

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

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Kansas City, KS 66101-2421*

August 11, 2000

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

**FROM: DARYL KOSIAK, Regional Counsel**

**SUBJECT: Monthly Report (July 2000)**

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

**LITIGATION:**

INST	NUM	HC	FTC	BIV	OTH	ANS	PEN	CLD	H/T	SET	AWD
NCR	23	6	5	10	2	17	437	36	1	0	

**Total cases for Calendar Year - 155**

- 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)**

Appeals	NUM	HC	FTC	BIV	OTH	ANS	PEN	CLD	H/T	SET	AWD
NCR	3	3					59	11			

Mental Health cases	Petitions filed	Hearings
18 USC § 4245	6	0
18 USC § 4246	2	0

**ADMINISTRATIVE CLAIMS**

	JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
#Pending				254	207	238	233					
#Received	55	65	55	47	48	59	52					
#Answered				45	55	71	66					
#Over 6 month				4	7	7	10					
#Pending				207	238	233	219					

**Total for Calendar Year - 381**

**ADMINISTRATIVE REMEDIES**

	JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
#Received	175	164	192	171	249	234	195					
#Answered	168	178	178	186	164	264	207					

**Total for Calendar Year - 1380**

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

FOIA/PA	JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
#Pending	47	33	48	68	71	70	73					
#Received	68	94	92	69	77	75	61					
#Processed	39	74	106	41	97	63	62					
#Backlog	16	4	1	1	3*	3*	0					

**Total for Calendar Year - 536**

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

### **ADVERSE DECISIONS**

#### **Love v. United States, et al., Case No. 98-K-2712, ADX Florence**

On July 28, 2000, the Court entered an order granting in part and denying in part defendants' Motion to Dismiss. Specifically, the Court dismissed plaintiff's Bivens claims insofar as they are alleged against the United States or the named individual defendants in their official capacities. The plaintiff's FTCA claims were also dismissed insofar as they are alleged against the named individual defendants. In addition, the Court dismissed plaintiff's Bivens claims for injunctive relief for failure to exhaust available administrative remedies. Defendants' Motion to Dismiss the Bivens and FTCA claims were denied on statute of limitations grounds, concluding that the doctrine of equitable tolling applied. Furthermore, the Court denied defendants' Motion to Dismiss plaintiff's Bivens claims on exhaustion grounds, noting that Congress has not provided any administrative remedies to date that must be exhausted when a inmate seeks damages against individual defendants in their individual capacities (after dismissing out the injunctive claims). Finally, the Court denied defendants' Motion to Dismiss the Bivens claims on qualified immunity grounds, finding plaintiff had pleaded his allegations of constitutional misconduct with the required specificity. Adverse decision memorandum has been prepared recommending appeal.

### **SETTLEMENTS OR JUDGMENTS**

None.

### **DECISIONS OF INTEREST**

#### **Gayle Clancy v. United States, Case No. 98-CV-910, MCC Chicago**

On August 4, 2000, a bench trial was held in the slip and fall case concerning a visitor entering MCC Chicago. The visitor alleged she slipped and fell on a metal electrical outlet which has become slightly raised (highest point 5/8 inch lowest point 1/4 inch) due to weather. The plaintiff was the sole non-government witness presented by the plaintiff's attorneys. Two staff members testified she slipped and fell as she was walking up the stairs towards the institution. Our Lieutenant testified she was sitting on the stairs further north of the outlet when he arrived. Our former safety manager also testified the outlet was never considered to be a safety hazzard due to the minor elevation and its location (not in the normal walking path to the ingress and egress of the building). Finally, our electrical foreman testified to the dimensions of the outlet. As

the trial was bifurcated, no testimony concerning damages was presented. The judge found in the Government's favor (which he indicated he rarely finds for the government after trial), specifically noting the staff had no bias to alter their testimony, and the conclusions/assumptions they made about her tripping on the stairs were due to their observations of where she landed and how she approached the building. Judgement was entered for the government.

**Johnson v United States of America, Case No. 98-3092-KHV, USP Leavenworth**

The defendant's Motion to Dismiss or, Alternatively, Motion for Summary Judgement was sustained and the case was dismissed for lack of subject matter jurisdiction. In this case, the plaintiff was placed in SHU for investigation concerning allegations that he was pressuring another inmate for sex. His personal property was inventoried and stored. He signed the forms without indicating any property was damaged or missing. Defendants asserted the law enforcement exception to the FTCA, and the Court found that BOP officials are "law enforcement officers" under § 2680(c).

**Moore v. Winn, Case No. 99-1322, FCI Pekin**

Habeas petition challenging DHO decision. Inmate received an incident report which ultimately resulted in a housing unit reassignment. The court found the reassignment, as well as the inclusion of the incident report in the petitioner's file, did not create a liberty interest. Therefore, the court found it did not have jurisdiction to hear the case.

**Massey and Steagall v. Helman, et al, Case No. 99-2663, 7<sup>th</sup> Cir. 98-1348, FCI Pekin**

Inmate and attorney alleged violations of their first amendment rights due to alleged reading of legal mail and denial of unmonitored phone calls. The court found the inmate plaintiff failed to exhaust his administrative remedies as required, thereby barring his claim. The attorney's claim was dismissed for lack of standing.

**Godines v. Oliver, et al., Case No. 00-Z-0098, 10<sup>th</sup> Cir. 00-1093, USP Florence**

Plaintiff was directed by the district court to cure deficiencies (did not file certified copy of trust fund account statement for previous 6 month period). He failed to do so, and the matter was dismissed *sua sponte*. Petitioner filed an appeal, rather than correcting deficiency. As Circuit noted, "[t]his Court is frankly mystified by Godines' insistence on filing a frivolous appeal rather than filing his civil rights complaint with an appropriately supported § 1915 motion."

**Merritt v. Pugh, Case No. 00-Z-0455, 10<sup>th</sup> Cir. 00-1129, ADX Florence**

Appeals dismissed of § 2241 petition filed challenging various prison disciplinary actions and conditions of confinement. District Court advised petitioner that his conditions of

confinement claims were not appropriate under § 2241 and must be filed under Bivens. Advised petitioner to submit new IFP motion and amend petition, or face dismissal. Petitioner appealed, rather than correct deficiencies. He was denied IFP on appeal, because the appeal was not taken in good faith. Tenth Circuit affirmed, finding appeal not taken in good faith.

**Mills, Mills-Mohler and Mills v. Lee et al., Case No. 99-Z-2147, 10<sup>th</sup> Cir. 00-1055**  
**USP Florence**

Inmate, his sister and their disabled father, filed an appeal alleging father was mistreated when he attempted to visit USP Florence in January 1999. The petitioners claim the father was denied access to visiting room in his personal wheelchair; the prison didn't provide a chair for over two hours; and he was forced to pull himself along a handrail to walk to the visiting room. The Court dismissed the inmate and sister for lack of standing. The matter was dismissed *sua sponte* by district court, because remaining claim did not state a constitutional claim. On appeal, the only issue raised was whether district court erred in not requiring an answer from defendants prior to dismissal. The Circuit held it was proper to dismiss prior to answer by defendants when it is clear from the face of the complaint that there are no legally cognizable claims.

**Robinson v. Smith, Case No. 99-WM-0306, FCI Florence**

Petitioner alleged that he was not released when he should have been. The R&R dated May 19, 2000, recommended dismissal as moot, due to petitioner's subsequent release from prison. Petitioner failed to keep court advised of his current address. No objections were filed. On July 10, 2000, the Court dismissed petition.

**PENDING CASES OF INTEREST**

**Yu Kikumura v. United States, No. 97-CV-52-JPG, USP Marion**

Plaintiff filed FTCA action wherein he sought \$1200.00 for lost or destroyed property. Staff at USP Marion inspected the cell where plaintiff was housed and confiscated as excess property sixty-one(61) books and one pair of tennis shoes. A Confiscation and Disposition of Contraband form was completed. However, plaintiff refused to sign the confiscation form. Plaintiff was informed that "Your refusal to sign the form, provide evidence of ownership and a destination of your choice to mail this property will result in its disposal after 120 days." In the pre-trial order, he states that the value of the books "is \$931.00 dollar." He then seeks \$300.00 for stamps, photocopies and other miscellaneous items. It should be noted that he did not buy these books himself but they were sent to him. Trial is set for August 28, 2000.

**James Lucus v. U.S.A., Case No. 00-3073-GTV, USP Leavenworth**

In this case, plaintiff alleges negligence on the part of staff for their failure to install the proper machine cutter blade protection as well as their failure to maintain and/or encourage maintenance of an environment free of the wood chips, saw dust and

machine oil which caused his injury. Plaintiff's right index finger was partially amputated as a result of an injury he received while working in Unicor at USP Leavenworth.

**Fields v. Lacy, Case No. 98-WM-1554, ADX Florence/USP Leavenworth**

Bivens action by inmate regarding his being found guilty by DHO in LVN of killing another inmate. On July 14, 2000, the Court dismissed defendants Hurley and Hershberger with prejudice and transferred remaining claims to District of Kansas.

**Barnes v. Holt, et al., Case No. 00-B-797, USP Florence**

Habeas action alleging petitioner has threats against his life and BOP failed to protect him. Petitioner claims he has been denied a transfer to a safer institution, he received incident reports for refusing general population, he has been placed in segregation for extended periods of time for not giving up other inmate's names and failing to cooperate in his protection investigation.

**Sheptin v. Hedrick, et al., Case No. 00-3308-CV-S-1-H, MCFP Springfield**

Petitioner alleges that respondents have stopped his chemotherapy through negligence. Further, petitioner contends that discontinuance of chemotherapy will cause him irreparable harm.

**Ricks v. Peterson, et al., Case No. 00-1363, FCI Sandstone**

Bivens action alleging violations of 8<sup>th</sup> Amendment rights (inadequate facilities, overcrowding vs. rated capacity, asbestos exposure, staffing issues, increase of violence and disease due to overcrowding and unsafe drinking water) and 1<sup>st</sup> Amendment rights (opening of incoming and outgoing legal mail).

**RELIGIOUS FREEDOM RESTORATION ACT**

**Kikumura v. Hurley and Gallegos, Case No. 98-B-1442, 10<sup>th</sup> Cir. 99-1284, ADX Florence**

Outside individual sought to visit with inmate for religious reasons. Visit denied because not requested by inmate and because not a member of same faith group. Private counsel for the named defendants, due to RFRA issues. Plaintiff filed motion for TRO, which was denied. He appealed the TRO denial. On appeal, Court appointed counsel for petitioner and directed briefing. Private counsel urged that RFRA should not apply. DOJ intervened, to argue that RFRA was constitutional and should apply. Matter set for oral argument on September 29, 2000.

**UPCOMING HEARINGS AND TRIALS**

See above Kikumura.

### CRIMINAL MATTERS

#### United States v. Ayala, USP Leavenworth

Louie Ayala, Reg. No. 80221-011, entered a guilty plea to charges that he unlawfully, knowingly, and intentionally used a communication facility, that is, a telephone, to commit, cause, and to facilitate the attempted possession with intent to distribute a controlled substance in violation of 21 U.S.C. Section 843(b).

#### United States v. Johnson and Schofler, USP Leavenworth

On July 31, 2000, Rick Winter, Attorney-Advisor at Leavenworth, attended a hearing in front of Judge VanBebber in connection with the plea agreements of Schofler and Johnson for the murder of inmate Smothers. Judge VanBebber ordered an expedited preparation of the PSIs and once completed, he will determine whether the conduct falls within the guidelines for a 10 year sentence. The responsible AUSA anticipates that this process will take approximately 30 days.

#### U.S. v. Cheryl Hicks (a.k.a. Rachel Lewis), FCI Pekin

Former staff member charged with two counts of Abusive Sexual Contact in violation of Title 18 U.S.C. § 2244 (a)(4). Final Motions/Pretrial hearing scheduled for September 7, 2000 at 1:45. Matter set for jury trial on September 25, 2000 at 9:00 a.m.

#### U.S. v. Elkins, FCI Pekin

Inmate indicted on July 20, 2000, for Possession of a Prohibited Object in violation of 18 U.S.C. §§ 1791(a)(2) & (b)(3)(1). Initial arraignment scheduled for August 3, 2000 at 3:00 p.m.

#### United States v. Rodney Allen Dent, No. 99-40046-JPG; United States v. Mitchell E. Kolb, No. 99-40047-JPG; United States v. David Michael Sahakian, No. 99-40044-JPG; United States v. Joseph L. Tokash, No. 99-40045-JPG; United States v. John Derel Usher, No. 99-40049-JPG (AUSA Cutchin). USP Marion

The above named inmates are charged with possession of a prohibited object in violation of 18 U.S.C. § 1791(a)(2). After asserting that they were operating under a mental disease or defect when the crime was committed, all defendants underwent evaluations pursuant to 18 U.S.C. §§ 4141 & 4142. A competency hearing was conducted on May 18, 2000, and defendants' (except Tokash) requests to represent themselves were granted. Trials are now set for August 14 for inmates Kolb and Tokash and September 18 for inmates Sahakian, Dent and Usher.

#### United States v. Charlotte Gutierrez, USP Florence

On July 21, 2000, former Senior Officer Charlotte Gutierrez pleaded guilty to an information charging her with a single misdemeanor violation of 18 U.S.C. § 242. Sentencing set for September. Ms. Gutierrez resigned on July 20, 2000.

**United States v. Patrick Heaps, USP Florence**

Inmate placed dummy in his bed and attempted to escape from USP Florence in May of 2000. Accepted for prosecution by United States Attorney's Office.

**PERSONNEL ISSUES**

[REDACTED]

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**STAFF TRAVEL AND LEAVE**

[REDACTED]	August 10-11	A/L
[REDACTED]	August 16-18	Butner, NC
[REDACTED]	August 18-25	House hunting
[REDACTED]	August 10-18	A/L
[REDACTED]	August 7-9	Washington, D.C.
[REDACTED]	August 7-9	Washington, D.C.
[REDACTED]	August 21-25	A/L
[REDACTED]	August 18	A/L