

**FEDERAL BUREAU OF PRISONS
WESTERN REGIONAL OFFICE**

**OFFICE OF THE REGIONAL COUNSEL
3RD QUARTER REPORT**

April 1, 1993 - June 30, 1993

**TO: Wallace H. Cheney
General Counsel**

**FROM: Douglas Curless
Regional Counsel**

DATE: July 29, 1993

LITIGATION MATTERS:

Supreme Court activity: None.

9th Circuit activity:

Hale v. ARCOR CA9 No. 88-15785, 89-15162 en banc opinion May 4, 1993.

The en banc 9th Circuit reversed a panel decision favorable to inmates. The panel in a 2-1 opinion indicated that for some work assignments inmates must be considered "employees" under the Fair Labor Standards Act (FLSA) and, accordingly, be paid minimum wage. The majority expressly stated it could not make a blanket decision that inmates were never employees. However, in this case involving Arizona DOC inmates, the Court found the "employment" relationship with inmates did not stem from any remunerative relationship or bargained-for exchange of labor for consideration, but from incarceration itself [quoting Vanskike v. Peters 974 F.2d 806 (7th Cir. 1992); cert. denied, 113 S.Ct. 1303 (1993)]. The 9th Circuit held the labor provided to ARCOR by Arizona DOC inmates working for programs structured pursuant to the state's requirement that prisoners work at hard labor is labor belonging to the institution and does not entitle inmates to minimum wage.

Lahey v. Floyd CA9 No. 92-55511 April 27, 1993.

A 9th Circuit panel has given us some further direction regarding Mills v. Taylor and jail time credit (JTC) under the sentencing guidelines and 18 USC § 3585 (b). The panel indicated third party custody as a condition of pretrial bond release is not sufficient restraint of liberty to qualify for JTC pursuant to 18 USC § 3585 (b). Inmate was released to the custody of his brother and had to be at his brother's residence from 10:00 p.m. until 6:00 a.m. and could not be away from the residence for more than 24 hours. Later his bond conditions were changed so he could stay at his own house.

The panel indicated release on bond under these conditions did not approach jail type conditions.

U.S. District Court activity:

U.S. v. Carmichael CR 92-335 HRF D. Oregon.

Inmate walked away from FPC Sheridan. Was recaptured within 2 weeks. Trial held April 26, 1993. Inmate found guilty on April 27, 1993. Mary Sullivan monitoring.

Wilmer v. Meyers C 92-1145 FMS N.D. Cal (San Francisco).

Bivens case against staff at FCI Dublin. Inmate Wilmer refused to be strip searched before placement in SHU pending investigation. Wilmer overpowered the two female Correctional Officers who were attempting the strip search. The Lt. and another male correctional officer had to restrain Wilmer while female CO's wrapped her in a

sheet and conducted a strip search. Inmate demanding \$750,000 in damages. Trial set for September 20, 1993. AUSA Paul Solon and Jenifer Grundy handling.

U.S. v. Diane Nevell CR 92 653 JMR D. AZ (PHX)
Wife of inmate charged with introduction of contraband (drugs in the visiting room hidden in infant's clothing). Convicted by jury on 5/6/93. Jane Haschmeyer monitoring.

Alexander v. Perrill CIV 87-582-TUC-RMB D. AZ (TUC)
Alexander is a former inmate who prevailed in a habeas action convincing the District Court he had not received enough foreign jail time credit. The Court granted his habeas request and ordered immediate release. Appeal was not sought because of the time lag in getting appeal authority from the Department and delay in getting cases argued and decided in the 9th Circuit. Inmate filed a Bivens suit against BOP staff. Inmate contends his sentence recalculation resulted in his late release from custody. Credit had been erroneously awarded by an ISM at another institution. To further complicate matters the ISM at this institution is now deceased.

BOP and the U.S. Attorney's Office for District of Arizona filed a motion for summary judgement and qualified immunity for all defendants. All defendants were dismissed with the exception of Warden Bill Perrill and ISM Luis Rivera. In a 2-1 decision the 9th Circuit denied our appeal for qualified immunity for the Warden and ISM for their alleged lack of response to the inmates claims for foreign jail credit. Only Central Office can grant foreign JTC in conjunction with DOJ Office of International Affairs. Neither the Warden or ISM has authority to award foreign jail credit.

The case was remanded to USDC in Tucson. Plaintiff seeks \$625,000 in damages. Discovery has been concluded. AUSA offered to settle with plaintiff for \$30,000 (we were not consulted). DOJ would not authorize a monetary settlement in a Bivens case. Pretrial conference set for August 4, 1993. We anticipate trial this fall. AUSA Gene Bracamonte, paralegal Tom Byron, and Valerie Stewart handling.

United States v. Dale DeNoyer CR-93-306 JSL C.D. Cal.
USP Lompoc inmate prosecuted for manufacturing a weapon in UNICOR. AUSA Julie Ryan prosecuted in the Central District of California. One day trial resulted in guilty verdict. Sentencing set in October 1993. Matt Carney monitoring.

U.S. v. Johnathan George S.D. Cal (San Diego)
MCC SD pretrial detainee awaiting trial on federal felon in possession of a firearm charges was writted from custody by San Diego D.A. for trial on minor state charges. After appearing in state Superior Court on June 2, 1992 inmate assaulted a Deputy

Sheriff, took her revolver, and escaped. George stopped a car, shot and killed the driver, and escaped. He was recaptured on October 5, 1992.

George has 3 federal charges pending. Felon in possession of a firearm (original federal charge), escape from federal custody (June 2, 1992), and felon in possession of a firearm (recapture October 5, 1992). George was tried and convicted of all three charges in June. Sentencing is set for September. George faces 3 state charges from the events of June 2, 1992. Assaulting a law enforcement officer, escape, and capital murder. State trial for assault/escape/murder is continued to February 1994.

Family of murder victim has filed a \$2,000,000 FTCA claim against BOP, USMS, and San Diego Sheriffs Office for negligence resulting in escape and murder. Andrea Dahlsten handling tort claim/monitoring criminal cases.

U.S. v. Raymond Paige/George Davis CR 92-760 S.D.CA (San Diego) Inmates at MCC San Diego were charged with introducing drugs into MCC San Diego. All inmate defendants pled guilty on 5/7/93. Andrea Dahlsten monitoring.

U.S. v. Deloney CR 92-164 RGS D. AZ (PHX). Staff member pled guilty to accepting a bribe to introduce contraband into FCI PHX. Jane Haschmeyer monitoring.

Vigil, et.al. v. MCC San Diego et.al.

BOP was served with a Bivens complaint and summons on July 1, 1993. Two deputy U.S. Marshals are seeking \$100,000 each (\$50,000 compensatory/\$50,000 punitives) for being unlawfully detained by staff at MCC San Diego. The deputies returned a mentally ill, suicidal inmate to MCC after a suicide attempt at MCC San Diego. He had been confined in an area hospital. Upon his return the inmate was obviously psychotic and had indicated he had attempted suicide on the way to MCC. The institution was under orders not to accept inmates in this condition. The Marshals attempted to drop him off and staff refused to accept the inmate. A court order was obtained after approximately 1 hour and the Marshals left the institution. Andrea Dahlsten handling.

EEO/FOIA Cases:

Leonardo Stewart v. Quinlan, CIV 91-707 RMB (D. AZ-TUC) Racial discrimination suit settled after going through EEO administrative process. EEO recommended \$150,000 and reinstatement to position. AUSA settled for \$79,615.77 and no reinstatement (for all claims). Stipulated Agreement entered 4/12/93 with payment within 30 days for Final Order of Dismissal. Funds came from DOJ judgment fund.

People of California v. Emdy

Los Angeles D.A. and defense counsel both have requested inmates Central file via FOI request. Emdy murdered his brother for informing on a third brother (while incarcerated with the state). Emdy the defendant and Emdy the victim did time together at USP Lompoc. Central files must be produced by trial date of June 6, 1993.

Sellers update: We have received numerous inmate requests to correct "inaccurate" information contained in PSI's in light of the OP's Memo issued by Central Office. Alan Ellis, Esq. a self proclaimed post conviction relief expert has widely dispersed a newsletter indicating BOP must clear up inaccurate information contained in PSI's. We are responding to inmates that PSI reports are records generated and maintained by the Courts and mandated by FRCrimP #32. The sentencing Court is the record custodian. BOP receives a copy of the record. If the inmate wants to change the record, he/she needs to seek that change with the Court or USPO.

We currently face one lawsuit filed by an FCI SHE inmate against Kathy Hawk, Pat Kane, Wally Cheney, and Doug Curless over information contained in a Post Sentence Report (filed in the District of Columbia).

UNICOR and Environmental Issues:

On August 17, 1993, California EPA has called a meeting of Potentially Responsible Parties (PRP's) to discuss environmental cleanup of the business site of Omega Chemical Company in Southern California. FPC Boron has been listed as a PRP because Omega received spent solvents from Unicor operations at FPC Boron.

Occupational Safety and Health Administration (OSHA) has increased its inspection activity this past quarter. They have conducted inspections at 7 institutions in WXR. The primary focus of these inspections is UNICOR. OSHA has indicated fines will be levied against institutions that don't correct OSHA deficiencies.

MATTERS OF INTEREST:

A recent trend in the District Courts in the Western Region finds Judges running 924(c) gun counts concurrent with other sentenced counts, contrary to statute. We have been contacting USPO's and AUSA's to notify them of our problem in computing the sentences. They indicate they are not willing to appeal.

TRAINING AND EDUCATION

April 13-15 Valerie Stewart attended the AGAI Environmental Law Seminar in San Francisco.

April 19-May 7 Janelle Brock attended FLETC for BOP basic training.

April 22 Tim Roberts was guest speaker at Pepperdine School of Law on the topic of sentencing issues.

May 24-28 Janelle Brock TDY to FCI TI; June 1-4 TDY to MDC LA.

May 25, 1993 Legal, DHA/DHO, CCM's and Correctional Services toured Pharm Chem Labs in Menlo Park, CA.

June 8-10, 1993 AGAI/BOP training at MSTC Aurora, Co. Presenters: Doug Curless, Valerie Stewart. Attendees: Tim Roberts and Mary Sullivan.

June 22-24 Valerie Stewart and intern Reg Webster attended EPA's federal facilities compliance conference in San Francisco.

Staff News:

Janelle Brock has been selected as an Attorney/Advisor for the LCI branch in Central Office. Her reporting date is October 12, 1993.

An Tran has been selected as the DOJ honors program attorney for Western Region. Her reporting date is August 22, 1993.

Institutions

USP Lompoc: Attorney/Advisor Matt Carney arrived at USP Lompoc on April 24, 1993.

MDC Los Angeles: Ed Ross rejoins legal. Ed has held posts as acting Deputy HSA and Acting Unit Manager for the past 9 months.

WESTERN REGIONAL OFFICE
 QUARTERLY REPORT
 TORT CLAIMS

April 1, 1993 through June 30, 1993
 3RD QUARTER - FY93

INST	RCVD	PROP	INJURY	APPR	AMOUNT	DEN	PENDING	OD
BRN	5	2	3	2	143.00	2	11	5
LOF	6	2	4	3	166.80	3	20	7
LOM	36	29	7	24	1,874.64	20	97	42
LOS	10	8	2	5	2,900.87	1	31	10
NEL	2	1	1	none	none	none	8	5
PHX	2	1	1	4	295.26	2	36	14
PLE	11	10	1	5	841.96	4	27	16
SAF	5	5	none	2	65.95	1	14	5
SDC	17	14	3	1	84.53	5	34	11
SHE	19	16	3	4	2,674.25	5	33	13
TRM	14	9	5	8	969.65	23	34	14
TCN	8	7	1	6	604.21	3	20	10
WXR	3	2	1	none	none	1	5	2
TOTAL	138	106	32	64	10,621.12	70	370	154