges the denial of pastoral visits. The inmate expressly raised a RFRA issue in his complaint and outside counsel was authorized. Motion to dismissed was filed and a status conference has been set for May 5, 1999.

**HEARINGS AND TRIALS**

**Merritt v. Hawk, et al., Case No. 95-Z-2653, ADX Florence**

A hearing was held regarding plaintiff's attempt to reactivate a TRO request he filed in late 1995. Specifically, plaintiff was concerned that his placement in an ADX general population unit put his life in jeopardy. At the hearing, plaintiff asserted that he only wanted to be guaranteed no physical contact with other inmates and single recreation. He is already receiving those things and the BOP does not intend to do otherwise with him. The hearing turned into a settlement conference with no final outcome. Clearly, the TRO will not be issued, as the court does not believe a threat to his immediate safety exists. Oral argument on the outstanding motions heard on April 22, 1999. New hearing on TRO set for May 26 at 2:00 p.m.

**Dunn v. Black, Case No. 95-928, FCI Greenville**

A bench trial was held in this case on April, 19, 1999. After Dunn, proceeding pro se, presented his case, the AUSA made a Rule 52 motion for a judgment as a matter of law. The Magistrate Judge granted this motion and found for the defendant.

**Scott Williams v. Victor Aponte, et al., Civil No. 95-678-JPG, USP Marion**

On April 15, 1999, an evidentiary hearing was held. After the plaintiff presented his evidence, the Court dismissed the case and the government never had to present evidence.

**U.S. v. Thomas, FPC Florence**

Inmate was found guilty of escape from the FPC. This defendant claimed he was not the person who escaped from the camp. The jury deliberated for a little over an hour before returning the guilty verdict. Sentencing set for July 2, 1999.

**U.S. v. Amaya-Martinez, Case No. 99-10022, FCI Pekin**

Inmate charged with Trafficking in Contraband. The inmate hid a weapon in the sole of his tennis shoe. The initial arraignment was held on April 29, 1999 at which time the inmate pled not guilty and was appointed counsel. The final pretrial hearing is scheduled for June 16, 1999.

**U.S. v. Zepeda, Case No. 98-10073, FCI Pekin**

Inmate charged with Assault with Intent to Commit a Felony following an incident on July 4, 1998. The inmate was sentenced to a consecutive term of 77 months on April 15, 1999. The government agreed to drop a second count of Possession of a Weapon Inside a Penal Institution in exchange for a waiver of appeal.

**UPCOMING HEARINGS OR TRIALS**

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See Adverse Decision, a number of cases have been consolidated and oral argument will be made for these case on May 12, 1999, before the 8th Circuit in St. Louis.

**John Glen Keeling v. Willard Ford, et al, USP Leavenworth**

Plaintiff alleges use of excessive force by defendants. A significant amount of time is being devoted to this civil action wherein the plaintiff is represented by the Washburn Law Clinic in Topeka.

Trial is scheduled for June 14, 1999.

**CRIMINAL MATTERS**

**U.S. v. Riddle and Black, USP Florence**

Inmate Black pleaded guilty to aggravated assault and was sentenced to 73 months consecutive. Inmate Riddle changed plea to guilty of Voluntary Manslaughter and 4 counts of assault on staff and is set for sentencing May 11.

**U.S. v. McElhiney, USP Leavenworth**

The trial date has now been changed to June 21, 1999 in order to allow additional time to interview prospective witnesses. The Regional Counsel, SIS, USP Leavenworth Attorney, Judge Rogers and his law Clerk all met in an effort to resolve issues concerning security concerns and interview of prospective witnesses USP Marion and FLF. ADMAX..

**U.S. v. Thomas, FPC Florence**

See Hearings and Trials.

**U.S. v. Reyes-Lopes, Case No. 99-106, FCI Waseca**

An indictment cam down on the assault case from FCI Waseca. This stemmed from a middle of the night assault on another inmate by striking him in the face with an iron.

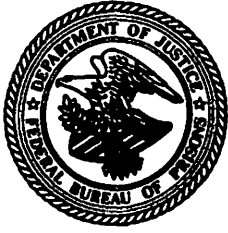
**U.S. v. Amaya-Martinez, Case No. 99-10022, FCI Pekin**

See Hearings and Trials.

**U.S. v. Zepeda, Case No. 98-10073, FCI Pekin**

See Hearings and Trials.

**PERSONNEL ISSUES**



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U.S. Department of Justice  
Federal Bureau of Prisons  
North Central Regional Office

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Kansas City, KS 66101-2421

June 9, 1999

MEMORANDUM FOR CHRISTOPHER ERLEWINE.  
ASSISTANT DIRECTOR/GENERAL COUNSEL  
GENERAL COUNSEL AND REVIEW DIVISION

FROM: JOHN R. SHAW, Regional Counsel

SUBJECT: Monthly Report (May, 1999)

**LITIGATION, CLAIMS, AND ADMINISTRATIVE REMEDY STATISTICS**

**LITIGATION:**

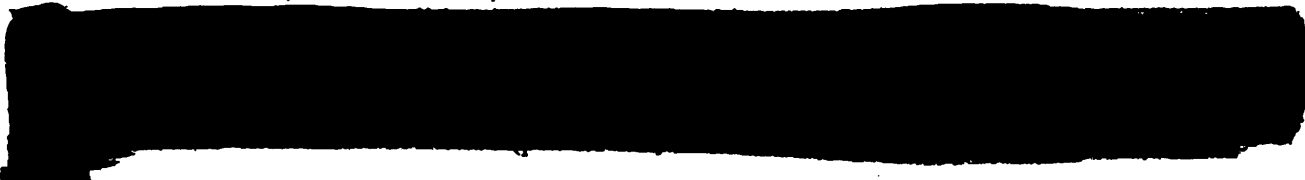
inst	num	hc	ftc	biv	oth	ans	pen	cld	h/t	set	awd
NCR	34	25	3	4	2	29	504	33	4		

**Total cases for Calendar Year 269**

NUM - Number of total lawsuits filed in the month  
HC - Number of habeas corpus actions filed in the reporting period  
FTC - Number of FTCA actions filed  
BIV - Number of Bivens actions filed  
OTH - Number of other actions filed, e.g., mental health, mandamus  
ANS - Number of litigation reports completed

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PEN - Number of cases pending  
 CLD - Number of cases closed  
 H/T - Number of hearings or trials (include in narrative)  
 SET - Number of settlements (include in narrative)  
 AWD - Number of Awards (include in narrative)



b2

**ADMINISTRATIVE CLAIMS:**

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
67	70	99	88	77							

**ADMINISTRATIVE REMEDIES**

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
188	208	228	215	207							

**Total for Calendar Year 1046**

**FREEDOM OF INFORMATION ACT/PRIVACY ACT REQUESTS**

	PRIVACY ACT	FOIA
ACTUAL ON-HAND	28	5
ACTUAL RECEIVED	43	13
ACTUAL PROCESSED	71	30
ACTUAL BACKLOG	2	0

**Total for Calendar Year 361**

Backlog represents those requests which have not been responded to within the twenty work days target set by DOJ.

\* Awaiting records from archives.

**ADVERSE DECISIONS**

None.

### **SETTLEMENTS OR JUDGMENTS**

None.

### **DECISIONS OF INTEREST**

#### **Ballato v. Romine, et al., Case No. 99-552, FCI Sandstone**

Plaintiff alleges that he slipped on ice buildup and fell by J Unit causing severe injury to his back and head. Plaintiff alleges staff inaction to maintain the sidewalk caused the slip and fall, and that he received inadequate medical treatment. Order issued on May 3, 1999 dismissing case.

#### **Moore v. Keohane, et al., Case No. 98-3487-CV-S-RGC-H, MCFP Springfield**

Petitioner requested an immediate kidney transplant or a compassionate release so that he could arrange for a kidney transplant. Case dismissed on May 11, 1999, with a partial grant, whereas the Court directed that the petitioner be seen by the MCFP contract Transplant Specialist for evaluation.

#### **Massey v. Wheeler et al, Case No. 98-1348, FCI Pekin**

Bivens action alleging that staff hampered the inmate's use of unmonitored telephone lines and opened and read his legal mail. The inmate's attorney joined as a plaintiff, alleging that the actions of staff violated his constitutional rights as well. Case dismissed due to the inmate's failure to exhaust administrative remedies.

#### **Gerald M. Kelly v. Mr. Scott, et al., Case No. 95-3101 (10th Cir. No. . 99-3132)**

##### **USP Leavenworth**

The court granted defendant's Motion for Summary Judgment in this case on February 23, 1998 wherein the plaintiff alleged a violation of his constitutional rights when a piece of glass which was broken by a staff member went into his eye. He further alleged that he was subsequently denied medical treatment and as a result he sustained a permanent eye injury. The plaintiff filed a motion for reconsideration and recusal. These motions were denied on March 24, 1999. The plaintiff filed his notice of appeal on May 3, 1999.

#### **Duarte v. BOP, Case No. 95-69-GPM (S.D. Illinois)(USP Marion)**

Plaintiff was appointed counsel to assist in this civil matter that has been set for trial. Counsel made arrangements to visit at ADX Florence with the plaintiff and several witnesses. He became

verbally abusive to visiting room staff and then he terminated the remainder of his visits. He sought to withdraw from the case. ADX Florence staff provided information to the AUSA to facilitate his response to these allegations. The Warden at the ADX wrote a lengthy letter to Judge explaining what occurred. On March 31st, the Court granted the attorney's request to withdraw.

**Embrey v. Parole Commission, et al., Case No. MC3-97-18, NCRO**

Plaintiff had been erroneously released. When he was taken back into custody, he sought and received bail. After the Supreme Court refused to review the en banc opinion of the 8th Circuit which in essence re-instated his two consecutive 20 year sentences, his bond was revoked. The order was moot as plaintiff and his half-brother had been arrested on unrelated charges in Missouri (including felon in possession of a firearm) and plaintiff was back in federal custody.

**PENDING CASES OF INTEREST**

**Aldape v. Sosa, et al., Case No. 98-WM-2791, ADX Florence**

Plaintiff claims he was coerced into assaulting another inmate and various other constitutional violations by individual defendants. Seeks \$500,000 from each defendant as well as \$1,000,000 in punitive damages, jointly and severally.

**Moore v. Cooksey, et al., Case No. 98-WM-2321, ADX Florence**

Plaintiff claims violations of his 14<sup>th</sup> Amendment rights of due process. He claims that he was illegally placed in the ADX Control Unit, and that falsified documents were used to justify the placement. He also alleges that he falls under the Americans With Disabilities Act (ADA) because of his medical condition and that as a result he was not to be placed in the Control Unit as inmates with "major physical disabilities" cannot be placed in the Control Unit.

**Sandefur v. Pugh, Case Nos. 98-1377 and 98-1400 (10<sup>th</sup> Circuit), ADX Florence**

In this habeas action, District Court dismissed Application for petitioner's request for prior custody credit under 18 USC § 3585(b). Petitioner requested credit for time spent on a federal writ of habeas corpus ad prosequendum [13 months] from the State of Nevada. Petitioner was serving a state sentence at the time, received a concurrent federal sentence, and returned to the state. State sentence continued to operate while petitioner was on writ. District Court dismissed based upon the plain language of § 3585(b) which precludes credit if it has already been credited against another sentence. Petitioner appealed. Tenth Circuit appointed Federal Public Defender's Office to represent inmate and requested parties address whether § 3585 operates to bar the grant of credit against a prisoner's federal sentence for time spent in custody when the petitioner already received credit for this time against his state concurrent sentence.

**Wilson v. Herrera, Case No. 99-K-765, FCI Florence**

In this habeas action, the inmate claims he is being denied pretrial jail credit on his new law sentence. He claims that his old law sentence in being computed in a manner to eliminate his jail credit on the new law sentence.

**Merritt v. Pugh, Case No. 97-Z-2118, ADX Florence**

Habeas petition wherein inmate seeks to challenge very old disciplinary actions. Court allowed him to amend petition after response already filed by government. Petitioner now seeks to challenge 62 separate disciplinary actions between 1988 and 1991. We renewed our objections to the amendment and argued prejudicial delay and failure to exhaust.

**Williams v. Pitt & Bowens, Case No. 96-597-JPG, FCI Greenville**

Magistrate Judge issued a Proposed Findings of Fact and Conclusions of Law in this case which arose out of the 1995 Disturbance at FCI Greenville. The Magistrate recommended that judgment be entered against plaintiff because of insufficient proof that the defendants caused the alleged constitutional violation.

**RELIGIOUS FREEDOM RESTORATION ACT CASES**

None.

**HEARINGS AND TRIALS**

**Merritt v. Hawk, et al., Case No. 95-Z-2653, ADX Florence**

Continuation of TRO hearing initially set for April. Inmate, who is represented by appointed counsel, appeared via video conference. Plaintiff attempted to call four inmate witnesses, all of whom refused to exit their cells to participate in the hearing. Plaintiff called two staff as witnesses and presented the plaintiff himself. Three hours had elapsed and the court continued the matter until July 16, when it will address the issue of the inmates who refuse to comply with the subpoenas and the defendants will present their case. Plaintiff claims his life is in danger in general population at ADX. He was forcefully moved from SHU to General Population in February 1999.

**Turner v. USA, Case No. 97-S-1340, ADX Florence**

The Magistrate Judge ordered a hearing into plaintiff's motion for TRO (without allowing government to respond in writing). Plaintiff claimed his life was in danger because he was being poisoned by ADX staff. Several witnesses were presented to rebut plaintiff's contentions at the May 24, 1999 hearing. After a 3.5 hour hearing, the Magistrate took the matter under



advisement. A recommendation favorable to the government was issued on May 25, 1999.

**USA v. Francis and Haney, attempted escape from USP Florence**

Motions hearing held May 18, 1999. Court reversed itself on several discovery issues from prior ruling. Ordered that BOP provide tour to defense counsel and allow video taping of various security areas, pursuant to a protective order. The tape is to remain in BOP custody and the BOP is to draft protective order. Duress defense allowed to proceed.

**John Glen Keeling v. Willard Ford, et al, USP Leavenworth**

Plaintiff alleges use of excessive force by defendants. A settlement conference was conducted, plaintiff requested restoration of (120) one hundred twenty days of SGT and the expungement of the incident report which gave rise to the lawsuit. Upon consultation with all relevant parties, the Warden at USP Allenwood agreed to restoration of (60) sixty days SGT. After providing a sample settlement agreement to the AUSA, an agreement was drafted to present to Keeling's attorney. The agreement has been sent to Keeling and we are waiting for the signed documents to be returned.



**UPCOMING HEARINGS OR TRIALS**

**U.S. v. Amaya-Martinez, Case No. 99-10022, FCI Pekin**

Inmate charged with Trafficking in Contraband. The inmate hid a weapon in the sole of his tennis shoe. The initial arraignment was held on April 29, 1999 at which time the inmate pled not guilty and was appointed counsel. The final pretrial hearing is scheduled for June 16, 1999.

**CRIMINAL MATTERS**

**U.S. v. Riddle, USP Florence**

Inmate pleaded guilty to voluntary manslaughter and 4 counts impeding staff. At sentencing, judge declined to sentence per the plea agreement and threw out the additional time for assaulting staff. Inmate sentenced to 10 years consecutive to outstanding terms.

**PERSONNEL ISSUES**

**STAFF TRAVEL AND LEAVE**



**U.S. Department of Justice  
Federal Bureau of Prisons  
North Central Regional Office**

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*Tower II, 8th Floor  
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July 9, 1999

**MEMORANDUM FOR CHRISTOPHER ERLEWINE,  
ASSISTANT DIRECTOR/GENERAL COUNSEL  
GENERAL COUNSEL AND REVIEW DIVISION**

**FROM: JOHN R. SHAW, Regional Counsel**

**SUBJECT: Monthly Report (June, 1999)**

**LITIGATION, CLAIMS, AND ADMINISTRATIVE REMEDY STATISTICS**

**LITIGATION:**

inst	num	hc	ftc	biv	oth	ans	pen	cld	h/t	set	awd
NCR	48	31	4	9	4	16	519	27	1	1	

**Total cases for Calendar Year 317**

**NUM - Number of total lawsuits filed in the month  
HC - Number of habeas corpus actions filed in the reporting period  
FTC - Number of FTCA actions filed  
BIV - Number of Bivens actions filed  
OTH - Number of other actions filed, e.g., mental health, mandamus  
ANS - Number of litigation reports completed**

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PEN - Number of cases pending  
 CLD - Number of cases closed  
 H/T - Number of hearings or trials (include in narrative)  
 SET - Number of settlements (include in narrative)  
 AWD - Number of Awards (include in narrative)

**ADMINISTRATIVE CLAIMS:**

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
67	70	99	88	77	97						

**ADMINISTRATIVE REMEDIES**

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
188	208	228	215	207	230						

**Total for Calendar Year 1276**

**FREEDOM OF INFORMATION ACT/PRIVACY ACT REQUESTS**

	PRIVACY ACT	FOIA
ACTUAL ON-HAND	41	5
ACTUAL RECEIVED	68	22
ACTUAL PROCESSED	53	26
ACTUAL BACKLOG	1*	0

**Total for Calendar Year 451**

Backlog represents those requests which have not been responded to within the twenty work days target set by DOJ.

\* Awaiting records from archives.

**ADVERSE DECISIONS**

**Shockey v. T.C. Peterson, Case No. 99-247, FCI Sandstone**

Petitioner alleges he was determined to be provisionally eligible for 3621e release in March 1996. A Change Notice to the Crime of Violence Program Statement in May, 1996 added his

offense to a crime of violence. Petitioner was never advised and withdrew from a vocational program to participate in RDAP. His sentence was re-computed to reflect the one year off. Upon transfer, staff reviewed his 3621e eligibility and determined he was not eligible. His sentence was re-computed to reflect the loss of 3621e, which petitioner alleged the BOP cannot do as it is retroactive and violates ex post facto. Petitioner requested the restoration of 3621e release. Received an Adverse R&R recommending sentence to be recalculated to show year off. Petitioner is currently at the MCFP. After consultation with OGC staff it was determined to restore the Petitioner's eligibility, and the Petitioner will be deemed eligible.

### **SETTLEMENTS OR JUDGMENTS**

#### **Strong v. United States , USP Leavenworth**

FTCA action for lost/stolen luxury Cartier eyeglasses which were allegedly worth \$950.00. In this case, Strong sought compensation to replace his Cartier prescription eyeglasses that were stolen from the Health Services Administrator's office in September 1997. Since there were several concerns about the factual circumstances surrounding the theft of these glasses, (box containing 13 pairs of inmate glasses were stolen), a decision was made to see whether or not the inmate would accept the original offer that was given to him in 1997, i.e., replacement glasses (top of the line) from Duffins Optical. Strong agreed to the offer as long as he would be able to have his eyes examined in the near future. On June 25, 1999, Strong saw the Duffins representative to pick his frames and on July 1, 1999, he had his eyes examined. This case was settled for approximately \$221.00 which will be paid out of the U.S. Attorney's Settlement Fund directly to the optical company .

### **DECISIONS OF INTEREST**

#### **Epps v. USA, et al., Case No. 99-3002, MCFP Springfield**

In this habeas corpus case, petitioner alleged deliberate indifference to his medical needs by not considering him for a kidney transplant and/or compassionate release. The Court found that petitioner failed to demonstrate that respondents have been deliberately indifferent to his serious medical needs because he has failed to demonstrate that he is currently eligible for a transplant through the BOP and is being denied that transplant. The Court also found that while he was seeking admission into a transplant program, he has not, to date, provided evidence of financial ability to pay, nor a written letter of acceptance from a transplant program. There is nothing to preclude petitioner from being accepted into a transplant program, provided that he satisfies the eligibility requirements. Based on the record at the time, the Court recommended dismissal without prejudice to his right to pursue these claims in his district of confinement should he find the need to do so.

**Harris v. Hurley, Case No. 98-S-1351, ADX Florence**

Inmate filed Habeas challenging the change in his computation (parolable/non-parolable) because of U.S. v. Gonzales, 520 U.S. 1. The Magistrate noted petitioner sought conviction reversals and that 2255 might apply. The Court recommended that the petition be denied on that basis and noted petitioner's claim of "double jeopardy" by having his five year non-parolable sentence served twice was not valid. Additionally, petitioner's claim that he was denied due process because he was not given a parole hearing in September 1996 (modified computation changed parole eligibility date from 2001 to 1996) was without merit as the USPC in a hearing in December 1998, noted new criminal conduct prior to 1996, while in prison and that the guidelines, as a result thereof, were set at 174-256 months and that possibility that USPC would exercise its discretion differently in 1996 than it did in 1998 (presumptive parole set at 188 months) was remote. Court also noted the *ex post facto* argument was without merit, holding agency may retroactively change its practice to conform to the law without violation of the *ex post facto* clause.

**Hudson v. Holt, Case No. 99-X-0014, USP Florence**

Inmate sought preservation of telephone tape recording of conversation he placed on inmate telephone system at USP. Court provisionally ordered tape be preserved, but advised inmate that he must file an amended complaint demonstrating that he expects to be a party in a civil action cognizable by a court of the United States but that he cannot bring the action at this time. In his response, plaintiff stated the sole bar to his filing suit for ineffective assistance of counsel was his incarceration. On June 1, 1999, the Judge held that was not a sufficient impediment to warrant an order to preserve evidence under Fed.R.Crim.P. 27. Court directed that BOP must continue to preserve recording temporarily, however that order will be vacated in sixty days unless inmate files appeal.

**Slaughter v. J. T. O'Brien, et al., Case No. 98-C-809-S, FCI Oxford**

Petitioner contends that his federal custody is unconstitutional because of deliberate indifference to his serious medical needs. Specifically, he alleges that he is being denied a proper low fat diet which is necessary to control his gall bladder problems. Case was originally dismissed without prejudice on November 27, 1998, for failure to exhaust administrative remedies. Petitioner's appeal was dismissed on January 27, 1999. On April 23, 1999, petitioner moved to reopen as he had exhausted his administrative remedies. His original complaint was styled as habeas petition and Bivens complaint. The court reopened the habeas portion of the complaint, but refused to open the Bivens portion of the complaint. Defendant's response argued for dismissal because the petitioner's allegations involve condition of confinement issues which are not permitted in a habeas corpus petition. Petitioner was given an extension of time until June 25, 1999, to file his traverse. The Petition was dismissed on June 29, 1999, because the petition did not challenge the actual fact or duration of his confinement.

**PENDING CASES OF INTEREST**

**Cuoco v. United States and Lt. Rick Marques, Case No. 99-ES-0533, ADX Florence**

In this FTCA action, inmate claims staff negligently knocked two books off the bars to his cell, causing one to strike the inmate in the arm. He claims to have suffered a physical injury from this incident and seeks \$5000.00 in damages. By order dated June 10, Judge Weinshienk *sua sponte* dismissed the claim against staff as legally frivolous. Only FTCA against USA will continue.

**Bustillos v. Hawk, et al., Case No. 97-WM-445, ADX Florence**

Plaintiff filed a motion for TRO indicating that he has been fed only one meal per day since February 23, 1999 [date on which he was placed in 4-point restraints for assaulting a staff member with a "correctional cocktail" in the Control Unit]; that he was assaulted between that date and February 26, 1999; that he had only the clothes on his back and had been unable to get them washed; and, that staff were not allowing him access to the Administrative Remedy Program.

**Collins v. LaVallee, Case No. 97-WM-1533, USP Florence**

Defendants' motion to dismiss/summary judgment denied due to difference of material fact. Defendants directed to answer by July 15, 1999. Plaintiff ordered to provide counsel with copy of his requested discovery by July 1 to allow us to respond or object. Court directed clerk to attempt to locate counsel for inmate due to fact that much of requested discovery seeks personal information about the defendants that the inmate should not possess himself. USAO filed motion for extension of time in which to answer due to possibility that DOJ will take over case.

**Fluker v. USA, Case No. 99-M-268, ADX Florence**

Bivens action in which inmate claims commissary staff are poisoning the food he purchases in retaliation for his complaints against other staff. We have received numerous motions from plaintiff. include "Motion for Injunction to Kathleen Hawk Sawyer to assign One Honest Kitchen Staff to prepare Plaintiff's Food", several requests for emergency court orders to have U.S.M.S. obtain samples of plaintiff's drinking water, send blood and urine samples to various testing laboratories, keep from isolating him on a range, Motion for Injunction directing BOP to conduct specific medical tests, and several motions for discovery.

**Turner v. USA, Case No. 97-S-1340, ADX Florence/USP Florence**

The Court held a TRO hearing on plaintiff's claim that his life was in danger because he was being poisoned by ADX staff. A recommendation favorable to the government was issued and

adopted by the Court. Additionally, Judge denied the government's Motion for Summary Judgement in underlying case. A favorable R&R which recommended dismissal was adopted in part and rejected in part. The Court dismissed the medical claims; punitive damage claims; request for a jury trial; and request for an advisory jury. Court declined to dismiss the negligence claim, finding that there is a genuine issue of material fact with respect to whether the defendant's employees had reason to know that placing inmate in the cell with plaintiff would lead to the altercation which ensued. Court notes that there are additional questions regarding the causation of plaintiff's injuries (due to his admission that he, not the other inmate, started the fight) which cannot be resolved on summary judgement.

**Leonard Peltier v. J. W. Booker, Warden, Case No. 99-CV-3194, USP Leavenworth**

Petition for writ of habeas corpus wherein Peltier's attorney alleges (1) that the USPC's decision to delay Peltier's parole is arbitrary, capricious, erroneous, unsupported by the evidence, and complete inconsistent with the position the United States has taken in judicial proceedings concerning Peltier's conviction; (2) the Commission failed to give adequate weight in considering Peltier's parole to dangerous, chronic and deteriorating physical condition he suffers that cannot be adequately be treated medically while he is incarcerated; and (3) the failure of the U.S. to release him on parole is based on animus and cites erroneous information.

**Walls v. Reno, et al., Case No. 98-658-WLB, FCI Greenville**

Inmate alleges a violation of the Administrative Procedures Act in that BOP staff improperly interpreted the provisions of Program Statement 5100.06. Specifically, he alleges that he is entitled to be reclassified after the expiration of one sentence via mandatory release even though he was not physically released from custody. Walls alleges that a 100 level incident report during service of the prior sentence should not be used against him for purposes of classification during service of the current sentence. Walls is seeking to be reclassified with an intent to be sent to a FPC from the FCI.

**Shepeck v. J.T. O'Brien, Case No. 99-164, FCI Oxford**


Petitioner alleges that the BOP erroneously designated his state and federal sentences as consecutive, rather than concurrent, and requests 260 days credit toward his federal sentence. The Court issued the Order based upon its belief that when a sentencing court does not indicate whether a federal sentence should be served consecutively to or concurrently with a yet-to-be-imposed state sentence. the BOP has the discretion to designate the state correctional facility as the place of confinement for the federal sentence, thus allowing the state and federal sentences to run concurrently. In essence, the court is asking the BOP to make a nunc pro tunc designation in accordance with Barden.

**Henson v. Schomig, Case No. 99-1094, FCI Pekin**

Petitioner requests placement in a federal facility to complete service of his state and federal sentences. The inmate is currently housed in the Illinois Department of Corrections. Due to the nature of the request and the potential affect on the BOP, a motion to intervene on behalf of the government was filed and granted.

**Paulsen v. Debra Alleman, et al., Case No. 98-1403, NCRO/FCI Sandstone**

Plaintiff alleges violations of his Fifth, Sixth, and Eighth Amendment rights for a multitude of issues (medical, failure to release medical records, FRP, inappropriate job assignment, lack of time to prepare legal work, staff failing to provide him unmonitored legal calls, falsified incident reports, falsified investigations, lack of impartiality by DHO, among other issues). Representation involves 40+ staff members at various locations throughout the BOP.

**Good Voice Flute v. United States of America, Case No. 99-874, FPC Duluth/FCI Sandstone** FTCA action alleging that the medical treatment of a heart attack provided to inmate Harold Good Voice Flute by defendant and others was the proximate cause of his death at FCI Sandstone in 1996. 

b5

**RELIGIOUS FREEDOM RESTORATION ACT CASES**

**Patel v. Wooten, Case No. 96-M-0286, FCI Florence**

RFRA case challenging religious diet at FCI Florence. The four individual defendants have received outside counsel and the plaintiff was appointed counsel. This case was originally dismissed by the District Court under RFRA, the 10<sup>th</sup> Circuit Court of Appeals reversed and remanded, with statement that RFRA was unconstitutional. Plaintiff's response was extended, pending attempts to settle (inmate wanted guarantee he would be allowed to purchase protein powder and bean pies from commissary at any BOP facility). Settlement cannot be accomplished because it is against national policy on protein powder.

**HEARINGS AND TRIALS**

**Oxendine v. Pennington, Case No. 98-M-1352, FCI Florence**

Inmate claimed experimental surgery being done on his finger and sought to prevent transfer to another facility. A hearing on a motion for TRO was held via video-conference wherein the inmate appeared to drop claims of medical experimentation. BOP offered testimony of two



witnesses, one stating that no plans existed to transfer plaintiff (and that plaintiff has asked to be considered for transfer in September team meeting), and one to explain the medical issues (plaintiff amputated a portion of his right index finger, staff reattached, minor problem with small portion of skin on graft area becoming necrotic, removed at local hospital without incident). The Judge adopted R&R and denied plaintiff's motion for TRO.

### UPCOMING HEARINGS OR TRIALS

**Okai v. Verfurth, et al., Case No. 96-47, FCI Greenville (1995 Disturbance case)**

This Bivens action alleging excessive use of force during the aftermath of the 1995 disturbance was set for a jury trial to begin on Wednesday, July 28, 1999. Paul Brown and Jesselyn Brown from Main Justice will be litigating the case.

**McCoy v. Nelson, et al., Case No. 96-790, FCI Greenville (1995 Disturbance case)**

A hearing has been set for July 16, 1999 at 8:30 AM to resolve the pending Plaintiff's Motion to Compel the Production of Documents. FCI Greenville was served with a subpoena for documents in this excessive use of force action. Some documents were provided, while others were withheld.

**Rodriquez. v Wise, Case No. 99-128 (MJD/RLE), FMC Rochester**

Inmate with INS detainer was diagnosed with cancer. Because treatment period would exceed period of incarceration, treatment was postponed. Inmate filed a habeas action alleging deliberate indifference. U.S. District Court ordered BOP not to remove inmate from FMC and ordered the INS to pay for treatment while the inmate remained in INS custody at FMC. Hearing will be held on July 15, 1999 to allow BOP to transfer to inmate's custody to INS.

**U.S. v. Fong Vang, FCI Oxford**

Inmate is charged with possession of a weapon. The trial is scheduled for July 12, 1999.

**U.S. v. McElhiney, USP Leavenworth**

On a daily basis, issues arise in connection with the prosecution of inmate [REDACTED] b7C  
[REDACTED] The trial date is July 19, 1999, unless postponed again. Several Sealed orders have been sent to the warden's office and Legal Office recently for delivery to McElhiney. Each order has been personally delivered by legal staff. [REDACTED] b5  
[REDACTED]

**U.S. v. Reyes-Lopes, Case No. 99-106, FCI Waseca**

An indictment came down on the assault case from FCI Waseca. This stemmed from a middle of the night assault on another inmate by striking him in the face with an iron. Trial set for July 26, 1999.

**CRIMINAL MATTERS**

**U.S. v. Amaya-Martinez, Case No. 99-10022, FCI Pekin**

Inmate charged with Trafficking in Contraband. The inmate hid a weapon in the sole of his tennis shoe. The initial arraignment was held on April 29, 1999 at which time the inmate pled not guilty and was appointed counsel. The final pretrial hearing was held on June 24, 1999. Inmate pled guilty to these charges and sentencing is scheduled for October 15, 1999.

**U.S. v. Fong Vang, FCI Oxford**

See above.

**U.S. v. McElhiney, USP Leavenworth**

See above.

**U.S. v. Alvarado, USP Leavenworth**

Inmate Alvarado pled guilty on April 4, 1999 to possession of a weapon in violation of 18 U.S.C. Section 1791(a)(2) was sentenced on June 21, 1999 to a (30) thirty month consecutive sentence, a \$100.00 Special Assessment and 3 years supervised released.

**U.S. v. Reyes-Lopes, Case No. 99-106, FCI Waseca**

See above.

**PERSONNEL ISSUES**

Chris Synnsvoll joined the FCC Florence staff as an attorney.

NCRO Honor Attorney Lisa Eckl resigned from the BOP.

Honor Attorney Tiffany Spann comes on board July 18, 1999.

**STAFF TRAVEL AND LEAVE**



**U.S. Department of Justice  
Federal Bureau of Prisons  
North Central Regional Office**

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*Tower II, 8th Floor  
400 State Street  
Kansas City, KS 66101-2421*

August 9, 1999

**MEMORANDUM FOR CHRISTOPHER ERLEWINE,  
ASSISTANT DIRECTOR/GENERAL COUNSEL  
GENERAL COUNSEL AND REVIEW DIVISION**

**FROM: JOHN R. SHAW, Regional Counsel**

**SUBJECT: Monthly Report (July, 1999)**

**LITIGATION, CLAIMS, AND ADMINISTRATIVE REMEDY STATISTICS**

**LITIGATION:**

inst	num	hc	ftc	biv	oth	ans	pen	cld	h/t	set	awd
NCR	32	17	3	6	6	19	524	27	10	0	0.00

**Total cases for Calendar Year 319**

**NUM - Number of total lawsuits filed in the month  
HC - Number of habeas corpus actions filed in the reporting period  
FTC - Number of FTCA actions filed  
BIV - Number of Bivens actions filed  
OTH - Number of other actions filed, e.g., mental health, mandamus  
ANS - Number of litigation reports completed**

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 Page 2

PEN - Number of cases pending  
 CLD - Number of cases closed  
 H/T - Number of hearings or trials (include in narrative)  
 SET - Number of settlements (include in narrative)  
 AWD - Number of Awards (include in narrative)

**ADMINISTRATIVE CLAIMS:**

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
67	70	99	88	77	97	68					

**ADMINISTRATIVE REMEDIES**

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
188	208	228	215	207	230	192					

**Total for Calendar Year 1468**

**FREEDOM OF INFORMATION ACT/PRIVACY ACT REQUESTS**

	PRIVACY ACT	FOIA
ACTUAL ON-HAND	34	4
ACTUAL RECEIVED	35	3
ACTUAL PROCESSED	49	10
ACTUAL BACKLOG	9	0

**Total for Calendar Year 486**

Backlog represents those requests which have not been responded to within the twenty work days target set by DOJ.

**ADVERSE DECISIONS**

Robinson v. J.W.Booker, Atchison. v. J. W. Booker, Broderick v. J. W. Booker, Gentle v. Booker, and Thompson v. Booker, USP Leavenworth, District of Kansas  
 U.S. District Court Judge, Richard D. Rogers recently decided that the BOP cannot use court-imposed sentence enhancements to deny inmates early release eligibility under 18 U.S.C. § 3621 (e)(2)(B). The court ordered the BOP to reconsider the inmates for early release. This case

is in line with previous decisions being appealed to the Tenth Circuit in Scroger, Ward, and Guido. An appeal brief was filed for these cases this month.

Grove v. Bureau of Prisons, FPC Duluth, District of Minnesota  
U.S. District Court Judge James Rosenbaum held that the BOP was required to apply the old Crimes of Violence program statement to an inmate who had not even entered the residential drug treatment program at the time of filing. The judge held that the inmate had expressed sufficient intent to enter the program and should thus benefit from the rules in place at the time he filed his lawsuit. NCRO Legal is requesting appeal authorization through OGC.

Anderson v. Tenenbaum, RCH Rochester, District of Minnesota  
U.S. District Court Judge Ann Montgomery held that the provisions of 28 C.F.R. § 549.43 were constitutionally inadequate because they did not satisfy due process. She found that FMC Rochester staff must now allow for an administrative hearing before an impartial medical decision maker when a person committed to the custody of the Attorney General has been administered psychotropic medication for a period exceeding twelve months. These hearing will take place in addition to the monthly monitoring program that exists in current BOP policy. NCRO Legal is not seeking an appeal of this ruling.

### **SETTLEMENTS OR JUDGMENTS**

Stapleton v. O'Brien, FCI Oxford, Seventh Circuit  
Stapleton was denied early release pursuant to § 3621(e)(2)(B) because a prior state conviction for Reckless Endangerment was found to be an "aggravated assault." While the BOP prevailed at the district court level, upon further review it was discovered that at the time of the inmate's conviction the state had an "aggravated battery" statute in place. Under the latest protocol for reviewing prior convictions from OGC, if a state has an aggravated battery or assault statute and the inmate was convicted of some other crime, he should not be found to have a prior aggravated assault. As a result of these circumstances the inmate was made eligible for early release.

### **DECISIONS OF INTEREST**

Blanche Dyer v. U.S.A., MCC Chicago, N.D. Illinois  
An inmate who was at MCC Chicago for two weeks in 1989 filed a tort claim with the U.S. Marshals Service regarding her medical treatment as a pre-trial inmate. U.S. District Court in Iowa granted summary judgment for the government, but the Eighth Circuit reversed and remanded to the U.S. District Court for the N.D. Illinois. District Court Judge dismissed case

for lack of prosecution.

### PENDING CASES OF INTEREST

Collins v. LaVallee, USP Florence, District of Colorado

Defendants' motion to dismiss/summary judgment denied due to difference of material fact. USAO filed motion for extension of time in which to answer due to possibility that DOJ will take over case. The Government has withdrawn representation authority for three of the four named defendants. DOJ also withdrew on the fourth defendant, however, procured private counsel at government expense for that defendant. This case involves alleged improper use of force against the plaintiff. Investigation continues.

Chong-Won Tai v. U.S., et al, FCI Pekin, N.D. Illinois

FTCA action filed in the Northern District of Illinois stemming from a bus accident in May of 1996. Representation requests are being completed for the individual defendants so that a motion to remove them from the case can be filed.

Massey and Otten v. Helman, et al, FCI Pekin, C.D. Illinois

Appeal of class action medical case. Case has been set for oral argument before the Seventh Circuit on Wednesday, September 8, 1999 at 9:30 a.m..

Clark v. Keohane, et al., USMCFP Springfield, W.D. Missouri

Plaintiff alleged that he suffered from chronic myelogenous leukemia and that he required an autologous bone marrow transplant in order to survive.

David Crocker, et al. v. T. Durkin, et al., USP Leavenworth, District of Kansas

In this Bivens-styled action, the four plaintiffs allege that defendants actions were unjust and arbitrary in connection with decisions made concerning religious issues involving the Nation of Islam.

Turner v. USA, USP Florence, District of Colorado

Failure to protect case arising from inmate assault at USP. Government's Motion to dismiss denied last month. Draft answer provided to USAO. We have encountered unusual difficulties in the defense of this matter. One of the involved staff has recently pleaded guilty to violation of civil rights.

Sousa v. U.S.A., et al., USMCFP Springfield, W.D. Missouri

Plaintiff alleged that medical professionals mistakenly diagnosed his medical condition and

removed his right lung pursuant to an unnecessary medical procedure.

Boyce v. Cooksey, ADX Florence and NCRO, District of Kansas

Christopher Boyce, convicted spy, prison escapee, and bank robber, has sued Mr. Hershberger and Mr. Cooksey after being designated to ADX Florence. He was placed in the ADX for both safety and security reasons. The BOP has filed a motion for summary judgment and opposing counsel continues to find reasons to file additional or supplemental responses. The latest supplement seeks to move Boyce because a management variable was not approved for Boyce in a timely manner.

Barnett v. Knowles, USP Florence, District of Colorado

Bivens action alleging a defendant spoke to an inmate improperly and that staff member was subsequently disciplined. Plaintiff asserts he was retaliated against by the other defendants and that this retaliation took the form of assault. Plaintiff filed a response to the defendants' motion to dismiss. Previously granted representation for certain of the defendants is being reconsidered by DOJ.

Bracciodieta v. Holt, USP Florence, District of Colorado

TRO hearing held on July 22, via video-conferencing. Plaintiff requested to not be celled with two other inmates, be given protective custody status and be transferred. Adverse R and R issued on August 3, 1999, in which the Magistrate Judge found that the plaintiff had met the burden of proof for the issuance of injunctive order. Magistrate recommended that the plaintiff be housed alone until his transfer. Objections to the recommendation to be filed.

**RELIGIOUS FREEDOM RESTORATION ACT CASES**

Kikumura v. Hurley, FCI Florence, District of Colorado

RFRA case involving denial of pastoral visit at ADX. DOJ paying for outside counsel. Outside counsel filed motion to dismiss claims and status conference was held. Court allowed plaintiff until July 1 to file response to Motion to Dismiss. DOJ appeared on behalf of the defendants in their official capacities, arguing that even under the RFRA standard, the actions of the defendants were appropriate.

**HEARINGS AND TRIALS**

USA v. Reyes-Lopez, FCI Waseca, District of Minnesota

Inmate on inmate assault prosecution. While there was clear evidence that the defendant stuck the victim with an iron, the jury returned a not guilty verdict after only two hours. Interviews of jurors revealed that they believed the defendant acted in self-defense even though the victim was sleeping at the time of the attack. Matt Tveite provided assistance at trial.

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USA v. McElhiney, USP Leavenworth, District of Kansas

Drug conspiracy prosecution of Aryan Brotherhood inmates. Jury deadlocked at 10-2 with only two jurors finding the inmate not guilty. Mary Ellen Doucette and Rick Winter provided substantial assistance to the U.S. Attorney's Office in this matter. Additionally, Paul Pepper and Jenifer Grundy spent plenty of time coordinating witness interviews. A new trial will take place in September 1999.

**UPCOMING HEARINGS OR TRIALS**

Okai v. Verfurth, et al., FCI Greenville, S.D. Illinois

This Bivens action alleging excessive use of force during the aftermath of the 1995 disturbance is set for jury trial on Thursday, August 26, 1999. District Court Judge Murphy has ordered eleven inmates from several BOP institutions to be transferred to the Southern District of Illinois to testify on Okai's behalf.

United States v. David Michael Sahakian, United States v. Joseph L. Tokash, United States v. Rodney Allen Dent, United States v. Scott Lee Martin, United States v. Mitchell E. Kolb, United States v. John Derel Usher, USP Marion, Southern District of Illinois.

An initial appearance and arraignment was held in the above cases on July 7, 1999. The above named inmates are charged with possession of a prohibited object in violation of 18 U.S.C. § 1791(a)(2). Jury trial is set for 9:00 AM, September 13, 1999 before Chief U.S. District Judge J. Phil Gilbert in Benton, IL.

**CRIMINAL MATTERS**

USA v. Washington, FCI Pekin, C.D. Illinois

Inmate indicted under Title 18 U.S.C. § 1791(a)(2). Initial arraignment set for August 19, 1999.

United States v. David Armstrong, USP Florence, District of Colorado

On July 13, 1999, a former correctional officer pleaded guilty to a one count information charging him with conspiracy to violate the civil rights of inmates in violation of 18 USC § 241. Sentencing range between 51 and 63 months. Sentencing set for mid-September, however, we anticipate it will be continued. This case has received some media coverage and impacted the defense of several on-going civil cases.





**U.S. Department of Justice  
Federal Bureau of Prisons  
North Central Regional Office**

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*Tower II, 8th Floor  
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Kansas City, KS 66101-2421*

August 9, 1999

MEMORANDUM FOR CHRISTOPHER ERLEWINE.  
ASSISTANT DIRECTOR/GENERAL COUNSEL  
GENERAL COUNSEL AND REVIEW DIVISION

FROM: JOHN R. SHAW, Regional Counsel

SUBJECT: **Monthly Report (July, 1999)**

**LITIGATION, CLAIMS, AND ADMINISTRATIVE REMEDY STATISTICS**

**LITIGATION:**

inst	num	hc	ftc	biv	oth	ans	pen	cld	h/t	set	awd
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JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
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**ADMINISTRATIVE REMEDIES**

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**ADVERSE DECISIONS**

Robinson v. J.W.Booker, Atchison. v. J. W. Booker, Broderick v. J. W. Booker, Gentle v. Booker, and Thompson v. Booker. USP Leavenworth, District of Kansas

U.S. District Court Judge, Richard D. Rogers recently decided that the BOP cannot use court-imposed sentence enhancements to deny inmates early release eligibility under 18 U.S.C. § 3621 (e)(2)(B). The court ordered the BOP to reconsider the inmates for early release. This case

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An inmate who was at MCC Chicago for two weeks in 1989 filed a tort claim with the U.S. Marshals Service regarding her medical treatment as a pre-trial inmate. U.S. District Court in Iowa granted summary judgment for the government, but the Eighth Circuit reversed and remanded to the U.S. District Court for the N.D. Illinois. District Court Judge dismissed case

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Plaintiff alleged that medical professionals mistakenly diagnosed his medical condition and removed his right lung pursuant to an unnecessary medical procedure.

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TRO hearing held on July 22, via video-conferencing. Plaintiff requested to not be celled with two other inmates, be given protective custody status and be transferred. Adverse R and R issued on August 3, 1999, in which the Magistrate Judge found that the plaintiff had met the burden of proof for the issuance of injunctive order. Magistrate recommended that the plaintiff

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RFRA case involving denial of pastoral visit at ADX. DOJ paying for outside counsel. Outside counsel filed motion to dismiss claims and status conference was held. Court allowed plaintiff until July 1 to file response to Motion to Dismiss. DOJ appeared on behalf of the defendants in their official capacities, arguing that even under the RFRA standard, the actions of the defendants were appropriate.

### **HEARINGS AND TRIALS**

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Inmate on inmate assault prosecution. While there was clear evidence that the defendant stuck the victim with an iron, the jury returned a not guilty verdict after only two hours. Interviews of jurors revealed that they believed the defendant acted in self-defense even though the victim was sleeping at the time of the attack. Matt Tveite provided assistance at trial.

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Drug conspiracy prosecution of Aryan Brotherhood inmates. Jury deadlocked at 10-2 with only two jurors finding the inmate not guilty. Mary Ellen Doucette and Rick Winter provided substantial assistance to the U.S. Attorney's Office in this matter. Additionally, Paul Pepper and Jenifer Grundy spent plenty of time coordinating witness interviews. A new trial will take place in September 1999.

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This Bivens action alleging excessive use of force during the aftermath of the 1995 disturbance is set for jury trial on Thursday, August 26, 1999. District Court Judge Murphy has ordered eleven inmates from several BOP institutions to be transferred to the Southern District of Illinois to testify on Okai's behalf.

United States v. David Michael Sahakian, United States v. Joseph L. Tokash, United States v. Rodney Allen Dent, United States v. Scott Lee Martin, United States v. Mitchell E. Kolb, United States v. John Derel Usher, USP Marion, Southern District of Illinois.

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Phil Gilbert in Benton, IL.

**CRIMINAL MATTERS**

USA v. Washington, FCI Pekin. C.D. Illinois

Inmate indicted under Title 18 U.S.C. § 1791(a)(2). Initial arraignment set for August 19, 1999.

United States v. David Armstrong. USP Florence. District of Colorado

On July 13, 1999, a former correctional officer pleaded guilty to a one count information charging him with conspiracy to violate the civil rights of inmates in violation of 18 USC § 241. Sentencing range between 51 and 63 months. Sentencing set for mid-September. however, we anticipate it will be continued. This case has received some media coverage.

**STAFF TRAVEL AND LEAVE**

[REDACTED]	None scheduled		b6
[REDACTED]	August 18 - 19	Meeting with judiciary in North Dakota	
[REDACTED]	None scheduled		
[REDACTED]	None scheduled		
[REDACTED]	July 31-August 15	Military Leave	
[REDACTED]	None scheduled		
[REDACTED]	None scheduled		
[REDACTED]	None scheduled		



**U.S. Department of Justice**  
Federal Bureau of Prisons  
North Central Regional Office

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*Tower II, 8th Floor*  
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September 22, 1999

**MEMORANDUM FOR CHRISTOPHER ERLEWINE**  
**ASSISTANT DIRECTOR/GENERAL COUNSEL**  
**GENERAL COUNSEL AND REVIEW DIVISION**

**FROM:** JOHN R. SHAW, Regional Counsel

**SUBJECT:** **Monthly Report (August 1999)**

**LITIGATION, CLAIMS, AND ADMINISTRATIVE REMEDY STATISTICS**

**LITIGATION:**

INST	NUM	HC	FTC	BIV	OTH	ANS	PEN	CLD	H/T	SET	AWD
NCR	58	38	3	13	4	34	471	24	2		

**Total cases for Calendar Year 407**

**NUM -** Number of total lawsuits filed in the month  
**HC -** Number of habeas corpus actions filed in the reporting period  
**FTC -** Number of FTCA actions filed  
**BIV -** Number of Bivens actions filed  
**OTH -** Number of other actions filed, e.g., mental health, mandamus  
**ANS -** Number of litigation reports completed  
**PEN -** Number of cases pending  
**CLD -** Number of cases closed

H/T - Number of hearings or trials (include in narrative)  
 SET - Number of settlements (include in narrative)  
 AWD - Number of Awards (include in narrative)

**ADMINISTRATIVE CLAIMS**

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
67	70	99	88	77	97	107					

**ADMINISTRATIVE REMEDIES**

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
188	208	228	215	207	230	187					

**Total for Calendar Year 1655**

**FREEDOM OF INFORMATION ACT/PRIVACY ACT REQUESTS**

	PRIVACY ACT	FOIA
ACTUAL ON-HAND	21	9
ACTUAL RECEIVED	54	23
ACTUAL PROCESSED	76	10
ACTUAL BACKLOG	0	2*

\* Awaiting records from archives

**Total for Calendar Year 563**

Backlog represents those requests which have not been responded to within the twenty work days target set by DOJ.

**ADVERSE DECISIONS**

None.

**SETTLEMENTS OR JUDGMENTS**



None.

### DECISIONS OF INTEREST

#### **Bastian v. Mack & Williams, Case No. 95-3535-MLB, USP Leavenworth**

In this Bivens-styled action, the plaintiff alleged that defendants assaulted, robbed and attempted to murder him on July 7, 1995, while he was confined at USP Leavenworth. He further alleged that he was denied food or water for six and one half hours and that on July 12, 1995, the "officers" refused to let him see an "outside" doctor. In granting the defendants motion for summary judgment, the Court determined that the plaintiff made no showing of excusable neglect in failing to file a timely response to the government's motion. Further, the Court determined that the plaintiff failed to overcome the defense of qualified immunity. For purposes of the current motion, the Court assumed plaintiff met the initial two-part burden to show defendants violated his constitutional rights and that the rights were clearly established. However, the defendants have shown there are no material disputes of material facts that would defeat their assertion of qualified immunity.

#### **Char Thomasson v. United States, et al., Case 99-3165-JTM, USP Leavenworth**

On August 24, 1999, the District Court granted the government's motion to dismiss in this case where claims were raised under the FTCA, 42 U.S.C. section 1983, and the Violence Against Women Act, (VAWA) 42 U.S.C. section 13931. Here, the surviving relatives of inmate Stanley Thomasson alleged defendants negligently allowed other inmates to consume alcohol and the defendants acted with deliberate indifference to Thomasson's safety and that his death was directly caused by the negligence of the employees at USP Leavenworth. The FTCA claims were dismissed because the administrative claim was not filed until July 9, 1999, which was well after the present action was filed.

The plaintiff's claim under the VAWA was dismissed on three alternative grounds. VAWA provides a civil remedy for acts of violence "motivated by gender." The plaintiff's alleged the decedent's fellow inmates were motivated solely by "his gender orientation." In reaching this determination, the court stated "had Congress wished to extend protections accorded in the VAWA to persons who suffered violence based on gender or sexual orientation, it could have, but did not do so. Second, the plaintiffs made no showing that the United States has waived sovereign immunity to actions under the VAWA. Third, the plaintiffs did not show any act of violence by the defendants. The various constitutional claims against the government were dismissed because the government has not waived sovereign immunity and the claims against the individual defendants were dismissed because plaintiffs failed to even attempt to obtain personal

service within ten months after the filing of the complaint.

**Hunter v. Romine, Case No. #98-1542, FCI Sandstone**

In this Bivens/FOIA action, the plaintiff alleges Eighth Amendment rights violations. Plaintiff alleges staff utilized false/inaccurate information in his central file and failed to remove the information which caused his removal from the RDAP. By order dated August 18, 1999, defendants granted motion for summary judgement.

**Hagerman v. J. T. O'Brien, Case No. 99-C-219-C, FCI Oxford**

Petitioner alleged that the respondent erroneously calculated the amount of presentence credit to which he is entitled for time spent in Canadian custody. The BOP did not give credit because the time requested was for unrelated Canadian escape and assault charges. Defendant's response was filed on June 1, 1999, and argued that the petitioner and the Judge's Order improperly relied on §3585, and that his requested time in Canadian custody was not in connection with the offense for which the federal sentence was imposed. Moreover, §3568 explicitly limits the term "offense" to violations of federal law triable in the federal courts, and no detainer was failed nor is there evidence that the Canadian offenses were bailable. On August 6, 1999, the Judge issued an Order dismissing the petition because the time petitioner spent in custody in Canada was not time spent in connection with the federal charges that resulted in his federal sentence. Petitioner moved for reconsideration of the order, but the motion was denied on August 20, 1999.

**PENDING CASES OF INTEREST**

**Winters v. Hawk Sawyer and Pugh, Case No. 99-S-1356, ADX Florence**

Plaintiff attempted to bring a class action against the BOP, claiming disregard for the life and safety of inmates. He claimed that in November 1997, at the ADX, an inmate seriously assaulted another inmate with a weapon that he made from the light fixture in his cell. Plaintiff asserted these light fixtures should be removed from all prisons to prevent similar assaults. He also claimed staff damaged his personal property and placed foreign objects in his and other inmates' food in retaliation for his claims of unsafe conditions.

**Celestin v. USA, Case No. 98-D-1488, USP Florence**

Defendant filed Motion for Clarification and Extension of Time, requesting clarification regarding the need to submit a brief on the Alien Tort Claims Act (ATCA) or further briefing on the Federal Tort Claims Act and the Torture Victim Protection Act (TVPA). Plaintiff was directed to show cause on or before September 7, 1999, why his FTCA

medical malpractice claim should not be dismissed for his failure to file a certificate of review as required by Colorado law. Court had previously ordered the Bureau of Prisons to allow a physician of the inmate's choosing and expense to conduct necessary medical file review for purposes of preparing the certificate of review.

**Owens v. Hurley, Case No. 98-S-1854, ADX Florence**

The Magistrate recommended judgement for the defendants on all claims and a finding that the matter is frivolous. Inmate filed a rambling complaint appearing to allege that the defendants were trying to kill him by changing his medication, resulting in him fainting and cutting his lip. The Magistrate found that the plaintiff failed to exhaust his FTCA claims, and that he failed to file a certificate of review. The Magistrate further found that the plaintiff failed to state a claim on the remaining allegations, as he merely made conclusory allegations that are not supported by any evidence.

**McElhiney v. Conway, et al., Case No. 99-02011, USP Leavenworth**

In this case, McElhiney alleged the 15 defendants have conspired to insure a criminal conviction in the case of **USA v. McElhiney**, Case No. 98-40083-01, which is scheduled for a re-trial on September 27, 1999, in the District of Kansas.

**Gonzalez v. J. T. O'Brien, Case No. 99-C-147-C, FCI Oxford**

Plaintiff alleged that the respondent had violated his right to procedural due process by refusing to allow his wife to visit without first conducting a hearing into the matter. The Judge has interpreted the denial as an outright ban on family visitation and therefore represents a significant and atypical hardship. The Judge also believes that the petitioner has received no due process. [REDACTED]

b2

**Paolone v. United States of America, Case No. 99-C-0022-C, FCI Oxford**

Plaintiff alleged medical malpractice with respect to an eye injury sustained on July 31, 1993. Specifically, he alleged that FCI Oxford medical staff delayed necessary medical treatment, and the delay made it more difficult to subsequently correct his vision problems. The plaintiff filed a tort claim with the BOP on May 1, 1999. However, it is alleged that he never received a response to the claim, and it appears as though this allegation is true. Documentation seems to demonstrate that the NCRO forwarded the claim to the Central Office back in 1995 for review because there was a possible delay in care which may have warranted a settlement offer, but the Central Office never responded. A pre-trial scheduling conference is scheduled for September 10, 1999.

**RELIGIOUS FREEDOM RESTORATION ACT CASES**

None.

### HEARINGS AND TRIALS

#### **Bustillos v. Hilliard, Case No. 90-CV-3040-WDS, ADX Florence**

ADX Florence received an order directing that the plaintiff will prosecute this civil matter at trial via video conferencing. Plaintiff is currently housed at ADX Florence, although the matters giving rise to this trial occurred at USP Marion. The pre-trial conference was held via video on August 4, 1999. The inmate requested removal of restraints during the trial. A compromise was reached wherein the inmate's right hand was freed during the proceedings to facilitate note-taking. The trial commenced on August 31, 1999. Two inmates, George Scaf and David Cota, appeared via video conferencing from the ADX Control Unit. Several former USP Marion staff members testified. The matter continued to September 1, 1999, for remaining witnesses and closing arguments.

#### **Merritt v. Hawk Sawyer, et al., Case No. 95-Z-2653, ADX Florence**

A video conference was held on August 6, 1999, regarding TRO. Several ADX inmates were ordered to testify. [Court issued order directing Bureau of Prisons to use reasonable force if necessary to obtain the inmates appearance.] The inmates appeared via video from the Control Unit. Two inmate witnesses then refused to specifically testify, claiming they feared for their lives, alleging Bureau staff would harm them. The plaintiff's attorney requested Court to compel their testimony and issue an order to the Bureau to ensure their protection. The Magistrate determined that the inmates did not have to testify if they feared for their safety and dismissed plaintiff's motion to compel testimony. Plaintiff subpoenaed Warden Pugh and court compelled his testimony over counsel's objections. Motion for TRO had originally been limited to a question whether Merritt had sufficient protection from other inmates while being housed in the ADX general population unit. The plaintiff's attorney, however, continued to venture into unrelated issues concerning conditions of confinement, over repeated objections and requests for clarification by government counsel. The Hearing was continued to October 14, 1999. A Court Order was filed August 17, 1999, requiring defendants to turn over to plaintiff's counsel a videotape of an August 28, 1996, incident where immediate use of force was necessary and where video recording began after inmate was placed under control. Defendants were also ordered to provide copy of video concerning calculated use of force on May 22, 1998 (no force was necessary, as confrontation avoidance was successful).

### UPCOMING HEARINGS OR TRIALS

**United States v. David Michael Sahakian, United States v. Joseph L. Tokash, United States v. Rodney Allen Dent, United States v. Scott Lee Martin, United States v. Mitchell E. Kolb, United States v. John Derel Usher, USP Marion, Southern**

**District of Illinois.** The above named inmates are charged with possession of a prohibited object in violation of 18 U.S.C. § 1791(a)(2). Jury trial is set for September 13, 1999, before Chief U.S. District Judge J. Phil Gilbert in Benton, IL.

**U.S. v. Fulton, Case No. 99-10055, FCI Pekin**

The inmate was indicted under Title 18 U.S.C. § 1791 for possession of marijuana. The final pre-trial hearing is scheduled for September 8, 1999, with a jury trial tentatively scheduled to begin on September 27, 1999

**U.S. v. Boyd, Case No. 99-10057, FCI Pekin**

The inmate was indicted under Title 18 U.S.C. § 1791 for possession of marijuana. The final pre-trial hearing is scheduled for September 8, 1999, with a jury trial tentatively scheduled to begin on September 27, 1999.

**US v. McElhiney, Case No. 98-40083-01, USP Leavenworth**

The trial of Michael McElhiney began on July 19, 1999, and concluded with oral arguments on Thursday, July 29, 1999. On Monday, August 2, 1999, the jury advised the court it was deadlocked. Ten of the jurors voted to convict and two voted to acquit. The retrial is scheduled for September 27, 1999, and is expected to last two weeks. A hearing is scheduled for September 20, 1999, in reference to subpoenas for production of documents.

**Holly v. True, et al., Case No. 3-97-0756, MCC Chicago**

This Bivens action, with the exception of the allegation with regard to physical alteration, has had all other counts of the complaint dismissed. The Court has set trial on the one remaining count for November 29, 1999.

**CRIMINAL MATTERS**

**U.S. v. Fulton, Case No. 99-10055, FCI Pekin**

The inmate was indicted under Title 18 U.S.C. § 1791 for possession of marijuana. The initial arraignment was held on August 3, 1999, at which time the defendant pled not guilty. The final pre-trial hearing is scheduled for September 8, 1999, with a jury trial tentatively scheduled to begin on September 27, 1999.

**U.S. v. Boyd, Case No. 99-10057, FCI Pekin**

The inmate was indicted under Title 18 U.S.C. § 1791 for possession of marijuana. The initial arraignment was held on August 3, 1999, at which time the defendant pled not guilty. The final pre-trial hearing is scheduled for September 8, 1999, with a jury trial tentatively scheduled to begin on September 27, 1999.

**U.S. v. Wills; U.S. v. Waddell; and U.S. v. Ducket, USP Leavenworth**

The following inmates, who pled guilty in May, were sentenced in the District of Kansas on July 19, 1999 to the following for a violation of 18 U.S.C. 1791(a)(2) possession of a

weapon on or about December 4, 1998, at USP Leavenworth: Michael Wills, sentence - 24 months; Reginald Waddell, sentence - 10 months; Warren Duckett, sentence- 18 months. Each inmate also received 3 years supervised release in connection with the above sentences.

**USA v. Edward Bosley, 99-1426M (FLP)**

The inmate was charged with violation of 18 U.S.C. §1791 and 21 U.S.C. §844, possession of contraband and a controlled substance, respectively. The inmate was found with 5 bindles of white substance, later found to be heroin, on February 1, 1999.

**USA v. Cosby, Case No. 99-1422M, USP Florence**

The inmate was charged with violation of 18 U.S.C. § 111(a) and (b), for his assault of a female correctional officer at USP Florence on September 29, 1998.

**USA v. Hawkins, Case No. 99-1424M, USP Florence**

The inmate was charged with violation of 18 U.S.C. § 111(a) and (b), for his assault of a female lieutenant and a male correctional officer at USP Florence on July 12, 1999.

**USA v. McGinley, Case No. 99-CR-30D, ADX Florence**

The inmate was charged with violation of 18 U.S.C. § 1791(a)(2) & (d)(1)(B), for possessing a homemade weapon at ADX Florence on January 30, 1998.

**USA v. Carol Palmer, Case No. 99-1423M, USP Florence**

A female visitor was charged with violation of 18 U.S.C. §§844 & 846, and 21 U.S.C. § 1791. Specifically, she was found attempting to introduce 12 balloons of marijuana into USP Florence through the visiting room on February 20, 1998.

**USA v. Walter Williams, Case No. 99-1425M, USP Florence**

The inmate was charged with violation of 18 U.S.C. §§844 & 846, and 21 U.S.C. § 1791. Specifically, he asked a female visitor (see previous case) to introduce 12 balloons of marijuana into USP Florence through the visiting room on February 20, 1998.

**PERSONNEL ISSUES**

**STAFF TRAVEL AND LEAVE**

None scheduled  
None scheduled  
Sept. 13 - 14 MCFP Springfield  
None scheduled  
None scheduled  
None scheduled

blb



**U.S. Department of Justice  
Federal Bureau of Prisons  
North Central Regional Office**

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*Tower II, 8th Floor  
400 State Street  
Kansas City, KS 66101-2421*

September 22, 1999

**MEMORANDUM FOR CHRISTOPHER ERLEWINE  
ASSISTANT DIRECTOR/GENERAL COUNSEL  
GENERAL COUNSEL AND REVIEW DIVISION**

**FROM: JOHN R. SHAW, Regional Counsel**

**SUBJECT: Monthly Report (August 1999)**

**LITIGATION, CLAIMS, AND ADMINISTRATIVE REMEDY STATISTICS**

**LITIGATION:**

INST	NUM	HC	FTC	BIV	OTH	ANS	PEN	CLD	H/T	SET	AWD
NCR	58	38	3	13	4	34	471	24	2		

**Total cases for Calendar Year 407**

**NUM -** Number of total lawsuits filed in the month  
**HC -** Number of habeas corpus actions filed in the reporting period  
**FTC -** Number of FTCA actions filed  
**BIV -** Number of Bivens actions filed  
**OTH -** Number of other actions filed, e.g., mental health, mandamus  
**ANS -** Number of litigation reports completed  
**PEN -** Number of cases pending  
**CLD -** Number of cases closed

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 Regional Counsel Monthly Report  
 August 1999  
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H/T - Number of hearings or trials (include in narrative)  
 SET - Number of settlements (include in narrative)  
 AWD - Number of Awards (include in narrative)

**ADMINISTRATIVE CLAIMS**

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
67	70	99	88	77	97	107					

**ADMINISTRATIVE REMEDIES**

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
188	208	228	215	207	230	187					

**Total for Calendar Year 1655**

**FREEDOM OF INFORMATION ACT/PRIVACY ACT REQUESTS**

	PRIVACY ACT	FOIA
ACTUAL ON-HAND	21	9
ACTUAL RECEIVED	54	23
ACTUAL PROCESSED	76	10
ACTUAL BACKLOG	0	2*

\* Awaiting records from archives

**Total for Calendar Year 563**

Backlog represents those requests which have not been responded to within the twenty work days target set by DOJ.

**ADVERSE DECISIONS**

None.

**SETTLEMENTS OR JUDGMENTS**



None.

### DECISIONS OF INTEREST

#### **Bastian v. Mack & Williams, Case No. 95-3535-MLB, USP Leavenworth**

In this Bivens-styled action, the plaintiff alleged that defendants assaulted, robbed and attempted to murder him on July 7, 1995, while he was confined at USP Leavenworth. He further alleged that he was denied food or water for six and one half hours and that on July 12, 1995, the "officers" refused to let him see an "outside" doctor. In granting the defendants motion for summary judgment, the Court determined that the plaintiff made no showing of excusable neglect in failing to file a timely response to the government's motion. Further, the Court determined that the plaintiff failed to overcome the defense of qualified immunity. For purposes of the current motion, the Court assumed plaintiff met the initial two-part burden to show defendants violated his constitutional rights and that the rights were clearly established. However, the defendants have shown there are no material disputes of material facts that would defeat their assertion of qualified immunity.

#### **Char Thomasson v. United States, et al., Case 99-3165-JTM, USP Leavenworth**

On August 24, 1999, the District Court granted the government's motion to dismiss in this case where claims were raised under the FTCA, 42 U.S.C. section 1983, and the Violence Against Women Act, (VAWA) 42 U.S.C. section 13931. Here, the surviving relatives of inmate Stanley Thomasson alleged defendants negligently allowed other inmates to consume alcohol and the defendants acted with deliberate indifference to Thomasson's safety and that his death was directly caused by the negligence of the employees at USP Leavenworth. The FTCA claims were dismissed because the administrative claim was not filed until July 9, 1999, which was well after the present action was filed.

The plaintiff's claim under the VAWA was dismissed on three alternative grounds. VAWA provides a civil remedy for acts of violence "motivated by gender." The plaintiff's alleged the decedent's fellow inmates were motivated solely by "his gender orientation." In reaching this determination, the court stated "had Congress wished to extend protections accorded in the VAWA to persons who suffered violence based on gender or sexual orientation, it could have, but did not do so. Second, the plaintiffs made no showing that the United States has waived sovereign immunity to actions under the VAWA. Third, the plaintiffs did not show any act of violence by the defendants. The various constitutional claims against the government were dismissed because the government has not waived sovereign immunity and the claims against the individual defendants were dismissed because plaintiffs failed to even attempt to obtain personal

service within ten months after the filing of the complaint.

**Hunter v. Romine, Case No. #98-1542, FCI Sandstone**

In this Bivens/FOIA action, the plaintiff alleges Eighth Amendment rights violations. Plaintiff alleges staff utilized false/inaccurate information in his central file and failed to remove the information which caused his removal from the RDAP. By order dated August 18, 1999, defendants granted motion for summary judgement.

**Hagerman v. J. T. O'Brien, Case No. 99-C-219-C, FCI Oxford**

Petitioner alleged that the respondent erroneously calculated the amount of presentence credit to which he is entitled for time spent in Canadian custody. The BOP did not give credit because the time requested was for unrelated Canadian escape and assault charges. Defendant's response was filed on June 1, 1999, and argued that the petitioner and the Judge's Order improperly relied on §3585, and that his requested time in Canadian custody was not in connection with the offense for which the federal sentence was imposed. Moreover, §3568 explicitly limits the term "offense" to violations of federal law triable in the federal courts, and no detainer was failed nor is there evidence that the Canadian offenses were bailable. On August 6, 1999, the Judge issued an Order dismissing the petition because the time petitioner spent in custody in Canada was not time spent in connection with the federal charges that resulted in his federal sentence. Petitioner moved for reconsideration of the order, but the motion was denied on August 20, 1999.

**PENDING CASES OF INTEREST**

**Winters v. Hawk Sawyer and Pugh, Case No. 99-S-1356, ADX Florence**

Plaintiff attempted to bring a class action against the BOP, claiming disregard for the life and safety of inmates. He claimed that in November 1997, at the ADX, an inmate seriously assaulted another inmate with a weapon that he made from the light fixture in his cell. Plaintiff asserted these light fixtures should be removed from all prisons to prevent similar assaults. He also claimed staff damaged his personal property and placed foreign objects in his and other inmates' food in retaliation for his claims of unsafe conditions.

**Celestin v. USA, Case No. 98-D-1488, USP Florence**

Defendant filed Motion for Clarification and Extension of Time, requesting clarification regarding the need to submit a brief on the Alien Tort Claims Act (ATCA) or further briefing on the Federal Tort Claims Act and the Torture Victim Protection Act (TVPA). Plaintiff was directed to show cause on or before September 7, 1999, why his FTCA

medical malpractice claim should not be dismissed for his failure to file a certificate of review as required by Colorado law. Court had previously ordered the Bureau of Prisons to allow a physician of the inmate's choosing and expense to conduct necessary medical file review for purposes of preparing the certificate of review.

**Owens v. Hurley, Case No. 98-S-1854, ADX Florence**

The Magistrate recommended judgement for the defendants on all claims and a finding that the matter is frivolous. Inmate filed a rambling complaint appearing to allege that the defendants were trying to kill him by changing his medication, resulting in him fainting and cutting his lip. The Magistrate found that the plaintiff failed to exhaust his FTCA claims, and that he failed to file a certificate of review. The Magistrate further found that the plaintiff failed to state a claim on the remaining allegations, as he merely made conclusory allegations that are not supported by any evidence.

**McElhiney v. Conway, et al., Case No. 99-02011, USP Leavenworth**

In this case, McElhiney alleged the 15 defendants have conspired to insure a criminal conviction in the case of **USA v. McElhiney**, Case No. 98-40083-01, which is scheduled for a re-trial on September 27, 1999, in the District of Kansas.

**Gonzalez v. J. T. O'Brien, Case No. 99-C-147-C, FCI Oxford**

Plaintiff alleged that the respondent had violated his right to procedural due process by refusing to allow his wife to visit without first conducting a hearing into the matter. The Judge has interpreted the denial as an outright ban on family visitation and therefore represents a significant and atypical hardship. The Judge also believes that the petitioner has received no due process. We are taking the position that the denial does not represent a significant and atypical hardship, and that the Warden reasonably believed that the petitioner's wife posed a threat to the security of the institution and that the administrative remedy process provided sufficient due process.

**Paolone v. United States of America, Case No. 99-C-0022-C, FCI Oxford**

Plaintiff alleged medical malpractice with respect to an eye injury sustained on July 31, 1993. Specifically, he alleged that FCI Oxford medical staff delayed necessary medical treatment, and the delay made it more difficult to subsequently correct his vision problems. The plaintiff filed a tort claim with the BOP on May 1, 1999. However, it is alleged that he never received a response to the claim, and it appears as though this allegation is true. Documentation seems to demonstrate that the NCRO forwarded the claim to the Central Office back in 1995 for review because there was a possible delay in care which may have warranted a settlement offer, but the Central Office never responded. A pre-trial scheduling conference is scheduled for September 10, 1999.

**RELIGIOUS FREEDOM RESTORATION ACT CASES**

None.

### HEARINGS AND TRIALS

#### Bustillos v. Hilliard, Case No. 90-CV-3040-WDS, ADX Florence

ADX Florence received an order directing that the plaintiff will prosecute this civil matter at trial via video conferencing. Plaintiff is currently housed at ADX Florence, although the matters giving rise to this trial occurred at USP Marion. The pre-trial conference was held via video on August 4, 1999. The inmate requested removal of restraints during the trial. A compromise was reached wherein the inmate's right hand was freed during the proceedings to facilitate note-taking. The trial commenced on August 31, 1999. Two inmates, George Scalf and David Cota, appeared via video conferencing from the ADX Control Unit. Several former USP Marion staff members testified. The matter continued to September 1, 1999, for remaining witnesses and closing arguments. b7c

#### Merritt v. Hawk Sawyer, et al., Case No. 95-Z-2653, ADX Florence

A video conference was held on August 6, 1999, regarding TRO. Several ADX inmates were ordered to testify. [Court issued order directing Bureau of Prisons to use reasonable force if necessary to obtain the inmates appearance.] The inmates appeared via video from the Control Unit. Two inmate witnesses then refused to specifically testify, claiming they feared for their lives, alleging Bureau staff would harm them. The plaintiff's attorney requested Court to compel their testimony and issue an order to the Bureau to ensure their protection. The Magistrate determined that the inmates did not have to testify if they feared for their safety and dismissed plaintiff's motion to compel testimony. Plaintiff subpoenaed Warden Pugh and court compelled his testimony over counsel's objections. Motion for TRO had originally been limited to a question whether Merritt had sufficient protection from other inmates while being housed in the ADX general population unit. The plaintiff's attorney, however, continued to venture into unrelated issues concerning conditions of confinement, over repeated objections and requests for clarification by government counsel. The Hearing was continued to October 14, 1999. A Court Order was filed August 17, 1999, requiring defendants to turn over to plaintiff's counsel a videotape of an August 28, 1996, incident where immediate use of force was necessary and where video recording began after inmate was placed under control. Defendants were also ordered to provide copy of video concerning calculated use of force on May 22, 1998 (no force was necessary, as confrontation avoidance was successful).

### UPCOMING HEARINGS OR TRIALS

United States v. David Michael Sahakian, United States v. Joseph L. Tokash, United States v. Rodney Allen Dent, United States v. Scott Lee Martin, United States v. Mitchell E. Kolb, United States v. John Derel Usher, USP Marion, Southern

**District of Illinois.** The above named inmates are charged with possession of a prohibited object in violation of 18 U.S.C. § 1791(a)(2). Jury trial is set for September 13, 1999, before Chief U.S. District Judge J. Phil Gilbert in Benton, IL.

**U.S. v. Fulton, Case No. 99-10055, FCI Pekin**

The inmate was indicted under Title 18 U.S.C. § 1791 for possession of marijuana. The final pre-trial hearing is scheduled for September 8, 1999, with a jury trial tentatively scheduled to begin on September 27, 1999

**U.S. v. Boyd, Case No. 99-10057, FCI Pekin**

The inmate was indicted under Title 18 U.S.C. § 1791 for possession of marijuana. The final pre-trial hearing is scheduled for September 8, 1999, with a jury trial tentatively scheduled to begin on September 27, 1999.

**US v. McElhiney, Case No. 98-40083-01, USP Leavenworth**

The trial of Michael McElhiney began on July 19, 1999, and concluded with oral arguments on Thursday, July 29, 1999. On Monday, August 2, 1999, the jury advised the court it was deadlocked. Ten of the jurors voted to convict and two voted to acquit. The retrial is scheduled for September 27, 1999, and is expected to last two weeks. A hearing is scheduled for September 20, 1999, in reference to subpoenas for production of documents.

**Holly v. True, et al., Case No. 3-97-0756, MCC Chicago**

This Bivens action, with the exception of the allegation with regard to physical alteration, has had all other counts of the complaint dismissed. The Court has set trial on the one remaining count for November 29, 1999.

**CRIMINAL MATTERS**

**U.S. v. Fulton, Case No. 99-10055, FCI Pekin**

The inmate was indicted under Title 18 U.S.C. § 1791 for possession of marijuana. The initial arraignment was held on August 3, 1999, at which time the defendant pled not guilty. The final pre-trial hearing is scheduled for September 8, 1999, with a jury trial tentatively scheduled to begin on September 27, 1999.

**U.S. v. Boyd, Case No. 99-10057, FCI Pekin**

The inmate was indicted under Title 18 U.S.C. § 1791 for possession of marijuana. The initial arraignment was held on August 3, 1999, at which time the defendant pled not guilty. The final pre-trial hearing is scheduled for September 8, 1999, with a jury trial tentatively scheduled to begin on September 27, 1999.

**U.S. v. Wills; U.S v. Waddell; and U.S. v. Duckett, USP Leavenworth**

The following inmates, who pled guilty in May, were sentenced in the District of Kansas on July 19, 1999 to the following for a violation of 18 U.S.C.1791(a)(2) possession of a

weapon on or about December 4, 1998, at USP Leavenworth: Michael Wills, sentence - 24 months; Reginald Waddell, sentence - 10 months; Warren Ducket, sentence- 18 months. Each inmate also received 3 years supervised release in connection with the above sentences.

**USA v. Edward Bosley, 99-1426M (FLP)**

The inmate was charged with violation of 18 U.S.C. §1791 and 21 U.S.C. §844, possession of contraband and a controlled substance, respectively. The inmate was found with 5 bindles of white substance, later found to be heroin, on February 1, 1999.

**USA v. Cosby, Case No. 99-1422M, USP Florence**

The inmate was charged with violation of 18 U.S.C. § 111(a) and (b), for his assault of a female correctional officer at USP Florence on September 29, 1998.

**USA v. Hawkins, Case No. 99-1424M, USP Florence**

The inmate was charged with violation of 18 U.S.C. § 111(a) and (b), for his assault of a female lieutenant and a male correctional officer at USP Florence on July 12, 1999.

**USA v. McGinley, Case No. 99-CR-30D, ADX Florence**

The inmate was charged with violation of 18 U.S.C. § 1791(a)(2) & (d)(1)(B), for possessing a homemade weapon at ADX Florence on January 30, 1998.

**USA v. Carol Palmer, Case No. 99-1423M, USP Florence**

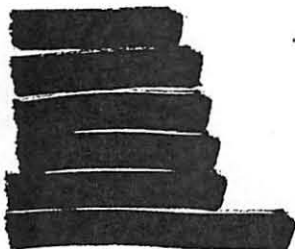
A female visitor was charged with violation of 18 U.S.C. §§844 & 846, and 21 U.S.C. § 1791. Specifically, she was found attempting to introduce 12 balloons of marijuana into USP Florence through the visiting room on February 20, 1998.

**USA v. Walter Williams, Case No. 99-1425M, USP Florence**

The inmate was charged with violation of 18 U.S.C. §§844 & 846, and 21 U.S.C. § 1791. Specifically, he asked a female visitor (see previous case) to introduce 12 balloons of marijuana into USP Florence through the visiting room on February 20, 1998.

**PERSONNEL ISSUES**

**STAFF TRAVEL AND LEAVE**



None scheduled  
None scheduled  
Sept. 13 - 14 MCFP Springfield  
None scheduled  
None scheduled  
None scheduled

ble



U.S. Department of Justice  
Federal Bureau of Prisons  
North Central Regional Office

Tower II, 8th Floor  
400 State Street  
Kansas City, KS 66101-2421

October 8, 1999

MEMORANDUM FOR CHRISTOPHER ERLEWINE  
ASSISTANT DIRECTOR/GENERAL COUNSEL  
GENERAL COUNSEL AND REVIEW DIVISION

FROM: JOHN R. SHAW, Regional Counsel

SUBJECT: Monthly Report (September 1999)

**LITIGATION, CLAIMS, AND ADMINISTRATIVE REMEDY STATISTICS**

**LITIGATION:**

INST	NUM	HC	FTC	BIV	OTH	ANS	PEN	CLD	H/T	SET	AWD
NCR	44	25	4	10	5	31	479	55	2		

**Total cases for Calendar Year - 451**

- NUM - Number of total lawsuits filed in the month
- HC - Number of habeas corpus actions filed in the reporting period
- FTC - Number of FTCA actions filed
- BIV - Number of Bivens actions filed
- OTH - Number of other actions filed, e.g., mental health, mandamus
- ANS - Number of litigation reports completed
- PEN - Number of cases pending
- CLD - Number of cases closed
- H/T - Number of hearings or trials (include in narrative)
- SET - Number of settlements (include in narrative)
- AWD - Number of Awards (include in narrative)

**ADMINISTRATIVE CLAIMS**

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
67	70	99	88	77	97	68	107	62			

**Total for Calendar Year - 735**  
**Pending 302**

Tort dBASE Files sent via e-mail to Monica Potter, OGC, on 10/1/99

**ADMINISTRATIVE REMEDIES**

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
188	208	228	215	207	230	192	187	167			

**Total for Calendar Year - 1822**

**FREEDOM OF INFORMATION ACT/PRIVACY ACT REQUESTS**

	PRIVACY ACT	FOIA
ACTUAL ON-HAND	25	17
ACTUAL RECEIVED	58	11
ACTUAL PROCESSED	45	15
ACTUAL BACKLOG	0	0

**Total for Calendar Year - 632**

**ADVERSE DECISIONS**

None.

**SETTLEMENTS OR JUDGMENTS**

None.



### DECISIONS OF INTEREST

**Williams v. Pitt, Bowen, Case No. 96-597, FCI Greenville**

plaintiff alleged excessive use of force during the aftermath of the 1995 disturbance. The Court dismissed with prejudice after an evidentiary hearing and finding in favor of the defendants.

**Smith v. King, et al., Case No. 96-507, FCI Greenville**

In this Bivens action alleging excessive use of force during the aftermath of the 1995 disturbance, plaintiff's complaint was dismissed for failure to exhaust his administrative remedies on the issue. This ruling was based upon the Seventh Circuit's holding in Perez v. Wisconsin Dept. of Corr.

**Huffman v. Nickerson, Case No. 96-629, FCI Greenville**

This Bivens action alleged excessive use of force during the aftermath of the disturbance in October 1995. The case was dismissed upon plaintiff's request.

**Nelson v. J. W. Booker, Case No. 98-3250-RDR, USP Leavenworth**

In this petition for writ of habeas corpus, petitioner alleged he was improperly confined in protective custody and that he was denied due process of an incident report. In denying this petition, the Court determined the decision to place Nelson in administrative detention was reasonable, and petitioner failed to advance any viable argument that his constitutional rights were violated by his placement in protective, administrative confinement following his attack on another inmate associated with a disruptive group. Petitioner also sought a transfer to either a lower-security facility or state placement. This request was also denied. Finally, the Court determined the petitioner's due process rights were not violated because he received adequate notice of the disciplinary charge, he had an opportunity to make a statement, and he received a written statement of the decision against him.

**Davis v. Richard P. Seiter, et al., Case No. 96-3316-KHV, USP Leavenworth**

In this Greenville Bus case, which was settled by the parties, the court denied the plaintiff's Motion to Reinstate Civil Action on September 3, 1999. In denying this motion, the Court stated, "on June 30, 1998, after various motions by plaintiff, the Court appointed counsel in this case. In that order, the Court ordered that plaintiff refrain from filing any further motions and direct all future correspondence to appointed counsel." Because this motion was filed by plaintiff, directly in violation of the Court's order, the Court found that it should be stricken without prejudice. The court further stated that if plaintiff wished to refile his motion to reinstate, he must either act through appointed counsel or seek to proceed pro se.

**Sandefur v. Pugh, Case No. 98-1377, CA#10 98-1400, FCI Florence**

Court of Appeals for the 10<sup>th</sup> Circuit, in an unpublished decision (1999 WL 679685) directed remand back to the district court with instructions to dismiss the habeas petition. This was in connection with petitioner's appeal from district court's denial of his petition under 28 USC §

2241 for refusal on the part of the Bureau of Prisons to apply prior custody credits for time spent serving a state sentence. The 10<sup>th</sup> Circuit agreed with respondent-appellee's argument that the Court lacked jurisdiction over the merits given appellant's failure to exhaust administrative remedies.

**Gavers v. Homeister, et al., Case No. 98-2500 (JRT/JMM), FPC Duluth**

State inmate in federal custody claimed he received inferior medical care while in BOP custody. Specifically, the inmate claimed that because the state was financially obligated to pay for extraordinary or special medical services, it would not give its approval for a surgical consultation on plaintiff. District Court found that the plaintiff was examined by numerous BOP medical staff and private physicians and denied the plaintiff's claim.

**Hartle v. BOP, Case No. 97-691 (JRT/JMM), FPC Duluth**

Magistrate Judge found that the BOP should be bound by its determination that an inmate was eligible for early release because the inmate had a "settled expectation" in a sentence reduction. The District Court Judge found that the Magistrate Judge wrongly applied the reasoning of Cort v. Crabtree, 113 F.3d 1081 (1997), and held that the BOP retains the discretion to deny early release regardless of its initial determination of an inmate's eligibility.

**PENDING CASES OF INTEREST**

**McCullum v. Hedrick, Case No. 99-3352-CV-S-RGC-H, MCFP Springfield**

Petitioner contends he requires a kidney transplant and the BOP policy concerning transplantation is unconstitutional.

**Palozie v. Hawk, et al., Case No. 99-3337-CV-S-RGC, MCFP Springfield**

Plaintiff alleges he was repeatedly forced to take medication against his will and that he was physically and sexually assaulted, and chained to his bed for eight consecutive days.

**Martinez v. Page True, et al., Case No. 99-9108-GTV, USP Leavenworth**

In this *Bivens*-styled action, plaintiff names (10) defendants and alleges he was transferred to USP Marion for: 1) retaliation for filing a civil action against the former Warden and SIS staff; 2) not cooperating with the SIS and SIA during investigations in to drug trafficking by USP Leavenworth staff; 3) BOP officials filing false allegations about the plaintiff; and 4) conspiracy to prevent plaintiff from exposing the illegal conduct by BOP staff.

**Lebaron v. USA, Case No. 99-X-0041, USP Florence**

Inmate filed motion to preserve master reel of telephone conversation he had on April 30, 1999. The Court noted several deficiencies with the pleading and directed petitioner to cure various deficiencies within 30 days. Additionally, the Court directed the BOP to preserve tape until further notice.

**Loparo v. USA, et al., Case No. 99-X-0036, USP Florence**

Inmate seeks to have court order the BOP to maintain videotape of incident which occurred August 30, 1999, as he intends to file a tort action alleging physical abuse. The Court directed inmate to file an amended petition and to cure deficiencies by October 9, 1999. Additionally, the Court directed BOP to maintain the videotape indefinitely.

**Oxedine v. Kaplan and Negron, Case No. 99-M-1224, FCI Florence**

Inmate filed this Bivens action alleging staff provided improper medical care in reattaching his self-amputated finger. The Court dismissed all defendants except the above two defendants. This matter was the subject of a TRO hearing in connection with Oxedine v. Pennington, et al., 98-M-1352. The TRO was denied.

**Gil v. Alston, et al., Case No. 95-CV-5217, MCC Chicago**

Inmate alleged deliberate indifference to gastric obstruction, and conditions caused by surgery. Deposition of defendant taken in Atlanta revealed that the doctor reviewed the charts, but never actually examined the inmate, and therefore may be problematic to his own liability and to other defendants.

**Jones v. Simek, et al., Case No. 94-CV-1097, 98-2243 (7<sup>th</sup> Cir.), MCC Chicago**

Inmate alleged excessive use of force by staff members, and deliberate indifference to resulting injuries. District Court had granted summary judgment on medical claims, and held a trial on excessive use of force issues. Court found in favor of BOP defendants. The inmate appealed to the 7<sup>th</sup> Circuit Court of Appeals. The Appellate Court affirmed the claims disposed of at trial, but reversed summary judgment granted to the doctor, stating there was material issue as to whether he was deliberately indifferent to the inmate's arm condition known as Reflex Sympathetic Dystrophy.

### **RELIGIOUS FREEDOM RESTORATION ACT CASES**

**Tolley, Tisor, Johnston and Post v. Booker, Case No. 97-N-0793, FCI Florence**

RFRA case that was stayed pending appointment of counsel for inmate plaintiffs. Counsel was appointed late this month, but no scheduling order has been issued yet. Inmates are seeking separate outdoor worship area for Odinists.

### **UPCOMING HEARINGS OR TRIALS**

None.

### **HEARINGS AND TRIALS**

**In the matter of John A. Cuoco, ADX Florence**

On September 14, 1999, an Emergency Ex Parte Application for Order to permit the force-feeding, rehydration, and laboratory analysis of inmate Cuoco was filed. Inmate Cuoco was

engaged in a hunger strike and had not eaten since 9/10. Health Services staff advised that if inmate Cuoco continued his hunger strike without medical intervention, which includes force-feeding, rehydration and laboratory analysis, the dehydration process could result in seizure, unconsciousness, organ failure and death. A telephonic hearing was held before the Magistrate Judge and an Order obtained on September 14, 1999. On September 15, 1999, inmate Cuoco ended his hunger strike and began eating and drinking fluids. A report regarding inmate Cuoco's status and condition was submitted to the Court on September 17, 1999.

**United States v. David Michael Sahakian, No. 99-40044-JPG; United States v. Joseph L. Tokash, No. 99-40045-JPG; United States v. Rodney Allen Dent, No. 99-40046-JPG; United States v. Scott Lee Martin, 99-40048-JPG; United States v. Mitchell E. Kolb, No. 99-40047-JPG; United States v. John Derel Usher, No. 99-40049-JPG., USP Marion**

A pre-trial conference was held in the above cases on September 3, 1999. The above named inmates are charged with possession of a prohibited object in violation of 18 U.S.C. § 1791(a)(2). The jury trial, set for September 13, 1999, before Chief U.S. District Judge J. Phil Gilbert, was continued indefinitely.

**Bustillos v. Hilliard, Case No. 90-CV-3040-WDS, ADX Florence**

This matter was continued to September 1, 1999, for remaining witnesses and closing arguments. Trial was conducted by video conferencing, with plaintiff representing himself. Two inmates, appeared via video conferencing from ADX Control Unit and several former USP Marion staff testified. The jury returned a verdict in favor of individual defendant on September 1, 1999. Plaintiff filed a motion for a new trial. He claimed it is necessitated due to "technical difficulties" caused by ADX Florence to intentionally interfere with his presentation of his case.

**US v. McElhiney, Case No. 98-40083-01, USP Leavenworth**

This trial is the second of Michael McElhiney, the first ended in a hung jury. The second hearing began on September 20, 1999, and is expected to last three weeks.

**US v. Shofler, USP Leavenworth**

This pre-trial inmate was indicted for the murder of inmate Smothers at USP Leavenworth. He has requested medication and also has second thoughts in reference to representing himself. Therefore, in compliance with the program statement on pre-trial inmates, a telephone conference with the Judge, CMC, MD, and AUSA has been scheduled.

**US v. Morgan, FPC Leavenworth**

On September 27, 1999, inmate Billy Morgan, Reg. No. 28554-004 was sentenced by Judge Lungstrum to a total term of (15) fifteen months to run concurrent with the sentence imposed in the U.S. District Court for the Middle District of Florida. This sentence was imposed as a result of Morgan walking away from FPC Leavenworth on April 19, 1998.

## CRIMINAL MATTERS

### USA v. Fulton, Case No. 99-10055, FCI Pekin

The inmate was indicted under Title 18 U.S.C. § 1791 for possession of marijuana. The initial arraignment was held on August 3, 1999, at which time the defendant pled not guilty. The final pre-trial hearing was held on September 8, 1999, with a jury trial tentatively scheduled to begin on September 27, 1999. However, the inmate changed his plea to guilty on September 8, 1999. He is scheduled for sentencing on December 10, 1999 at 4:00 p.m.

### USA v. Boyd, Case No. 99-10057, FCI Pekin

The inmate was indicted under Title 18 U.S.C. § 1791 for possession of marijuana. The initial arraignment was held on August 3, 1999, at which time the defendant pled not guilty. The final pre-trial hearing was held on September 8, 1999, with a jury trial tentatively scheduled to begin on September 27, 1999. However, the inmate changed his plea to guilty on September 8, 1999. He is scheduled for sentencing on December 10, 1999 at 1:00 p.m.

### USA v. Washington, Case No. 99-10056, FCI Pekin

Inmate indicted under Title 18 U.S.C. § 1791(a)(2). He is scheduled for sentencing on December 10, 1999 at 10:00 a.m.

### USA v. Edward Bosley, 99-1426M, USP Florence

The inmate was charged with violation of 18 U.S.C. § 1791 and 21 U.S.C. § 844, possession of contraband and a controlled substance, respectively. The inmate was found with 5 bindles of a white substance, later found to be heroin, on February 1, 1999.

### USA v. Cosby, Case No. 99-1422M, USP Florence

The inmate was charged with violation of 18 U.S.C. § 111(a) and (b), for his assault of a female correctional officer at USP Florence on September 29, 1998.

### USA v. Hawkins, Case No. 99-1424M, USP Florence

The inmate was charged with violation of 18 U.S.C. § 111(a) and (b), for his assault of a female lieutenant and a male correctional officer at USP Florence on July 12, 1999.

### USA v. McGinley, Case No. 99-CR-30D, ADX Florence

The inmate was charged with violation of 18 U.S.C. § 1791(a)(2) & (d)(1)(B), for possessing a homemade weapon at ADX Florence on January 30, 1998.

### USA v. Carol Palmer, Case No. 99-1423M, USP Florence

A female visitor was charged with violation of 18 U.S.C. §§ 844 & 846, and 21 U.S.C. § 1791. Specifically, she was found attempting to introduce 12 balloons of marijuana into USP Florence through the visiting room on February 20, 1998.

**USA v. Walter Williams, Case No. 99-1425M, USP Florence**

The inmate was charged with violation of 18 U.S.C. §§844 & 846, and 21 U.S.C. § 1791. Specifically, he asked a female visitor (see previous case) to introduce 12 balloons of marijuana into USP Florence through the visiting room on February 20, 1998.

**USA v. Gonzales; USA v. Viarrial; and USA v. Zacarias, Case No. 99-CR-110-M, FCI Englewood**

The inmates are charged with introduction of contraband and conspiracy to introduce contraband.

**USA v. Bogan; USA v. Calhoun; and USA v. McGhee, FCI Oxford**

The inmates have been charged with assault on an officer. The U.S. Attorney's Office has accepted the above for prosecution.

**PERSONNEL ISSUES**

**STAFF TRAVEL AND LEAVE**

Oct. 18-22	Washington, D.C.
Oct. 25-29	A/L
Oct. 19-21	Washington, D.C.
Oct. 8	A/L
Oct. 19	Park College Lecture
Oct. 21	Hearing in Mpls., MN
None scheduled	
Oct. 12 -22	S/L
Oct. 15	A/L
None scheduled	
Oct. 12-15	House Hunting, Big Springs, TX
Oct. 21-22	A/L
Sept. 13 - Oct. 7	FLETC, Glynco, Georgia
Oct. 8	A/L

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