



**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*

December 14, 1999

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

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

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

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

**LITIGATION:**

INST	NUM	HC	FTC	BIV	OTH	ANS	PEN	CLD	H/T	SET	AWD
NCR											
	29	11	2	10	6	28	423	14	4	0	0

**Total cases for Calendar Year - 546**

- 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	62	60	

**Total for Calendar Year - 857**  
**Pending 311**

Tort dBASE Files sent via e-mail to OGC, on 12/3/99

**ADMINISTRATIVE REMEDIES**

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
188	208	228	215	207	230	192	187	167	193	187	

**Total for Calendar Year - 2202**

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

	PRIVACY ACT	FOIA
ACTUAL ON-HAND	12	2
ACTUAL RECEIVED	34	7
ACTUAL PROCESSED	40	8
ACTUAL BACKLOG	12	2

**Total for Calendar Year - 725**

\* 1 Requests awaiting the retrieval of records from the archives.

### ADVERSE DECISIONS

#### Cuoco v. USA, et al., Case Number 98-D-1182, FCI Florence

On November 15, 1999, Judge Daniel concluded defendant Lopez was not entitled to qualified immunity and there existed genuine issues of material fact for trial. The case involves allegations of excessive force.

### SETTLEMENTS OR JUDGMENTS

None.

### DECISIONS OF INTEREST

#### Angarita v. Helman, Case No. 99-1337, FCI Pekin, 7<sup>th</sup> Circuit

Inmate filed appeal of district court decision denying his petition for habeas relief. Focus of appeal was the destruction of a videotape which showed the petitioner engaging in a sex act in the visiting room. Decision of the District Court affirmed.

#### Jones v. Simek, Case No. 193 F.3d 485, MCC Chicago, 7<sup>th</sup> Circuit

Inmate filed civil rights suit, alleging that defendants had subjected him to excessive force and refused to give him medical treatment, in violation of Eighth Amendment's prohibition against cruel and unusual punishment. The United States District Court for the Northern District of Illinois, Charles P. Kocoras, J., 1996 WL 67976, dismissed medical care claim, and found for defendants on excessive force claim. Inmate appealed. The Court of Appeals, Diane P. Wood, Circuit Judge, held that: (1) complaint did not state medical care claim against corrections officer; (2) fact questions precluded summary judgment on medical care claim against prison physician; and (3) district court did not abuse its discretion in denying plaintiff's motions for continuance and voluntary dismissal. Affirmed in part, and reversed and remanded in part.

### PENDING CASES OF INTEREST

#### Aleatha Shaw v. Alban Jervier and Terrance Wells, Case No. 99-CV-5139, MCC Chicago

Female inmate alleges a staff member sexually assaulted her while she was a pretrial detainee. Grand Jury investigation is pending, and letter was sent from Warden to U.S. Attorney to request for expedited proceedings. Staff members have requested representation and have been advised of the potential conflicts. Due to improper service on the staff members, the answer date has not been set. The United States Attorney's Office has requested that no litigation report be sent until the representation issue has been settled.

#### Turner v. Schultz, et al., Case No. 99-WM-2232, USP Florence

Staff received certified mail packets from law firm of Baroway & Dawson, who represent inmate Turner in this Bivens action. Turner asserts that the defendants assaulted him at USP Florence in August 1996, falsified documents concerning the incident, conspired to frame him for assault and

wrongfully took disciplinary action against him. Turner seeks \$25 million from the defendants in various amounts for their actions and failure to train or supervise subordinates.

**Cordero v. UNICOR, et al., Case No. 99-K-1447, USP Florence**

Bivens action against several current and former BOP staff in which inmate alleges he was assaulted by another inmate with a screwdriver. He claims the defendants knowingly allowed the screwdriver to be removed from UNICOR. Plaintiff seeks \$15 million from each defendant in compensatory, punitive, declaratory, consequential and actual and future damages. Inmate is being "represented" by another inmate and included in the representation agreement is a contingency fee.

**Richard D. Kunkle v. J. W. Booker, et al., Case No 99-3352-RDR, USP Leavenworth**

In this petition for writ of habeas corpus, Kunkle requests the findings of the DHO be expunged in connection with his failure to provide a urine sample and that the sanctions imposed also be expunged. In addition, petitioner requests release to a halfway house based upon a one-year reduction under 18 U.S.C. section 3621(e).

**Harding v. Winn, Case No 99-1367, FCI Pekin**

Habeas action requesting a nunc pro tunc designation to the state of Georgia. After initial review, there appears to be some merit to the petitioner's claim that his federal sentence was to run concurrent to his state sentence. The prosecuting U.S. Attorney's Office is being consulted for further clarification. Granting request will result in an immediate release for the petitioner.

**Neftali Dejesus v. J. T. O'Brien, et al., Case No. 99-C-308-S, FCI Oxford**

Plaintiff was assaulted by an inmate on March 30, 1999, and alleges that FCI Oxford failed to maintain a safe environment free, from violence; that the BOP should have known that the perpetrator represented a danger to others in the general population at FCI Oxford; and that FCI Oxford failed to provide swift and sufficient medical care. A motion for judgment on the pleadings was filed on November 8, 1999.

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

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

[REDACTED]

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**Okai v. USA, Case No. 98-637, FCI Greenville**

Okai brought this FTCA action alleging: failure to properly train, supervise, and control the use of force and chemical agents; the denial of access to adequate medical care; failure to properly train, supervise, and control the illegal denial of access to court and intrusion of privacy; illegal denial of

access to court; and illegal intrusion of privacy. These allegations stem from the October 1995 disturbance. Okai previously lost a jury trial in which he sued several correctional officers for alleged Eighth Amendment violations stemming from a majority of the same incidents.

### **HEARINGS AND TRIALS**

#### **Cuoco v. USA, et al., Case No. 98-D-1182 , FCI Florence**

A telephonic hearing was held on November 15, 1999, regarding defendant Lopez's Motion to Dismiss. Judge Daniel entered an adverse decision against defendant Lopez on the constitutional claims but granted the government's motion to substitute the USA for defendant Lopez on the FTCA claims. Inmate Cuoco sought and obtained leave of court to further amend his complaint to include additional allegations against defendant Lopez.

#### **Wilson v. Moore, No. 96-591, FCI Greenville**

A bench trial was held on November 30, 1999, in Benton, Illinois, in this Bivens case. The inmate alleged excessive use of force when a bus of inmates was gassed following the disturbance in October 1995. Magistrate Frazier presided over the trial in which Wilson was the only witness for his case. The primary arguments presented by the defense were that the use of the chemical agent was justified under the circumstances, that it was the least amount of force necessary to calm the situation, and that plaintiff did not suffer any lasting effects of the chemical agent or the alleged beating that he received. No decision has been rendered by the Magistrate.

### **CRIMINAL MATTERS**

**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**

The above-named inmates are charged with possession of a prohibited object in violation of 18 U.S.C. § 1791(a)(2). A trial date has not been set.

**U.S.A v. Bellwood, Hall, Marston, Nicolace, and Johnson, Case No. 99-30182, FCI Greenville**  
Bellwood, a former BOP employee, pled guilty to conspiracy and possession with intent to distribute. Inmates Hall, Marston, and Nicolace pled guilty to conspiracy. Johnson also pled guilty to conspiracy and possession. None of the defendants have yet been sentenced

#### **U.S.A. v. Tony Calhoun, FCI Oxford**

Inmate charged with assault with a deadly weapon. He was indicted on September 16, 1999. Trial has been scheduled for January 3, 2000

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

Pre-trial hearing held on November 19, 1999, in this attempted escape case. Court denied Haney's motion to use duress as a defense. Trial date set for April 17, 2000.

**U.S.A. v. Mark Bogan, FCI Oxford**

Inmate charged with assault with a deadly weapon and assault with the intent to commit murder. He was indicted on September 16, 1999. Trial has been scheduled for January 3, 2000.

**U.S.A. v. Scott Alex Schofler and Damion Johnson, USP Leavenworth**

A trial date of February 8, 2000 has been set for the prosecution of inmates Scott Alex Shofler and Damion Johnson for the murder of inmate Smothers. The trial is expected to last 2 weeks.

**PERSONNEL ISSUES**

**STAFF TRAVEL AND LEAVE**

b6

[REDACTED]	12/20-12/30	AL
[REDACTED]	12/23-12/27	AL
[REDACTED]	12/12-12/17	OLE Columbia, SC
[REDACTED]	12/27-12/30	AL
[REDACTED]	12/27-12/30	AL
[REDACTED]	12/3-12/9	Washington, D.C.
[REDACTED]	12/27-12/28	AL
[REDACTED]	12/23-12/30	AL
[REDACTED]	12/22-12/23	AL



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January 10, 2000

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

FROM: JOHN R. SHAW, Regional Counsel

SUBJECT: Monthly Report (December 1999)

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

**LITIGATION:**

INST	NUM	HC	FTC	BIV	OTH	ANS	PEN	CLD	H/T	SET	AWD
NCR	34	19	4	9	2	21	440	17	1	0	0.00

**Total cases for Calendar Year - 580**

- 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	62	60	51

**Total for Calendar Year - 908**  
**Pending 302**

Tort dBASE Files sent via e-mail to OGC, on 1/5/00

**ADMINISTRATIVE REMEDIES**

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
188	208	228	215	207	230	192	187	167	193	187	189

**Total for Calendar Year - 2391**

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

	PA/FOIA	FOIA
ACTUAL ON-HAND	19	1
ACTUAL RECEIVED	24	1
ACTUAL PROCESSED	26	6
ACTUAL BACKLOG	7*	2*

**Total for Calendar Year - 750**

\* 1 Requests awaiting the retrieval of records from the archives.

\* 8 Requests received 10-14 days after date received in Central Office.



### ADVERSE DECISIONS

**Holloway v. J. W. Booker, Jr., Case No. 99-3322-RDR, USP Leavenworth**

On December 2, 1999, the District Court Judge ruled against the agency in the above-referenced Section 2241 petition. Petitioner sought a one year sentence reduction in his sentence pursuant to 18 U.S.C. Section 3621(e) after his successful completion of the residential phase of the RDAP program. In connection with his sentence, Holloway received a 2 level enhancement for possession of a weapon in connection with a drug offense.

**Anderson v. Herrera, Case No. 99-D-1523, FCI Florence**

Petitioner received a 2-point enhancement for possession of a firearm. Eligibility for early release was denied under director's discretion. On December 13, 1999, the District Court Judge granted petition, directing BOP to consider petitioner eligible for early release.

### SETTLEMENTS OR JUDGMENTS

None.

### DECISIONS OF INTEREST

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

On November 22, 1999, this disturbance related case was dismissed for Stewart's failure to comply with a discovery order.

**Bacon v. Seiter & Moore, Case No. 97-038; Larkin v. Galloway & Bowling, Case No. 96-607; and Johnson v. Nelson, et al., Case No. 96-396, FCI Greenville**

On December 7, 1999, the District Judge rejected the Report and Recommendations from Magistrate Judge Frazier in the above referenced cases which had denied a motion to dismiss for failure to exhaust administrative remedies. The Judge found that the so-called "exception" to the exhaustion requirement found in Perez is dicta and is not binding. The cases were dismissed and judgments entered in favor of defendants: Seiter and Moore in Bacon; Galloway, and Bowling in Larkin; and Nelson, Bowen, Zachary, and Zucksworth in Johnson.

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

An Order was issued on December 1, 1999, adopting the R & R where defendant's motion to dismiss was granted because of lack of jurisdiction due to the discretionary function exception. Plaintiff alleged 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 him from his cell. He sought \$1,100,000 in damages.

**Burk v. Moorhead, et al., Case No. 98-3030-MLB, USP Leavenworth**

On December 13, 1999, the Court granted the government's motion for summary judgment in this Bivens-styled action wherein Burk alleged his constitutional rights were violated when he was placed in the Special Housing Unit. Specifically, Burk argued that he was placed in SHU even though defendants knew he was not guilty of violating any prison rules. Plaintiff argued this arbitrary action denied him due process, that his strip search violated his Fourth Amendment rights, and that the conditions he suffered for three days violated his Eighth Amendment right to be free from cruel and unusual punishment. In reaching its decision, the court concluded that the Fifth Amendment Due Process clause was not implicated because plaintiff was given three meals a day, the opportunity to exercise, and the opportunity to be seen by the prison's medical staff. The court also found that the prison had a legitimate penological interest in searching the plaintiff's person prior to being placed in SHU. Finally, the court determined the plaintiff failed to demonstrate that the specific defendants were deliberately indifferent to his lack of a blanket, pants or personal hygiene items.

**McAlister v. Pugh, Case No. 98-N-1425, FCI Florence**

On December 13, 1999, the District Judge adopted the Report and Recommendation issued by the Magistrate Judge on October 15, 1999, and dismissed the petition. The case involved a challenge to 3621(e) early release denial for inmate convicted under 922(g). The Court rejected petitioner's argument that the adoption of the new regulation was defective under the APA. Furthermore, the Court also rejected petitioner's argument concerning Program Statement 5162.02, finding that the decision to exclude him from consideration was based on an appropriate exercise of discretion by the Director, not upon a determination that 922(g) is a "crime of violence." The Court held that the decision to adopt a generalized standard in exercising discretion in this area is not arbitrary or capricious, nor is the agency determination that inmates convicted of both drug and firearm offenses pose a greater risk to society than those convicted solely of drug offenses irrational.

**PENDING CASES OF INTEREST**

**Johnson v. United States, Case No. 96-CV-5708, MCC Chicago**

FTCA action filed by the family seeking damages in suicide death of pre-trial inmate. The complaint alleges that the United States was negligent in allowing the suicide to occur and seeks compensation for pain and suffering of deceased prior to his suicide. The family also seeks compensation for estate expenses. Trial is scheduled for February 22, 2000.

**Bracciodieta v. USA, Case No. 99-M-1997, USP Florence**

Petitioner originally filed habeas/Bivens in District of New Jersey, concerning application of good time credits, specific psychiatric care, transfer to a medical center as recommended by the sentencing judge and damages for failing to provide the mental

health services. Originally, the case was transferred to the District of Kansas when petitioner was housed at Leavenworth. The District Judge dismissed all claims except that concerning good time credits and transferred petition to District of Colorado as petitioner had been transferred to USP Florence. Petitioner seeks good time credit for a 12 month supervised release violation term.

**Cuoco v. Hurley, Hershberger, Roal, and Hawk, Case No. 98-D-2438, ADX Florence**  
Plaintiff challenges rejection of several publications and Bureau's implementation of the Zimmer Amendment.

**Pride v. Herrera, Case No. 99-WM-0255, FCI Florence**

An Order to Show Cause indicates that petitioner is not to be transferred from their jurisdiction during pendency of petition. Petitioner filed a "Motion to Transfer" seeking to be released from the "geographic hold" imposed by the Court, so that he can be transferred to Pekin. BOP responded as directed by the Court, arguing that the BOP does not disagree with removing the geographic hold on petitioner but objects to any order that would direct placement of petitioner in a specific facility or direct a transfer.

**Mathison v. USA, Case No. 99-1897, FCI Sandstone**

Plaintiff filed this FTCA suit alleging that he broke a tooth when he bit into a turkey leg that was served to him, and that the injury was not properly treated by prison dental staff.

**RELIGIOUS FREEDOM RESTORATION ACT CASES**

**Kikumura v. Hurley and Gallegos, Case No. 10<sup>th</sup> Cir. 98-1284, (98-B-1442), ADX Florence**

Plaintiff challenges defendants' denial of "pastoral" visits under RFRA. Visits did not comply with BOP policy on religious visits. Plaintiff filed motion for TRO/PI to preclude denial of future pastoral visits. The Magistrate Judge recommended denial of the application, as plaintiff did not have a substantial likelihood of success on the merits. He also noted that RFRA was no longer a basis of jurisdiction, having been declared unconstitutional by the Supreme Court. This R&R was adopted by the District Court without change. Plaintiff appealed denial of his motion for TRO/PI to the 10<sup>th</sup> Circuit. Defendants are represented by private counsel at government expense in this RFRA case. In their reply, defendants assert that plaintiff could not meet his burden of proof on the TRO because he could not show a substantial likelihood of success on his claims. With respect to the RFRA claims, the defendants asserted that plaintiff could not meet his burden of proving a substantial burden on a sincerely held religious belief (the requested visitors were from another faith group) and that security interests outweigh any burden on his religious practice. In the alternative, the defendants argued that RFRA was unconstitutional. After briefing was complete, DOJ intervened to support the plaintiff's argument that RFRA is constitutional. On December 6, 1999, private counsel responded to the DOJ brief, rebutting the DOJ arguments on constitutionality.

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

This is a RFRA case filed by several Odinst inmates challenging the denial of a separate outdoor worship area for their use. Court previously allowed three additional inmates to intervene, but refused to certify as a class action. On or about December 3, 1999, 19 additional inmates filed motions to join. Court previously appointed counsel for plaintiff Tolley. On 12/13/99, the Judge referred this matter to the Magistrate Judge and directed that an R&R or status report of necessary proceedings be filed on or before July 30, 2000.

**HEARINGS AND TRIALS**

**Marlow v. U.S., Case No. 98-1512, FCI Pekin**

FTCA action alleging negligence by the government in its failure to know of an employee's alleged propensity for violence. Inmate alleged that the employee struck him while he was in the hospital recovering from hernia surgery. Two day trial held in St. Louis, Missouri on December 8 - 9, 1999. The court took the case under advisement.

**CRIMINAL MATTERS**

**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**  
The above-named inmates are charged with possession of a prohibited object in violation of 18 U.S.C. § 1791(a)(2). A status conference is set at the USP Marion courtroom on January 10, 2000. The trial has been set for March 20, 2000.

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

Inmate 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. Shane Bailey, USP Florence**

Inmate killed his cellmate (Wroblewski) on May 23, 1999, at the USP. Bailey told staff he assisted in cellmate's suicide. Manner of death confirmed as strangulation with a bed sheet. Information provided to USAO to assist in referral to DOJ for death penalty consideration.

**USA v. Mark Jordan, USP Florence**

Inmate was seen chasing inmate Aaron Stone on rec yard in front of C/B unit on June 3, 1999, at the USP. Jordan was seen throwing an object on the roof of C/B unit, which was later determined to be a sharpened metal instrument. Jordan was restrained by staff outside D Unit. Stone was laying on sidewalk, bleeding. Medical assistance was provided and Stone was transported to local hospital. Stone was pronounced dead at the local hospital from multiple stab wounds. Information provided to USAO to assist in referral to DOJ for death penalty consideration.